# DCLG PCS REASONABLE ADJUSTMENT GUIDE

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## 1. Introduction

This guide is not intended as comprehensive and definitive advice nor is it intended as an alternative to proper legal advice from a lawyer.

Its purpose is to act as a brief summary of how different conditions can meet the legal definition of disability and how far the Department must go in implementing reasonable adjustments. It will look at what an Employment Tribunal would consider if it needed to decide if the Department has acted lawfully in denying or withdrawing reasonable adjustments and what the Department and line managers need to consider when making these decisions.

It is important that line managers understand these obligations to avoid unnecessary discrimination through denial of 'reasonable' adjustments and the possibility of reputational damage to the Department. Discussions on reasonable adjustments should therefore be frank and open with flexible solutions adopted across the Department as a whole.

## 2. Overview of Equality Act

The law prohibiting disability discrimination in employment and other fields was introduced by the Disability Discrimination Act 1995 (DDA). On 1 October 2010, it became part of the Equality Act (EqA) instead. Although the basic concepts remained the same, there were small changes to the way the definition of disability is applied and to ways in which disability discrimination can occur.

There are two important documents which any decision maker needs to be aware of:

- **The Guidance**. This deals with the definition of "disability" and therefore who is covered by the EqA. Its full name is the '*Guidance on matters to be taken into account in determining questions relating to the definition of 'disability'*.

- **The EHRC Employment Code**. The Code covers discrimination in employment in relation to all the protected characteristics under the EqA, not just disability. Its official name is *Employment: Statutory Code of Practice.* Chapters 5 and 6 focus particularly on disability and give useful guidelines and illustrations of the law, including the kind of adjustments which employers should make to their workplace and when discrimination may be justified.

## 3. Failure To Make Reasonable Adjustments Under the EqA – s20 – s21

This duty is at the heart of disability discrimination law. Where any workplace practice or feature of the premises puts a disabled employee at a disadvantage, the employer must make all adjustments which are reasonable to remove that disadvantage. Many employees and line managers do not realise quite how far DCLG as an employer must go to meet this duty.

## 4. Part A: Who is "Disabled" Under the EqA?

To gain the protection of the EqA, an employee must prove s/he meets the legal definition of disability in the Act.

The EqA does not simply cover visible disabilities such as the need to use a wheelchair. It can cover disabilities which may be unseen, e.g. diabetes and depression, and temporary illnesses or injuries, e.g. severe back disorders.

Sometimes employees with apparently obvious impairments do not fall within the EqA.

The question is not whether the named disability is covered by the EqA. It is whether the particular employee with the disability is covered. This will depend on the nature, severity and duration of the disability in the employee's individual circumstances.

### 4a. The Legal Definition: Overview

Section 6(1) of the EqA says:

> "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."

Each element of this definition should be separately considered in the following stages:

1. Is there a physical or mental impairment?

2. Does the impairment have an effect on the employee's ability to carry out normal day-to-day activities? Is the effect substantial?

3. Is the substantial effect long-term?

## 4b. Is There An Impairment?

Physical impairment includes sensory impairment and severe disfigurement.

Mental impairment can include dyslexia and other learning difficulties, as well as mental illness such as depression. However, 'impairment' does not equate with a medical condition. The emphasis of the definition is more on the fact that the employee's ability to carry out normal day-to-day activities is impaired, than on the precise name of the 'impairment'.

In some cases, it is hard to identify the impairment or distinguish it from its effects. This does not usually matter. An impairment can be the cause of various adverse effects or it can itself be the adverse effects.

## 4c. Substantially Affecting Normal Day-to-Day Activities

The impairment must have a substantial adverse effect. It is relevant to compare the way the employee carries out the activities in question with how s/he would carry them out if s/he was not impaired.

The impairment must have substantial adverse effect on the employee's ability to carry out normal day-to-day activities.

