

## University of St Andrews

### Human Resources

#### Appendix to the Equal Opportunities Policy - Disability Discrimination Act 1995

This paper should be read in conjunction with the University's Equal Opportunities Policy, which makes clear the University's commitment to ensuring that disabled persons are not unfairly discriminated against on the grounds of their disability. The Disability Discrimination Act, 1995, places on employers (and their staff) a range of responsibilities. In most cases the interpretation of these is quite clear. However, inevitably there are areas of uncertainty regarding definition of disability (eg the concept of a registered disabled person has been done away with) and what are reasonable actions. Wherever any doubt arises a member of staff should seek expert advice from Human Resources. If an individual believes her/himself to have been discriminated against unfairly a claim may be made against either the University, one of its employees who was responsible or both. In tackling any situation involving a person with a disability or who you suspect may have a disability it is very important that you involve that person actively in discussing how best to overcome any disadvantageous side effects of difficulties. *Failure to respond to the needs of a disabled person through lack of knowledge of assistance that may be available could constitute an offence under the Act and give rise to a case in an industrial tribunal against both the University and the member of staff involved.*

These notes have been prepared as part of the University's continuing commitment to raise awareness of the needs of disabled people and of the University's legal obligations. Support will be provided through appropriate training sessions from time to time and will be an element in the compulsory recruitment training sessions provided for conveners of selection committees and training offered on handling grievance and discipline. The requirements of the Act do not solely impact on recruitment and selection but also have important implications for all internal Human Resources procedures (e.g. promotion, regrading, discipline, grievance). The principles set out in these notes should be borne in mind whenever any of the University's Human Resources procedures are invoked.

Estates will take into account the requirements of the Act in any new buildings planned and in any conversions to existing buildings.

*Equal opportunities insofar as it relates to disability is a rapidly evolving area. As such the University will review its commitments on an annual basis.*

#### **Definition of Disability**

The Act defines a disabled person as:

*" A person with a physical or mental impairment which has a substantial and long-term adverse effect on her/his ability to carry out normal day-to-day activities."*

The practical implications of this are many and too varied to be itemised in a document such as this. All cases should be referred to Human Resources for advice in association with the University's Special Needs Adviser, Occupational Health and Estates.

*What is meant by "discrimination"?*

Discrimination occurs when for a reason which relates to a disabled person's disability you treat that disabled person less favourably than you treat or would treat others to whom the reason does not or would not apply **and** you cannot show that this treatment is justified.

Discrimination also occurs if you fail to comply with the duty of making reasonably adjustment which is required by the Act **and** you cannot show that this failure is justified.

*What is meant by "substantial"?*

"Substantial" is taken to mean a limitation that goes beyond the normal differences in ability that exist between people. Thus "substantial" is an effect that is non trivial or not minor. In assessing this you should, for example, compare the time taken for someone to do a routine task and the way in which it is done with what might be expected if the person had no impairment.

As with all other areas of equal opportunities it is important to avoid unwarranted assumptions and stereotypes e.g. that disabled people are more likely to take sick leave than others. As soon as you are aware that an individual is disabled, or may fall under the definition of disabled, you should discuss with her/him the implications of the disability and the possible strategies for overcoming any difficulties. It is only lawful to discriminate against the person on the basis of the individual case in hand the employer can claim that the disability would substantially effect the performance of the job. This test must be seen within the obligation to make reasonable adjustment (see section below).

*What is meant by "long term"?*

Long term is an impairment that has, or is likely to, last for at least 12 months or is likely to last for the rest of a person's life. It also covers impairments that recur from time to time.

*Are there any exclusions to conditions covered by the Act?*

Yes, a list of conditions not regarded as amounting to a disability within the terms of the legislation set out in the Appendix.

