

Disability Discrimination in the Workplace and Diabetes

Introduction

The Disability Discrimination Act 1995 (as amended subsequently) marked the first major piece of anti-discrimination legislation for two decades, and the first to deal with the issue of disabled people in the work place. It governs workplace relations and also imposes obligations on providers of goods and services and affects the design of buildings and access to transport.

The focus of this note, however, is to deal with diabetes as a disability under the Act and to outline to you how the Act may be able to protect and assist you in the workplace.

Please be aware that this note is intended to provide guidance only and is not intended to provide or replace independent legal advice on specific sets of circumstances.

Definition of Disability

Only those individuals deemed to be disabled for the purposes of the Act can enjoy the protection it offers. However, many people with diabetes would never normally view themselves as being disabled.

For the avoidance of doubt, disability for the purposes of the Act is not related to your entitlement or otherwise to disability or sickness benefits – in other words, you don't have to be formally registered as disabled to benefit from the protection it offers.

The formal definition of disability in the Act is:

“a person has a disability for the purposes of this act if he has a physical or mental impairment which has a substantial and long-term effect on his ability to carry out normal day-to-day activities”

Diabetes (sometimes with no distinction made between Type I and Type II) has been found in previous cases to amount to a disability under the Act. This does not mean, however, that this condition will always amount to a disability in every case. If you believe you have been discriminated against and your employee argues that you are not disabled (and so not protected by the Act), it will be a question of fact for an Employment Tribunal to determine whether your condition has a substantial and long-term adverse effect on your ability to carry out day-to-day activities in your particular circumstances.

In determining whether someone with diabetes is disabled there are several key points to note:

- In each person's case there will need to be an objective assessment conducted of the circumstances to ascertain whether that person is disabled for the purposes of the Act. This is an assessment for the Employment Tribunal to make (usually with medical assistance);

- “Progressive Conditions” enjoy special protection under that Act which, in theory means that even where there is no current substantial adverse affect on your day-to-day activities, the fact that you have a condition (such as Type II diabetes) may provide you with protection in any event (although there must be some effect showing). (Diabetes has been found in a previous case to amount to a progressive condition, but unfortunately, no distinction was drawn between Type I and Type II diabetes in the case, so the outcome of a challenge on this basis is not certain);
- The beneficial effects of medical treatment are discounted when considering whether someone is disabled. So, for example, while someone who has well controlled diabetes thanks to a successful and well managed insulin regimen may not have substantial negative effects on their day to day activities, take the insulin away and the situation changes radically, allowing them to be protected by the Act.
- Due to the fact that medication is disregarded, it is almost certain that all insulin dependent diabetes sufferers are viewed as disabled for the purposes of the Act (this is often not even disputed by employers);
- Those people with diabetes who rely on medication, but not insulin, may also be considered disabled. This will very much depend on their individual circumstances, but given the fact that medication is to be discounted when considering whether someone is disabled, it seems likely that Type II diabetics taking medication such as Metformin, Gliclazide etc would be protected by the Act;
- Those people who manage by diet and exercise alone, may not be offered the protection of the Act. However, this is by no means certain, since government guidance on the issue provides that “if a disabled person is advised by a medical practitioner to behave in a certain way in order to reduce the impact of a disability, that might count as treatment to be disregarded”. In other words, if you have been advised by a nutritionist or doctor to follow a strict diet and to take certain exercise on a regular basis, the assessment as to whether you are disabled may have to take place in a world where you don’t do the diet or take the exercise;
- Remember that secondary conditions (such as retinopathy, neuropathy or heart disease) could of themselves amount to a disability under the Act.

In general terms, it is likely that all people with Type I diabetes will be covered by the Act. It is likely that many people with Type II diabetes who take medication to control the illness will be covered by the Act. Those with Type II diabetes who manage by diet and exercise alone may not be covered, but this will depend on the circumstances.