Under the DDA, it was necessary that the adverse effects fell within a list of capacities set out in Schedule 1, clause 4(1). The EqA does not require the effects to fall within such a list or indeed, within any categories at all. This has made it easier for some less obvious effects to be covered, but the old list of capacities may still be a useful starting point to give you ideas. This was the old and now abolished list:

- Mobility
- Manual dexterity
- Physical coordination
- Continence
- Ability to lift, carry or move everyday objects
- Speech, hearing or eyesight
- Memory or ability to concentrate, learn or understand
- Perception of the risk of physical danger.

Normal activities simply means activities carried out by most people fairly regularly, e.g. shopping, reading, writing, having a conversation, watching TV, getting washed and dressed, cooking and eating, housework, walking, travelling including public transport, and taking part in social activities. An activity need not be carried out by the whole population for it to be a normal daily activity.

### 4c (i) Substantial Adverse Effect

A “substantial” adverse effect simply means an effect which is something more than minor or trivial. (EqA s212(1))

As a guide a list of circumstances where it would be reasonable to regard the adverse effect on a person’s ability to carry out day-to-day activities as substantial might be as follows;

- difficulty getting dressed, preparing a meal or eating
- difficulty using transport, whether because of physical restrictions or as a result of a mental impairment
- difficulty using steps, or ability to walk only a short distance without difficulty, e.g. because of pain or fatigue
- difficulty carrying objects of moderate weight with one hand, e.g. a shopping bag or small piece of luggage
- difficulty hearing and understanding another person speaking clearly on the telephone
- persistent and significant difficulty reading or understanding written material, e.g. because of a mental impairment or learning difficulty or visual impairment
- difficulty understanding or following simple verbal instructions
- difficulty operating a computer, e.g. because of a physical impairment or a learning disability
- behaviour which challenges other people, making it difficult for the person to be accepted in public places
- persistent general low motivation or loss of interest in everyday activities
- persistent difficulty taking part in normal social interaction
- compulsive activities or behaviour; difficulty adapting after a reasonable period to minor changes in a routine
- difficulty concentrating
- intermittent loss of consciousness

### 4c (ii) Focus On What The Employee Cannot Do

Legally, it does not matter that the employee can generally cope with life and can carry out most normal activities. It is enough that there is substantial adverse effect on some normal day-to-day activities. The EAT has said repeatedly that the tribunal

> "must concentrate on what the Claimant cannot do or can only do with difficulty rather than on the things that s/he can do." [1]

### 4d. Long-Term Effects

The substantial adverse effect must also be long-term, i.e. 12 months or for the rest of the employee's life if less than 12 months. It does not matter if, at the time of the discrimination, 12 months have not yet passed. However, if the tribunal hearing occurs before the year is up, it will be necessary to prove the effect is likely to be at least 12 months in total.

The law covers impairments with fluctuating or recurring effects if these are still likely to recur beyond 12 months after the first occurrence. Examples of impairments with recurring effects could be rheumatoid arthritis, epilepsy, or clinical depression.

## 5. Part B: The Duty To Make Reasonable Adjustments

The most important part of the law against disability discrimination is the duty on employers to make reasonable adjustments. Basically this means that, where employees are disadvantaged by workplace practices because of their disability, employers must take reasonable steps, e.g. by adjusting hours or duties, buying or modifying equipment or allowing time off, so that they can carry out their job.

The duty is set out in sections 20 and 21 of the EqA. Section 21 says that a failure to comply with the first, second or third requirement set out in section 20 is a failure to comply with a duty to make a reasonable adjustment.

Section 20(3) says:
"**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 in order to avoid the disadvantage."

Section 20(4) says:
"**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 in order to avoid the disadvantage."

Section 20(5) says:
"**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

[1] Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19, EAT

to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to provide the auxiliary aid."

Provided an adjustment would be reasonable, an employer has no defence of justification for not carrying it out.

Employers are expected to act positively and constructively. In the key case of *Archibald v Fife Council*, the House of Lords said:

> "The DDA does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability"

Paragraph 6.33 of the Employment Code lists the following possible adjustments, giving an example for each. Previously most of these adjustments were written into the Disability Discrimination Act. It should not make any difference that they are now in the Code rather than in the statute.

