



DISABILITY EQUALITY GUIDANCE



Equality, Health & Safety

Understanding reasonable adjustments (S.20–21 Equality Act 2010)

Reasonable adjustments are a key part of the Equality Act 2010 (EA) and can be essential to enabling a disabled person to retain employment.

Unfortunately, employers are often guilty of under-estimating the extent of their duty to make adjustments and can thus fall foul of the law. The EA puts employers under an obligation to make reasonable adjustments in relation to the following:

1. Provisions, criteria or practices, including company policies
2. Physical features, such as the layout of and access to workplaces
3. Provision of auxiliary aids, including providing information in an accessible format such as Braille, large print or email

Where any of the above place a disabled person 'at a substantial disadvantage' the employer has to take any steps that are 'reasonable in all the circumstances' to prevent that disadvantage occurring.

When considering reasonable adjustments factors to take into account include:

- how effective the adjustment would be in overcoming the disadvantage;
- how practicable it is to make the adjustment;
- the financial and other costs incurred by the employer and the extent of any disruption to activities;
- the extent of the employer's financial and other resources;
- the availability of financial and/or other assistance in making the adjustment;
- the nature of the employer's activities and size of undertaking.

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Reasonable adjustment ongoing obligation

The duty to make reasonable adjustments is ongoing. If an adjustment has been made and this subsequently proves not to be effective in overcoming the disadvantage, then the employer must think again, they cannot just assume that, having made one adjustment, their duty to do so is discharged.

Adjustments – a strong argument

In a case towards the end of 2004 (*Archibald -v- Fife Council*) the House of Lords considered the extent of an employer's duty to make reasonable adjustments. They made it clear in their judgement that, depending on the extent of the disadvantage suffered by the employee, employers could be expected to make significant adjustments. Also, because employers have now lost their original defence that they could justify not making a reasonable adjustment, it offers a very compelling duty on employers to take action. An employer's only defence against it is to show that making an adjustment is not 'reasonable in all the circumstances', by reference to the list of tests in the Code of Practice. Reps are advised to always use a failure to make reasonable adjustments in preference to claims of less favourable treatment.

Employment practices

Employers are usually good at identifying equipment and other physical changes that they can make to overcome barriers. Where they are less imaginative is in finding adjustments to administrative and procedural practices that can place disabled people at a disadvantage. There are many examples of such adjustments:

- Relaxing absence rules and limits for those with disability related sickness absence;
- Excluding disability related absence from calculations of when half or no pay is appropriate;
- Revising flexible working hours rules, especially core times, to allow travelling outside of rush hours;
- Accepting lower levels of output, accuracy etc.



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Any of these might be reasonable, but it depends on the circumstances of the employer. Generally, larger employers should be more flexible.

Some examples of possible adjustments are:

- making adjustments to premises;
- allocating some of the disabled person's duties to another person;
- transferring him/her to fill an existing vacancy;
- altering his/her hours of work or training;
- assigning him/her to a different place of work or training;
- allowing him/her to be absent during work or training hours for rehabilitation, assessment or treatment;
- giving, or arranging for, training or mentoring (whether for the disabled person or any other person);
- acquiring or modifying equipment;
- modifying instruction or reference manuals;
- modifying procedures for testing or assessment;
- providing a reader or interpreter;
- providing supervision or other support.

The EA also defines physical features of premises to include:

- any feature arising from the design or construction of a building on the premises,
- any feature on the premises of any approach to, exit from or access to such a building,
- any fixtures, fittings, furnishings, furniture, equipment or material in or on the premises,
- any other physical element or quality of any land comprised in the premises.



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No duty to suggest adjustments

Case law *Ridout -v-TC Group (1999 IRLR 628 EAT)* has established that the duty to determine reasonable adjustments lies with the employer. They cannot assume that their duty has been discharged just because the disabled employee and their advisers cannot suggest any suitable adjustments. It is always advisable, where possible, to make suggestions as to adjustments that could overcome any substantial disadvantage, as this makes it more difficult for the employer to argue that no adjustments exist which could be effective.

Sources of help and information

In many cases the need for an adjustment and the types of adjustment that could be effective will be simple to identify and the disabled person themselves should always be involved in any such discussions. Occasionally, however, external assistance can be helpful in making suggestions, knowing what is practicable or even assisting with the costs of some adjustments. Here we list some possible sources of advice:

- **Disability Employment Advisers (DEAs)**

Jobcentres each have access to the services of DEAs who are able to assess needs and identify equipment and other possible adjustments that can assist in the employment or retention of disabled people. They can also advise on Access to Work funding – Government money available to help employers pay for necessary adjustments. Further details can be found on the Directgov website: www.direct.gov.uk or through the local Jobcentre Plus office.