Discrimination

The Act outlines four types of discrimination against which you are protected. If you believe yourself to be disabled and to have been subject to this type of treatment, there could be legal redress available to you:

- Direct Discrimination – this means treating a disabled person less favourably than a non-disabled person where everything else is the same. So, for example, not giving someone with diabetes a promotion because they had diabetes;
- Disability-related Discrimination – this is where less favourable treatment occurs for a reason related to the disability, but not the disability itself. So, an example of this would be where someone with diabetes was not promoted for a position because he has had several days off in the last year to attend hospital appointments, and instead the employer promoted someone with a 100% attendance record;
- Failure to comply with the duty to make reasonable adjustments – All employers, under the Act, have a duty to make reasonable adjustments for disabled employees to remove any disadvantage from which they may suffer as a result of their disability. For example, allowing a person with diabetes to take extra breaks throughout the day in order to test blood glucose or to eat or inject insulin as required.
- Victimisation – It is unlawful for an employer to take action against an employee because they have complained or brought a claim in connection with the Act. For example, if an employee complains that reasonable adjustments have not been made and is then ostracised or demoted, this would amount to victimisation.

Employment

Although we say that the rules related to disability discrimination apply in the context of “employment”, this is broadly drafted to encompass:

- Recruitment – so if you think you have been turned down for a job because you have disclosed your diabetes
- Current Employees – terms of employment, access to promotion, transfer and training, access to benefits or dismissing an employee
- Former employees – for example a refusal from your former employer to provide a reference because of your disability

Forms of Discrimination

You have now had an introduction to the theory behind the law. BUT: what does this mean for you in practice?

The most common instances of disability discrimination tend to be *disability-related discrimination* and *failure to make reasonable adjustments*. Therefore, we will focus on those areas in this note.

Disability-Related Discrimination

There are endless ways in which disability-related discrimination could come about for someone with diabetes. Some examples could be:

- Failure to promote someone because of time away from work because of hospital appointments;
- Taking disciplinary action against someone because they left their post to inject insulin, test their blood sugar or eat something;
- Dismissing someone who was rude to a colleague during a hypoglycaemic episode;
- Taking performance management action against an employee who struggles to meet targets one month because they have been off attending a DAFNE course;
- Refusing to promote a diabetic person into a role which involves driving in case of hypoglycaemic episodes;
- Failure to employ someone with diabetes because they would be expected to work night shifts alone without meal breaks.

It is important to note that it is possible for an employer to justify the treatment of a disabled person where that treatment is both material in the circumstances and substantial. So, in a recent case a Company was justified in not employing a diabetic fitter at a distribution centre because there was a substantial risk of injury to the employee who would have to work alone, at night, in a low-temperature environment and at heights, meaning he was at risk of injury through hypos. It was not possible in the particular circumstances to supply or modify equipment which would alleviate this risk.

Similarly, in the case above, it might be possible to justify dismissing a person who has been rude to a colleague during a hypo where they have neglected their own condition. In a previous case a man was dismissed for being aggressive to his supervisor during a hypo. On the face of it, this could be disability-related discrimination: the man was dismissed due to behaviour caused by his disability. However, the tribunal found that the employer had been justified in dismissing the individual because the employer had been aware of the condition, referred him to the Company doctor for help and made reasonable adjustments for him. However, the employee was failing to adequately control his condition (by neglecting to administer his medical treatment properly) and therefore the violent outburst was his own fault.

However, a justification must be material and substantial. So, a minor discrepancy in the productivity of a person with diabetes (who, perhaps, has to leave their desk more

often to test, inject and eat throughout the course of the day) is unlikely to be regarded as a substantial reason. Therefore, treating them less favourably as a result - for example, by taking performance management action against them - would be discriminatory and not justified, making it unlawful.

Less favourable treatment of a diabetic person for a reason based on a general assumption about people with a particular condition – such as that diabetic people cannot drive because of the risk of hypos – would not be a material reason because it is not related to the particular circumstances of the person receiving that less favourable treatment.

Note that it is never possible to justify direct discrimination.

The Duty to Make Reasonable Adjustments

Broadly, an employer is under a duty to take such steps as are reasonable to ensure that no “criterion, provision or practice” (or physical feature of the premises) places the disabled person concerned at a substantial disadvantage in comparison to non-disabled people. If an employer fails to make reasonable adjustments for you, he has discriminated against you. A failure to make reasonable adjustments cannot be justified.