- making adjustments to premises
- providing information in accessible formats
- allocating some of the employee's duties to another person
- transferring the employee to fill an existing vacancy
- altering the employee's hours of working or training
- assigning the employee to a different place of work or training or allowing home working
- allowing the employee to be absent during working or training hours for rehabilitation, assessment or treatment
- allowing the employee to take a period of disability leave
- giving, or arranging for, training or mentoring (whether for the disabled employee or any other person)
- acquiring or modifying equipment
- modifying procedures for testing or assessment

- providing a reader or interpreter
- providing supervision or other support
- employing a support employee to assist a disabled employee
- modifying disciplinary or grievance procedures
- modifying performance-related pay arrangements
- adjusting redundancy selection criteria

The Code points out that it may sometimes be necessary for each employer to take a combination of steps.

## 6. Part C - How Much Must an Employer Do?

A tribunal will decide on the facts of each individual case how much the employer ought to have done by way of reasonable adjustment. It will consider DCLG as a whole rather than one individual role within DCLG.

At paragraph 6.28, the Employment Code lists factors which a tribunal may take into account when deciding whether an adjustment would have been reasonable:

- whether taking any particular step would be effective in preventing the substantial disadvantage
- the practicability of the step
- the financial and other costs of making the adjustment and the extent of any disruption caused
- the extent of the employer's financial or other resources
- the availability to the employer of financial or other assistance to help make an adjustment
- the type and size of the employer

### 6a. The Employer's Resources

A large employer such as DCLG with substantial financial resources is more likely than a small employer to have to make adjustments which may have a significant cost, such as alterations to premises. However, it is important to note that most reasonable adjustments have little or no cost and may simply require a change to a working pattern or a location. If a shop or restaurant is part of a chain, the resources of the whole chain will be taken into account, in the same way that the resources of DCLG are taken as a whole and not individual budgets or a particular role.

Any decision should therefore be based on whether it is reasonable for the adjustment to be accommodated or resourced by DCLG as one entity and not one particular role, team or line manager, as an ET will look at whether the reasonable adjustment could have been accommodated anywhere and at any grade within DCLG.

## 6b. What If The Employer Doesn't Know?

The employer is not under a duty to make reasonable adjustments if s/he does not know and cannot reasonably be expected to know that:

1. the employee has a disability and
2. the employee is likely to be placed at a substantial disadvantage as a result.

However, it is necessary that the employer was aware (or should have been aware) of facts which would satisfy the legal definition of a 'disabled' person, i.e. that the employee has an impairment which has a substantial and long-term adverse effect on his/her ability to carry out day-to-day activities. It is not necessary that the employer realises those particular facts meet the legal definition of disability.

The employer can rely on occupational health or other medical advice to provide the facts, e.g. to answer questions as to how long the adverse effects are likely to last. But the employer cannot just rely on a bald statement from occupational health that an employee is not disabled, especially where there are certain indications otherwise and where the employer has not asked for precise information from occupational health which keys into the wording of the definition.

## 6c. Reasonable Adjustments: Some Ideas Appropriate To Many Disabilities

As most conditions vary greatly in their severity and in the symptoms for every individual, it is essential that line managers and HR ask disabled staff what areas of difficulty they have at work and which solutions might be useful.

The Employment Code lists possible reasonable adjustments (see above), but these are only suggestions. A tribunal may think a certain adjustment should have been made which is outside that list. The following expands on some of those suggestions, and adds a few more ideas. Any of the options could be carried out on a temporary, occasional or permanent basis.

### 6c (i) Flexible Hours, Work Schedules and Breaks

This may entail allowing staff to work part-time, fewer hours or to job share, or to alter hours, e.g. to avoid rush-hour travel or because s/he feels less well in

mornings or evenings. Staff may find it suitable to spread the work over a longer period with more frequent breaks. Staff with only episodic attacks, e.g. asthma or migraine, may be happy to make up the hours on other occasions, although this is not to suggest they are not entitled to sick leave (see below).

Whether an employer should continue to pay the full rate of pay, even though the employee is working shortened hours, is a matter of what is reasonable in every case. Employers should be relatively receptive to the idea of allowing flexible working.

