



Disability & Performance Management

Summary

This document is intended as a guide for line managers who may manage staff with a disability, long term illness or where consideration needs to be given to the implementation of reasonable adjustments and the assessment of performance in these conditions. It can also be used as a helpful aid for other line/senior managers attending moderation meetings and of course to inform all staff on the legal obligations placed on the Department, in relation to disability discrimination and performance management.

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Introduction

If you manage a member of staff with disabilities, you will need to consider whether it is applicable to request an Occupational Health Service (OHS) assessment and the implementation of any identified reasonable adjustments. It would be unlawful to deny adjustments that are reasonable and help to remove the disadvantage faced by disabled staff.

If in doubt on the definition of disability or how far DCLG needs to go to implement reasonable adjustments, please refer to the [PCS DCLG Reasonable Adjustment Guidance](#)

The Equality Act

Performance assessments can be linked to many other processes, such as disciplinary action, redundancy selection, promotion, or payment of bonuses, so appraisals need to be fair and transparent and take into consideration individual adjustments, which may include a revised standard for the role.

The Equality Act 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."

It is this requirement which requires the Department to fairly assess a disabled person in the performance management process, so as to remove this disadvantage. This may require a degree of positive action.

Does an Employee have a Disability?

This may sound like an obvious starting point, but do not make assumptions about whether an employee is disabled or not. The legal definition of disability fulfils the following criteria;

- Is there a mental or physical impairment?
- Does it have an effect on day to day activities (look at the effect without any adjustments)?
- Is this effect substantial?
- Is it long term (has lasted or is or likely to last over 12 months)?

This means that sometimes conditions that one would not traditionally consider to be a disability fulfils the legal definition and therefore these employees are protected from discrimination. Possible examples might be anxiety, stress, cancer and HIV.

Most people develop impairments during their working lives, rather than being born with a disability. Some may not even be aware of their disability for example, many adults do not know they have dyslexia, having developed coping mechanisms, and only realise after a formal assessment is undertaken.

Make sure that performance is discussed throughout the year as performance may be affected by a nonvisible disability, which may not have been previously disclosed.

How to Assess Performance of a Disabled Employee

There are two specific Equality Act provisions that can help ensure that performance management and appraisals are done fairly:

- **Reasonable adjustments** – public sector employers need to take steps to remove, reduce or prevent the obstacles that disabled workers may face, so that they have the same opportunities to perform as non-disabled workers.
- **Positive action measures** – public sector employers should consider taking proportionate actions to address disadvantage.

As no two individuals will require exactly the same set of reasonable adjustments or positive actions, it can be challenging to assess the success of a bespoke adjustment(s) in removing the disadvantage, in order to provide a fair and transparent assessment. However, the following considerations objectively evidenced, will go some way to providing an assurance that the Department has tried to avoid the possibility of discriminating in the PMR process. The list below can be a useful guide and aid in making sure that disability or health conditions have been considered when making an assessment.

1. Reasonable Adjustments

- OHS Referral/Workplace Assessment and/or Reasonable Adjustments
Check whether the employee has been given an opportunity of having an OHS referral. You might want to talk to them about issues with performance and to ask if these have been brought up before and whether there are any underlying health conditions to consider. The employee does not need to answer, but it is helpful for the employee to disclose any impairments, so that adjustments can be implemented or assessed. If the employee has refused an OHS referral and does not disclose any underlying health conditions, assess the employee according to the recognised standard for the grade.
- Workplace/Specialist Assessment
In some circumstances a disabled member of staff diagnosed with a complex condition, may require a medical assessment by a specialist or body recognised for that condition. An OHS Report may not provide the detailed assessment required to identify the range of reasonable adjustments required. If there has been an OHS referral, check whether a workplace or specialist assessment is required, this will normally be suggested within the body of the OHS Report.
- Have Reasonable Adjustments Been Implemented
If there has been an OHS referral, check whether the recommendations of the OHS Report and/or workplace assessment have been implemented. If so, consider what has been implemented and the amount of time it has been in place.

