

## Editorial

## The Equality Act 2010 and mental health

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**Summary**

One aim of the Equality Act 2010 is to protect people with disabilities and prevent disability discrimination. We review the key provisions of the Act relevant to disability discrimination with respect to mental illness.

**Declaration of interest**

None.

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The Equality Act 2010 brought all the grounds of discrimination into one statute, harmonised definitions and concepts, and introduced new requirements and concepts. It permits greater scope for positive action, provides expressly for discrimination based on more than one characteristic, and strengthens disability protections. The Act represents an attempt to enhance the legal protection for people with disabilities, particularly mental illness.

**Background**

The first substantive provisions to tackle workplace disability discrimination were introduced in the 1995 Disability Discrimination Act and amended in 2001 and 2005. The Disability Discrimination Act covered people in Britain with physical or mental impairments that have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

The then government set a target of 80% employment for disabled people. This required engagement with those furthest from the labour market<sup>1</sup> and a reduction of discrimination by employers (e.g. only 37% of employers in 2001 reported that they would employ someone with a mental health problem).<sup>2</sup> Government research in 2004<sup>3</sup> showed that only 24% of this group were employed, compared with 65% of people with physical health problems. Meanwhile, 40% of people on incapacity benefit have a mental illness as their primary impairment (60% if secondary impairments are included).<sup>4</sup> The issue of rights to inclusion of people with mental illness has thus moved from the periphery of disability rights policy to a central position in employment policy.

**The definition of disability**

Disability is defined in the Equality Act 2010 as a 'physical or mental impairment which has a substantial and long-term adverse effect on the ability to carry out normal day to day activities'. The terms physical or mental impairment are not defined, but are intended to cover all forms of impairment, including sensory impairments.<sup>5</sup> Conditions deemed not to be impairments include dependency on alcohol, nicotine or other non-prescribed substances, pyromania, kleptomania, a tendency to physical or

sexual abuse of others, exhibitionism, voyeurism and hay fever. However, in *Power v. Panasonic UK Ltd* [2003],<sup>6</sup> the Employment Appeal Tribunal held that where alcohol misuse resulted in depression, the latter was a disability under the Act.

'A substantial adverse effect' of an impairment is one which is more than minor or trivial, and the effect is 'long-term' if it has lasted 12 months, is likely to last at least 12 months, or is likely to last for the rest of the life of the person affected. If an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, it is treated as continuing if 'likely' to recur. Conditions with effects that fluctuate can still qualify as impairments in respect of the meaning of 'long-term'. A condition will be seen as 'likely' to recur if this 'could well happen' rather than the higher threshold of 'more probably than not'.<sup>7</sup>

The burden of proof is on the employee to show that they meet the requirements in Section 6 of the Equality Act. The effect of an impairment determines coverage under the Act; for example, someone with depression with only minor effects on their daily life may not be covered, whereas someone with severe depression with substantial effects on their daily life is likely to be considered disabled.

**Types of discrimination and harassment covered**

The Equality Act prohibits several types of conduct in relation to employment. First, it prohibits direct discrimination, where someone discriminates against a disabled person because they are disabled. The Act extends direct discrimination by allowing claims for disability discrimination and harassment to be brought by individuals on the basis that they are perceived to be disabled (and are not), or because they associate with someone who is disabled. Second, the Act extends indirect discrimination to cover disability. Thus, an employee can claim that a particular practice, criterion or provision disadvantages persons sharing the same disability as the applicant. There is no need to show that the employer knew (or ought to have known) that the applicant was disabled. Third, discrimination arising from disability occurs where an employer treats a disabled person unfavourably because of something connected with their disability. For example, an employer dismisses a worker because she has had 3 months' sick leave. The employer is aware that the worker has depression and that her sick leave is disability-related. The decision to dismiss is not because of the disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take disability-related sick leave).<sup>8</sup> No comparator is required and the employer would have to objectively justify the treatment. The 'justification' test is whether the alleged discriminatory treatment is a proportionate

means of achieving a legitimate aim. The employer must produce evidence that their action was 'appropriate and necessary' and not rely on mere assertions.<sup>8</sup> This approach requires courts and tribunals to balance the degree of discrimination with the aim to be achieved, taking into account the circumstances.

The Equality Act 2010 also refers to third-party harassment due to disability. Employers are liable for harassment of their employees by a third party (e.g. a customer or client), where: the employer knows the employee has been harassed; harassment occurred at least twice (it is irrelevant whether the third party is the same or a different person on each occasion); and the employer did not take reasonably practicable steps to prevent harassment recurring.

### Pre-employment health questions

A significant feature of the Act is that it makes it unlawful for employers to enquire of an applicant's disability or health, until that person has either been offered a job or been included in a pool of candidates to be offered a job when a suitable position arises. This restriction is qualified by several exclusions: questions required for national security vetting; making reasonable adjustments to enable the disabled person to participate in recruitment; establishing whether a job applicant would be able to undertake a function intrinsic to the job, with reasonable adjustments in place as required; monitoring diversity in job applications; supporting positive action in employment for disabled people; and if the employer applies a requirement to have a particular disability, establishing whether the applicant has the disability. Nothing in the Act prevents employers asking health-related questions once recruitment decisions have been taken.

The restriction on pre-employment health questions is only enforceable by the Equality and Human Rights Commission. However, its breach constitutes evidence of disability discrimination. For example, an applicant rejected on the basis of the information obtained may sue for direct disability discrimination.

### Disclosure of mental illness

The Act does not obligate disclosure of disability. However, the issue requires careful consideration. A claim for direct discrimination or discrimination arising from disability can only be made where the employer knew or ought to have known that the person was disabled. Second, no duty arises to provide 'reasonable adjustments' if the employer does not know or could not reasonably be expected to know that a person has a disability. However, in some circumstances disclosure may be obligatory; for example, if a job environment is such that one's disability could present a risk to one's health and safety or that of colleagues (Health and Safety at Work etc. Act 1974).

Dismissal on the grounds of non-disclosure of a medical condition may lead to two potential claims: one for unfair dismissal, which is possible if the employee has worked for the employer for at least 12 months; and one for disability discrimination, if the medical condition amounts to a disability under the Equality Act. Dismissal in these circumstances is likely to be fair provided the employer followed a fair procedure and informed the employee on recruitment that a failure to disclose medical information (or other relevant information), as requested, constitutes grounds for dismissal.<sup>9</sup>

If the reason for the dismissal arises from the medical condition, the dismissal will be unlawful discrimination, unless

the employer can justify it, for example by showing that the employee's medical condition makes them unable to perform the job. However, before dismissing the employee, the employer must consider making reasonable adjustments, and only dismiss if there are none that would facilitate continuing employment.

Discrimination adds to the disability of people with mental illness. The Act therefore represents a welcome strengthening of disability protections as well as clarification for those considering disclosure of mental illness.<sup>10</sup>

Awareness of the Act will enable general practitioners, psychiatrists and other mental health professionals to advocate for their patients and produce informed reports for employers on request. Many advice and advocacy services (e.g. Citizens' Advice Bureaux, disability employment advisors at job centres) and vocational services (e.g. supported employment agencies) are under funding pressures, but continue to advise and support people facing legal difficulties at work due to mental illness. The introduction of the Equality Act provides the opportunity to study its impact compared with that of the legislation it replaces, to see whether this will help reduce workplace discrimination and improve the recruitment and retention rates of individuals with mental illness.

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