The Employment Code gives these suggestions at paragraph 6.33:

- Allowing the employee to work flexible hours so s/he can have additional breaks.
- Permitting part-time working.
- Allowing different working hours to avoid rush hour travel.

### 6c (ii) Home Working

Obviously it depends on the job, but it is becoming more feasible and acceptable to allow most roles a certain amount of home working. Home working, on a temporary, permanent or part-time basis, is a very useful solution for a number of conditions, because it gives increased flexibility in hours, cuts out difficult travel and may provide a more conducive environment.

### 6c (iii) Disability Leave

It is wrong to assume that a disabled employee will be absent from work anymore than anyone else. However, it is possible in some cases that the employee will need additional time off, either because of illness related to the disability, e.g. asthma or migraine attacks, or for routine medical checks, e.g. to have a hearing aid checked with an audiologist.

The Employment Code suggests allowing the employee to be absent during working or training hours for rehabilitation, assessment or treatment. This may entail a single period of disability leave, e.g. for a period of treatment, rehabilitation or adjustment when someone is newly disabled, or intermittent days.

Many employers have a sickness attendance policy whereby employees are monitored, counselled, disciplined and eventually dismissed, as their absence level reaches certain levels. An employer would probably be expected to make a reasonable adjustment by not counting a certain amount of leave for disability-related reasons into such a scheme or, even better, by having a separate scheme for disability-related absence.

If the whole reason the employee is off sick is because the employer has failed to make the reasonable adjustments which would enable him/her to return to work, there is a good argument that s/he should receive full pay and that this leave should be discounted from any sickness trigger points, or when looking at redundancy, redeployment, promotion etc.

### 6c (iv) Gradual Return To Work

Where the employee has been absent for some time due to his/her disability, a phased return to work is likely to be a desirable option. The return can be phased in terms of number of daily hours, number of days/week or type of duties taken on. It can be combined with partial home working. The Employment Code at paragraph 6.33 says a phased return to work with a gradual build-up of hours might be appropriate in some circumstances.

### 6c (v) Reallocation of Some Duties

The Employment Code suggests some of the employee's duties could be allocated to another person and gives an example at paragraph 6.33. It may also be possible for the employee to swap certain duties with a colleague on a temporary or permanent basis.

### 6c (vi) Transfer To Another Job

A tribunal would expect of an employer the size of DCLG that a reasonable adjustment may be to reallocate or swap duties, or to transfer the employee to a different location or to an existing or new vacancy.

The Employment Code lists transferring an employee to fill an existing vacancy as one of its examples. In paragraph 6.33 it points out that this may entail reasonable adjustments in the new job, e.g. retraining or provision of special equipment or transfer to a position on a higher grade.

The duty to make reasonable adjustments may go further than enabling the employee to apply for vacancies. Moreover, many tribunals expect an employee to be slotted into an existing suitable vacancy without being interviewed or having to compete for it against employees who do not have a disability.

### 6c (vii) Acquiring Or Modifying Equipment

This is a fairly obvious suggestion and is listed at paragraph 6.33 of the Employment Code. The range of equipment available is enormous and the specialist disability organisations provide the best advice on what is suitable.

Whether or not an employer is expected to provide special equipment will depend on its effectiveness, the cost and the employer's resources.

Surprisingly, many cases involve employers' failure to take relatively inexpensive and easy steps to provide specialist equipment. The following difficulties are common and could amount to failure to make reasonable adjustments:

- The equipment is not ready and in place when the employee starts the new job, even though the employer knew when s/he recruited the employee of the need to acquire such equipment. Often it is left to the employee to make the arrangements.

- It takes a considerable time following a request by an employee for the equipment to be supplied. Delays often occur in getting an appropriate assessment or in following up on an assessment and recommendation. The employee often has to make repeated requests.

- When the equipment eventually arrives, there are delays in getting it installed and further delays in training the employee on its use.

- All the above delays lead to stress for the employee, which can exacerbate his/her disability and work performance, and lead to tensions or worse in the working relationship.