- **Charities and specialist organisations**

There are a wide variety of charities relating to specific impairment types. These are often experts in their particular fields, relating to adjustments to facilitate employment. Most of the major charities have websites that can be used to find contact details.

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Other specialist agencies also exist, such as Computability, which concentrates on finding IT solutions for disabled people using IT equipment.

One word of warning with charities: some have been set up to establish the disabled people that they purport to represent as victims of tragedy, as unfortunate individuals who need our help and understanding etc. These are very often controlled by non disabled people who have little time for enabling the subjects of their 'charity'. Avoid such organisations whenever possible as they do little to advance the real needs and agenda of those with a particular impairment. The British Coalition of Organisations of Disabled People (BCODP) is an umbrella organisation of those where it is the disabled people themselves who are in control of or have a major input in the running of the organisation. Their directory of member organisations is a good place to find alternatives to the major charities and organisations for disabled people. Go to their website www.bcodp.org.uk for details.

- **Occupational health advisers**

With an expertise in bringing medical and occupational health issues together, these advisers may be able to assist with possible physical and other adjustments.

- **Other medical experts**

Specialists in particular fields of medicine or experts in particular medical issues may have knowledge that can assist in suggesting adjustments. Where individuals have issues with the gaining and retention of knowledge or information, perhaps due to dyslexia, educational psychologists may be able to assist by determining learning methods and advising on how to adapt standard training and information manuals to meet specific needs.

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Reasonable adjustments for absence issues

- **Sick Absences**

One example of this that we frequently see is in relation to time off for sickness due to disability related reasons. For example, if an employer decides, with occupational health advice, that an additional ten days is appropriate, they may increase the trigger point for action under the absence management scheme by that amount. If the employee then exceeds the increased trigger point, the employer (or line manager) would treat the disabled person as they would any other employee which has exceeded the trigger point. This could still be discriminatory. What they should be doing is reviewing the adjustment and determining whether it is still 'reasonable in all the circumstances' to accept the higher level of absence related to disability.

Sickness absence, particularly absence management schemes, can cause a lot of problems for disabled members. There are a variety of legal cases that have a bearing on the law in this area, not least a successful case taken at an Employment Tribunal against the Inland Revenue in 2004, where the counting of disability related sickness absence towards the cut-off point for sick pay was found to be both a failure to make a reasonable adjustment and unjustified less favourable treatment. Other significant cases include:

Clark -v- TDG Ltd t/a Novocold (1999 IRLR 318 CA)

This case determined the correct comparator in cases for less favourable treatment. Where an employee is absent from work for a disability related reason, the correct comparator is someone without the disability and, therefore, without the absence, and not someone absent for a non disability reason.

Meikle -v- Nottinghamshire County Council (2004 IRLR 703 CA)

Ms Meikle was signed off work as she was unable to continue in a situation where her employer had failed to make the necessary reasonable adjustments to her workplace. In such circumstances, the court found that it would also have been a reasonable adjustment to have continued to pay her at her full pay rate, rather than cut her pay after six months absence.

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Archibald -v- Fife Council (2004 IRLR 651 HoL)

This case is significant as it outlines the scope of the duty to make reasonable adjustments and recognises that this could extend into what might be considered to be positive discrimination in favour of a disabled person.

Noor -v- Foreign & Commonwealth Office [2011EqLR 448]

Case law here made some helpful statements regarding the effectiveness of reasonable adjustments. Reasonable adjustments must:

- prevent a disabled person from being at a substantial disadvantage (experienced as a result of practice, criterion or policy)
- create a level playing field for a disabled person to compete/perform

Each case will be judged on its own merits. Issues to bear in mind include:

- ensure the member is likely to meet the definition of disability within the EA (S.6 EA 2010);
- any prejudicial action can be classed as discrimination, including the issuing of verbal or written warnings, don't wait for dismissal to occur;
- consider any facility for disability leave if such a system exists, or request paid special leave, if the individual would be fit to work in a suitably adjusted environment;
- it will not always be clear where absence is related to disability. For example, someone with asthma may take longer to recover from respiratory related illnesses (colds etc) than someone without asthma. Consider how 'disability related absence' is defined;
- in cases of prolonged absence for reasons relating to disability, claiming continuation of full pay may prejudice other defences under the EA, such as against dismissal, as costs of retaining the absent person will be increased. Also, employers might choose to move towards dismissal decisions earlier in such circumstances.