*What happens if I did not know a person was disabled?*

Ignorance is no defence against discrimination. It is therefore not justifiable to claim that you were unaware that someone was disabled. There is, however, no duty to make reasonable adjustments unless you knew, or could reasonably have been expected to know, that someone was disabled. In the recruitment process the University will always ask applicants as part of the standard application form to state if they are disabled. In cases of discipline, grievance, poor performance etc. it is important to establish if disability may be a factor. Human Resources should always be consulted about cases of disabled staff or staff who may fall within the definition of the Act. If through lack of specialised knowledge the University or one of its agents misses the opportunity to make reasonable adjustments to the work place or working methods the University and the agent could be open to a charge of discrimination.

*If I hire staff from third parties such as employment agencies, research councils etc are they covered by the Act?*

Staff whose salaries are paid directly by a third party, such as research council or industrial sponsor, are covered by the Act. The University has a duty to cooperate with the third party in making necessary adjustments to working methods and work places.

### **Employer's Duties and Test of Reasonableness**

The University has a duty under the Act to make reasonable adjustments to:

- work place (physical features including fixtures, fittings, furniture and equipment etc.)
- methods and means of working (working practices, timetables, working hours etc.)
- pace of work

*What is meant by the term "Adjustments"?*

The purpose of an adjustment is to overcome any *substantial* disadvantage that a disabled person might experience arising from physical features or work arrangements. There is no obligation to make an adjustment if it would breach health and safety and/or building regulations or if the disadvantage itself is minor or trivial.

*What types of adjustment are considered reasonable?*

The range of adjustments which it might be reasonable for the University to make cannot be listed exhaustively. However the following is a list of examples offered by government:

- make physical alterations to fixtures, fittings, equipment, furniture
- allocate some of a disabled person's duties to another member of staff;
- transfer the disabled person to another job;
- alter the hours of work;
- assign the person a different work place;
- allow absence from work to attend rehabilitation;
- arrange training so as work can be continued or acquire/modify equipment for work;
- acquire or modify equipment
- modify instructions;
- modify testing and assessment procedures to ensure take account of the disabled person;
- provide reader/interpreter and/or supervisor.

*What is the definition of "reasonable"?*

The fact that these items are cited as examples of adjustments does not mean that in all circumstances the University is required to take such measures. The adjustments that might be made are moderated by what it is reasonable for an employer to do.

As in all areas of employment law the concept of what is reasonable has no fixed definition. While guidance is given below the final arbiter of what is or is not reasonable will be the Industrial Tribunal and Court systems. The definition of what is reasonable is continually modified by case law as the Employment Appeal Tribunals and the Court of Appeal make decisions. Whenever in any doubt you should contact Human Resources. The following are some key points that you should bear I mind when considering how to respond to the needs of a disabled colleague:

*Substantial Disadvantage* - Where there is a substantial disadvantage it will not be reasonable to address only minor or trivial difficulties while ignoring more serious difficulties. You must seek to tackle the central difficulty if it is possible to do so;

*Extent of Mitigation of Disadvantage* - when evaluating the steps that could be taken to tackle a disadvantage you should weigh up the extent to which these will overcome the effect in question. If any steps that could be taken will have little impact on the disadvantage it may be reasonable to conclude that the adjustments proposed should not be taken;

*How Practicable are the Adjustments?* - In certain circumstances a series of adjustments might be theoretically possible but if practical conditions mean that they cannot be implemented properly you may be able to argue that it is not reasonable for the University to make the adjustments proposed. However, this does not mean that if it would take some time to implement some adjustments it would be reasonable to refuse to undertake them. Unless there is a genuine need to have an employee on site quickly (or to seek the return to work of an existing employee) the expectation is that employers will wait for adjustments to be implemented for a disabled person. In some cases it might be reasonable for the University to implement temporary arrangements to enable employment to start/continue while permanent arrangements are being prepared

*Costs of Adjustments* - the cost of making an adjustment may be taken into account. You should remember, however, that many of the adjustments necessary to enable a disabled person to be a productive employee are inexpensive and relatively easy to implement. On the occasions when this is not the case and significant financial outlay is involved an employer will be expected to:

*weigh the costs of seeking a replacement for the disabled person in comparison with the costs of adjustment*

*weigh the likely length of service (and by implications the costs of this) against the initial costs of the proposed adjustment*

*weigh the value to the employer of the skills and/or experience of the disabled person against the costs of the proposed adjustment*

It is likely that employers will be expected to fund alterations up to the cost of recruiting and training a replacement. On the basis of the above it may be reasonable to conclude that a more expensive adjustment could be a sound investment in an experienced and valuable employee.