### 6c (viii) Training of Managers and Co-workers

The Employment Code suggests giving or arranging training for the disabled employee or anyone else. An example could be the employer providing training for employees in conducting meetings in a way that enables a deaf staff member to participate effectively.

Much discrimination against disabled employees occurs due to lack of awareness of the barriers they face. Training at the outset could make a big difference. Tribunals often suggest that awareness training for managers or co-workers would have been helpful.

Linked to this is the need in some circumstances to ensure the co-operation of co-workers with any adjustments. The Employment Code discusses this at paragraph 6.35.

### 6c (ix) Redundancy

Redundancy selection criteria may need to be adjusted. Usually the employer uses a combination of several criteria, but some of these may disadvantage employees because of their disability. For example, points for 'leadership ability' might disadvantage a person with autism who found it difficult to interact with others. Deducting points for sickness absences may be particularly unfair for

some disabled employees who have had slightly higher absences levels due to their disability. The EHRC Code gives an example of an employer discounting disability related absences when scoring for redundancy at paragraph 6.33

It is also important to make adjustments to available alternative employment.

### 6c (x) Modifying Disciplinary or Grievance Procedures

This suggestion is made in paragraph 6.33 of the Code. The Code suggests an employee with learning disability be allowed to bring a friend outside work to act as an advocate for him/her at a grievance meeting if they are not a member of a trade union. It is important to note however, that union members already have protected rights to be represented at official hearings.

There have been several cases where the tribunals have expected a flexible approach to the handling of disciplinary or grievance procedures, e.g. (depending on the nature of the employee's disability):

- Relaxing time-limits for lodging grievances and appeals against disciplinary action.
- Relaxing requirements for format of grievances, e.g. not insisting on forms being completed.
- Ensuring the employee fully understands the issues. Providing interpreters / signers as necessary. Allowing a friend or helper outside work to accompany the employee.
- Establishing preferred mode of communication, e.g. allowing written submissions before or after the hearing rather than relying on oral representations.
- Flexibility regarding hearing dates. Waiting until the employee is well enough to attend.
- Allowing full preparation time. The employee should be informed well in advance of the hearing date and sent all relevant papers well in advance.
- Not leaving the employee waiting a long time in the waiting room.
- Adopting a non-threatening manner and mode of speech.
- Allowing more time during the hearing and breaks.
- If travel is difficult, conducting the hearing by telephone, at home or at another suitable venue.
- Ensuring the employee is not disciplined for conduct which may be reasonably explained by his/her disability, e.g. a deaf person apparently disobeying a verbal instruction or someone losing their temper when in pain.

The fact that disciplinary proceedings are pending is not necessarily a reason not to proceed with other reasonable adjustments such as relocation.

## 7. The Burden of Proof

The Equality Act 2010 sets out the burden of proof for all discrimination claims in section 136. Basically this says -

If there are facts from which a tribunal **could** decide, in the absence of any other explanation, that the employer has discriminated against the employee, the tribunal **must find** such discrimination has occurred, **unless** the employer proves that s/he did not discriminate.

In the context of a claim for failure to make reasonable adjustments, the claimant must only establish

- there is a provision, criterion or practice or workplace feature or lack of an auxiliary aid which is causing him/her substantial disadvantage
- there is an apparently reasonable adjustment which could be made.

The burden of proof then shifts to the employer to prove that s/he did not fail in his/her duty to make that adjustment.

In practical terms, this means that when an employee brings a reasonable adjustment case, s/he must indicate what kind of reasonable adjustments s/he says ought to have been made. S/he only needs to give enough detail for the employer to understand generally what sort of suggestion s/he is making. Although the wording of the burden of proof under the EqA is slightly different from that under the DDA, these principles will still apply, since the point is that an employer cannot defend a negative. The employer needs to know what reasonable adjustment s/he is supposed to have made, before s/he can explain why s/he did not make it.

## 8. Further Reading

**Further Reading on the Equality Act**

**EHRC Guide to Making Adjustments**

**ACAS Guide on Reasonable Adjustments**

**Information on the Department's Equality and Diversity policy and procedures**

**DCLG Casework Services**

**The Departments Grievance Procedure**