Examples of reasonable adjustments an employer may have to make for a person with diabetes *could* include:

- Allowing reasonable time off during working hours to attend medical appointments, assessments or a DAFNE course;
- Allowing some time away from duties during the working day for blood testing, meals, or taking medication;
- Allowing someone with diabetes to eat or drink during a shift (or carry food or drink on their person) where other employees would not normally be allowed to do so;
- Discounting sickness absence relating to the disability when considering an employee for a bonus or promotion;
- Taking into account time needed away from work during the year, or away from a work station during the day to deal with medication or hypos when setting performance targets;
- Providing a private, clean place for someone with diabetes to go to inject and/or test blood sugar (other than the toilets);
- Varying working patterns for an employee with diabetes to allow them to work more regular hours and thereby eat regularly.

It is important to note that employers have a duty to make *reasonable* adjustments only. When considering whether a particular adjustment is reasonable, a tribunal would consider the extent to which taking the step would prevent or reduce a disadvantage to an employee, the extent to which it is practicable for the employer to take such steps, the costs incurred, any disruption to the employer's business, the employer's available resources, the size of the business, the co-operation of the individual employee.

Therefore, while it might be appropriate for an employer to discount some sickness absence for an employee with diabetes where this is related to that disability, they could still take action where the employee was taking excessive sickness absence for an unrelated condition. Similarly, a step which it may be reasonable for a large employer to take – such as providing a separate room for a diabetic employee to go to inject or test blood sugar – may not be reasonable for a small, family run business with limited room in the premises.

It has been argued in the past that disabled employees should continue to receive Company Sick pay even when their entitlement to this has run out, but the Tribunals have determined that this is excessive and not a reasonable adjustment in most cases (unless the employer itself has caused the absence).

If you think that there is a reasonable adjustment which would make your working life easier or fairer, consider approaching your employer about this.

Employer's knowledge of Disability

Diabetes is, largely, a 'hidden disability'. In other words, unless you specifically make your employer aware of your condition, it is unlikely that they would ever know that you have diabetes.

Surprisingly, tribunals have found that it is *not* necessary for an employer to know of a person's disability in order to be able to discriminate against them. In other words, even if you don't tell your employer about your condition, you may still benefit from the protection of the Act. However, whether or not an employer knew about the disability might affect its ability to justify the treatment.

Conversely, the employer's knowledge of an employee's disability is important in respect of the duty to make reasonable adjustments. The employer is only under a duty to make reasonable adjustments where he knows or could reasonably be expected to know that the person concerned is disabled and is likely to be placed at a disadvantage.

In any event, it is normally advisable to let your employer know about your condition, even if you ask for this information to be kept confidential. This is not least the case in order that someone at work can help you in the event that you become ill at work.

Taking Action

In the event that you feel you have been discriminated against or that your employer has failed to make reasonable adjustments, here are some practical steps you can consider taking:

- Raise the issue informally with your line manager if you have not already done so. It is normally best to try to resolve issues amicably if at all possible;
- If tackling the issue informally does not help, raise a grievance using your employer's standard grievance procedure (all employers must now have a grievance process in place for you to use);
- If you have been dismissed and you think this is as a result of your disability, exhaust the appeals process within your organisation;
- If the grievance process and/or an appeal do not allow you to resolve matters, you can consider taking your case to an employment tribunal;
- In most circumstances, you must submit your claim no more than three months from the act complained of (i.e. the less favourable treatment and/or dismissal);
- In the event that the circumstances you are complaining of took place over a prolonged period of time, the time limit will normally run from the date of the last act in the series of acts;
- If you feel that the treatment you are receiving is so bad that you feel you have no option but to resign, you must raise a grievance about the issues you are complaining about before you resign (unless you have already done so).

If you make a claim to the tribunal and are successful, there are several possible outcomes. These include:

- An award of money for future loss of earnings (if you have been dismissed);
- An award of money for injury to feelings;
- An order to an employer that they must make a particular reasonable adjustment going forward;
- An order requiring that you are re-instated to your job if you have been dismissed.

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