Remember that some adjustments will require time to bed in or take effect and results or improvements will not normally be instantaneous. The individual's performance should not be assessed until a reasonable period of time has been given for the adjustments to take effect.

- **Reasonable adjustments** may include:
 - ensuring any paperwork for the appraisal/performance review is accessible
 - ensuring that the meeting itself is accessible in terms of timing, venue etc.
 - allowing the disabled worker more time to complete tasks, or more breaks
 - providing equipment that would remedy any shortfalls in productivity
 - provision of voice recognition or text reader software
 - provision of quiet spaces in which to work
 - changing the ambience in the workplace, i.e. lighting or temperature
 - ergonomic adjustments to the workstation, e.g. seating, keyboard, mouse
 - flexible working hours
 - coaching or mentoring
 - help with planning or prioritising tasks
 - training in particular skills, e.g. project or time management
 - transfer to a suitable alternative post
- Are There a Combination of Reasonable Adjustments?

Consider if there is a series of recommendations in the OHS Report or workplace assessment. If so, check whether all of these have been implemented or if there are some that still need to be applied. Also consider when each adjustment was implemented, as there is a risk in looking at when the first adjustment was put in place and simply take the timeline from that, without also considering other adjustments provided after this date.
- Have the Reasonable Adjustments Removed the Disadvantage?

Consider whether the implemented adjustments have removed the substantial disadvantage. In some cases this will be obvious, but more often than not, it will require speaking to the individual to see if the adjustment has done what was intended. It is important to understand what the individual requires and whether the adjustment has substantially helped. Even most specialist assessors work on a try and test basis, as the effects of a disability are unique to the individual and therefore not all suggested recommendations will work.
- Have There Been any Adverse Effects from the Reasonable Adjustments?

Consider whether the adjustments had any adverse effects on performance, for example, does it now take longer to do certain tasks with

the adjustment? Ensure that this has been accounted for in the performance assessment.

It would be wrong to give a 'Development Needed' marking if not all reasonable adjustments have been implemented, or if they have not had the required time to remove the disadvantage.

2. Moderating Objectives

Once the nature of the impairment and recommended reasonable adjustments have been established, it is important to look at the objectives and consider whether these will need to be modified to remove any disadvantage. You should focus on what the individual can do and adjust objectives and standards expected according to the effect or the nature of impairment. Possible adjustments to objectives could include the following:

- changing or reducing targets
- reallocation of duties
- agreeing defined areas for objectives rather than covering all criteria
- matching objectives and outputs to agreed flexible working patterns
- agreeing a longer period of time for an individual to meet specific competencies or complete particular tasks
- allocating some aspects of the job role to colleagues
- limiting the number of changes to tasks or work during the year

3. Possible Poor Performance

In any assessment of possible poor performance, think about what may be seen as being done ineffectively. Consider whether this could be related to the disability. Sometimes the link is not always obvious, for example an occasional curt response when someone is in pain or someone with Asperger's syndrome may not be able to work as part of a team. Therefore, as a reasonable adjustment, this should be discounted from the criteria for assessing performance.

Check the OHS Report/workplace assessment, and consider if all the recommendations have been implemented or if there are there any outstanding. Check if the OHS report recommends trying other adjustments or varying them, in order to get to the optimum adjustment to substantially remove the disadvantage. It is important to remember that a Performance Improvement Plan (PIP) should not be instigated when there are still adjustments outstanding.

4. Have There Been any Assumptions About Performance

Check whether any assumptions have been made about performance and capabilities? For example, is the employee subject to excessive criticism, or is their work checked more often than normal, because an assumption has been made about the ability of the employee based on their disability? Remember to

do all that you can to remove any bias when managing staff and making an assessment. All line managers should have completed the mandatory Unconscious Bias and Disability Awareness training.

5. Feedback From Other Staff Managers and Employees

Have other managers/staff provided feedback criticising the employee for a task or behaviour associated with their disability? For example, are staff negatively assessed for verbal or written communication when they have an impairment affecting these skills? It is important to remember that other staff may not know the nature of the disability or the reasonable adjustments that have been made, and may not be in full receipt of the facts, so not all feedback can be treated at face value.