*The Impact of an Employer's Resources* - the level of an employer's financial and human resources will be taken into account when a Tribunal considers what adjustments it might be reasonable to make. As the agent a large employer you should be sensitive to the implications of this when considering what adjustments to implement.

*Use of Internal and External Support Agencies* - ensure that you are aware of outside financial and other help that may be available to assist in making any necessary adjustments. Similarly the disabled person may be able to give some assistance in making changes. A failure to familiarise yourself with sources of assistance could make a decision to refuse to make adjustments discriminatory. Assistance on this matter should be sought from Human Resources who will work closely with the University's Special Needs Adviser.

*Impact of an Adjustment on the Ability of other Employees to Work Effectively* -weigh up the impact of any proposed adjustments on other employees. Where a proposed adjustment could have a significant impact on the ability of other employees to carry on their work it may be reasonable to refuse to make the change. Where any inconvenience could be described as minor or trivial it may not be reasonable to decline the adjustment. Where changes are to be made it is important to consult all staff affected, disabled or otherwise.. If changes are being made to the work place to accommodate the needs of a disabled employee the appropriate members of the University management will undertake the consultation.

### **Impact on Selection Procedures**

Details of the impact of the Disability Discrimination Act, 1995 on specific Human Resources procedures are set out in each of the procedure documents. This section provides a brief overview on selection procedures, which will be critical in the University's commitment to further equal opportunities. Essentially it is now unlawful to discriminate against a disabled person in the selection process in terms of employment offered or by deliberately refusing to make an appointment to a disabled person.

*How do I avoid incorporating potentially discriminatory statements in selection and recruitment processes?*

It is very important that nothing that could be described as discouraging applications from disabled people is included in either a job advertisement or further particulars. Any aggrieved applicant could refer the matter to an Industrial Tribunal. The best way of ensuring that you meet the requirements of opportunity for all is by drawing up a formal set of selection criteria and including in this **only** those matters that are truly relevant to the needs of the job. You should avoid the use of blanket exclusions. In this regard the equal opportunity requirements of disability are exactly same as those that govern race and sex discrimination. If in doubt you should seek advice from the Recruitment Section of Human Resources. Internal notices, memos or entries on the internet all count as advertisements for the purposes of the legislation

*Do I have to provide information in different formats ?*

Yes, if an applicant or potential applicant asks for material in alternative formats (ie tape, Braille) it is normally reasonable to do this. Advice is available from Human Resources and the university's Special Needs Adviser.

*Can I ask potential employees to undergo a health examination?*

Yes, but you must be careful that in doing so you are not treating a disabled person less favourably than an able-bodied person. This means that you must not target disabled people for health checks when for a similar post you would not ask an able-bodied person to undergo a similar examination. If you have a blanket policy of pre-employment medical checks these should be acceptable so long as the nature of the examination is the same for disabled and able-bodied persons. If you choose to apply a health examination you must be prepared to justify why the test is required. If someone who is not normally required to undergo a medical and you decide in the context of the nature of their disability to ask for a medical this would only be justified if you can show that the condition is key to the person's ability to do the job.

*How do I know if a person is disabled?*

In the great majority of cases the answer to this question will be straightforward. However, in the absence of the category "registered disabled" there may be occasions when it is not immediately clear that the impairments identified by a candidate are sufficiently substantial as to qualify under the definition given in the Act. In such cases the convener of the selection committee should seek advice from the Recruitment Section of Human Resources.