It may be discrimination to allow other managers or staff to negatively assess an individual on performance related to their impairment at moderation meetings, or to take this into account when writing the assessment.

6. Has the Employee Had Access to Training?

Think about access to training and development opportunities and consider whether they have had the same level of opportunities as other non-disabled employees. The disabled employee may also need specialist training to help them stay in their current role or adapt to a new role, as well as new equipment or adaptations provided to them. The time taken for training for a new role or to get used to new equipment, should be discounted in terms of their appraisal/performance review.

Training and development opportunities must be accessible for the disabled employee, and they should be consulted about the best ways to make the training accessible for them.

Examples of reasonable adjustments for training:

- sending handouts before the day
- one-to-one training for particular tasks
- adjustments to physical access to training locations
- improved lighting
- better signage
- adjustments to residential accommodation
- different timings for courses
- using more frequent rest breaks
- changes in style of presentation
- allowing the trainee to bring a personal care attendant
- providing training over a longer period of time
- providing follow-up mentoring

7. Has Performance Been Assessed at the Right Level?

Most of the considerations above relate mainly to performance issues and implementing reasonable adjustments when the employee and/or the Department recognise the need for them. However reasonable adjustments are about creating a level playing field so that disabled employees can compete equally and fulfil their true potential. So do not forget that employees can also exceed.

It is important not to inadvertently mark down an employee's performance because of their disability or a perception based on that disability. In the same way that the standard for 'Good' may need to be adjusted to take into account adjustments, the standard for 'Exceeded' may also need to be revised to create a situation where everyone has an equal chance to succeed.

In this respect write down what is the required standard for 'Good' and 'Exceeded' for the specific role. If an employee is likely to be rated as 'Good', consider why the employee has not been rated 'Exceeded'. If the answer relates to a competence related to their disability, consider whether the 'Exceeded' standard needs to be adjusted to remove any disadvantage.

Disability and Section 15 of the Equality Act

As well as the positive actions and reasonable adjustments that should be introduced to level the playing field, Section 15 of the Equality Act also protects disabled staff against unreasonable treatment.

It states that "person (A) discriminates against a disabled person (B) if –

- (i) A treats B unfavourably because of something arising in consequence of B's disability, and
- (ii) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

What Does This Mean in Practice

Where the unfavourable treatment is because of something arising in consequence of a disability it is prohibited unless the employer can show that it is a proportionate means of achieving a legitimate aim.

This would mean, for example, that marking down an employee in his/her PMR for tasks or behaviours which are related to his/her disability would amount to unfavourable treatment and would therefore require clear justification on both grounds.

The Burden Of Proof

The disabled employee is not required to show comparison with a non-disabled person because Section 15 is dealing with unfavourable treatment, not less

favourable treatment, so the onus to justify the action taken is shifted to the Department.

The test on the employer is not merely to show a legitimate aim, but also to show that the action taken is a proportionate means of achieving any claimed legitimate aim, this would be a difficult test for DCLG to achieve. For example, if there was any reasonable alternative that could have been taken, then DCLG would be unlikely to succeed in this defence. This could include all the reasonable adjustments set out in [section 1 above](#).

Further Advice for Managers

If targets are reduced for disabled employees, managers should consider how this is communicated to others, particularly if they are part of a team, so that there is no peer misunderstanding. Focusing on the disabled member's strengths within the team, or a reallocation of duties within the team may help to overcome this.

Any sick leave or absences related to an employee's disability or impairment should be discounted in any criteria for appraisals/performance reviews.

Employers and line managers should assess performance after a reasonable adjustment has been put in place and has been given time to remove the disadvantage enabling employees to fulfil their potential at work.

Remember that in relation to disability discrimination, employers are able to treat disabled people more favourably than others in order to remove barriers and ensure equality of outcome.

Related Links

[PCS Reasonable Adjustment Guidance](#)

[PCS Reasonable Adjustment Guidance – Summary](#)

[EHRC Guide to Adjustments](#)