*What provisions should be made for a disabled person at an interview or in any selection tests?*

The applications form will invite applicants to indicate if they consider themselves disabled and, if so, what is the nature of their disability. Human Resources will alert conveners of selection committees once short listing is complete to any disabilities, which would require special measures as part of the selection process. This could mean that adjustments will have to be made to the physical location of the interview or to the type of skills tests (if any) that are incorporated as part of the selection process. Even where a person fails to alert the University to a disability if when (s)he arrives for interview, it is clear that they will be at a substantial disadvantage because of arrangements it is likely that you will have to make what adjustments are possible in the time and resources available.

*At what stage is consideration given to an applicant's disability?*

As with other equal opportunities matters at the short-listing stage selectors will not have access to information about any disabilities of applicants unless the applicants choose to include such information on their cv or letter of application. Once short listing has been completed information about a disability will be made available to the convener of the committee so that adjustments to the physical layout of the interview and to any aptitude/competence tests can be made. At the interview itself you should not ask questions about a person's disability unless the topic is raised by them, or a question that you have asked all other applicants bears directly on the type of disability. At the interview the task of the selection committee is to assess a disabled candidate on her/his abilities to carry out the job as if any reasonable adjustments had been made. If on this basis the disabled person is judged to be the most technically competent the committee should recommend the appointment subject to the University being able to make reasonable adjustments to the work place.

At this point the convener of the selection committee must seek the advice of Human Resources to assess the needs of the individual. In doing this Human Resources will consult the University's Special Needs Adviser, Occupational Health and Estates, as appropriate. Human Resources, with support from appropriate specialist advisers. It is particularly important to involve fully the disabled person in discussions about the adjustments that might be made to the workplace. On the basis of this an assessment will be made by the convener of the selection committee, Human Resources and appropriate specialist advisers on whether it is reasonable and/or possible to make the adjustments to the workplace that are necessary to enable employment. In the case of any failure to agree the matter will be referred to the Executive.

*Can practical or aptitude tests still be used as part of the selection process?*

Yes, but you must be ready to adjust the nature of the test or how you assess the results so as to be fair to the disabled person. An example would be if a disabled person applied for a secretarial post for which a test of copy typing was given. You would either have to provide material/equipment to help the individual or take account of the effects of the disability in your assessment of how the person had responded to the test.

### **Grievance/Discipline/Promotions/Probation**

*How does the act apply to promotions and regrading procedures?*

The act covers all employment procedures. All those involved in promotions or regrading must ensure that the criteria used are justified for the jobs and grades in question. When assessing a person performance for promotion or regrading it is essential to take account of any disabilities and the impact these may have had.

Material for promotion and regrading procedures must be available on request in alternative formats.

*How does the act apply in cases of poor performance or discipline?*

The obligations already described of making reasonable adjustments apply. As soon as it becomes apparent that a colleague's poor/inadequate performance or behaviour may be the result of a condition considered a disability under the act you should discuss the situation with the person concerned. An important part of informal counselling about performance will be to identify reasonable adjustments that should be made to offset the effects of the disability that have impaired performance. Disciplinary warnings or termination that arise from problems created by a disability can only be justified if the adverse effects of the disability can not be removed by any reasonable adjustments.

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## Appendix

### List of Conditions Excluded from the Disability Act

addiction or dependency on alcohol, nicotine or any other substance (other than as a result of the substance being medically prescribed)

seasonal allergic rhinitis (eg. hayfever), except where it aggravates the effect of another condition

pyromania

kleptomania

tendency to physical or sexual abuse of other persons

exhibitionism

voyeurism

Normally where someone is receiving treatment the fact that the treatment may reduce the symptoms should be ignored and the employer is expected to respond as if the symptoms were still present. The only exception to this rule is the wearing of glasses and contact lenses!