



University of Strathclyde  
**LAW CLINIC**

# 8A How to prove disability status

A guide for the general public

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# Legal definition of disability

In order to succeed with a claim of disability discrimination, the first thing you have to do is prove that you have a disability.

This is often referred to by Employment Tribunal Judges and solicitors as 'disability status'. All this means is whether or not a person has a disability within the meaning given to it in the Equality Act.

Proving that you have a disability within this meaning requires proof that you meet the legal definition of disability in the Equality Act.

We use the word 'disability' in many different ways and people will give different meanings to it- but for the purposes of the Equality Act and your rights arising out of this Act- we have to look at this 'legal definition of disability'.

# Legal definition of disability

Sometimes, your employer, or their solicitor on their behalf, will ‘concede’ (i.e. admit) that you have a disability, in which case you can focus your efforts on proving that the discrimination occurred.

However, if your employer disputes that you have a disability, or says that they cannot admit it without your proving this to be the case, then you will have to present evidence to the Tribunal to establish that you have a disability within the meaning of disability in the Equality Act.

# The legislation

The legal definition of a disability can be found in Section 6(1) of the Equality Act 2010, which says:

"A person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

# The legislation (2)

It is helpful to break this definition into three stages:

1. Is there a physical or mental impairment?
2. Does the impairment have a substantial adverse effect on your ability to carry out normal day to day activities?
3. Is the substantial effect long term?

We will now consider each of these in turn.

# 1. Is there a physical or mental impairment?

Usually it will be quite easy to determine if there is a physical or mental impairment. There is no need to identify the cause of the impairment. There are a huge range of impairments which can constitute a disability. These are better explained as physical, mental or cognitive. There isn't space to list them all here but some examples include

- ▶ Sensory impairments (e.g. those affecting sight or hearing)
- ▶ Impairments with fluctuating or recurring effects (e.g. arthritis, ME, fibromyalgia, depression)
- ▶ Progressive impairments (e.g. dementia, motor neurone disease)
- ▶ Auto-immune conditions
- ▶ Mobility issues
- ▶ Mental health conditions
- ▶ Learning disabilities
- ▶ Developmental conditions
- ▶ Cognitive impairments

# 1. Is there a physical or mental impairment?

What is important is the effect of the impairment, not the impairment itself. For example:

A man has a borderline moderate learning disability which has an adverse impact on his short-term memory and his levels of literacy and numeracy. For example, he cannot write any original material, as opposed to slowly copying existing text, and he cannot write his address from memory.

A woman is obese. Her obesity in itself is not an impairment, but it causes breathing and mobility difficulties which substantially adversely affect her ability to walk.

# 1. Is there a physical or mental impairment?

Certain medical conditions are excluded from being an impairment for the purposes of disability discrimination law, these are:

- ▶ Addiction to or dependency on alcohol, nicotine, or any other substance
- ▶ Hayfever (except where it aggravates the effect of another condition)
- ▶ Tendency to set fires
- ▶ Tendency to steal
- ▶ Tendency to physical or sexual abuse of other persons
- ▶ Exhibitionism
- ▶ Voyeurism

A person with an excluded condition may nevertheless be protected as a disabled person if he or she has an accompanying impairment which meets the requirements of the definition. For example, a person who is addicted to alcohol may also have depression, or a physical impairment such as liver damage, arising from the alcohol addiction. While this person would not meet the definition simply on the basis of having an addiction, he or she may still meet the definition as a result of the effects of the depression or the liver damage.

# An example of how the excluded impairments work

A young man has Attention Deficit Hyperactivity Disorder (ADHD) which manifests itself in a number of ways, including exhibitionism and an inability to concentrate. The disorder, as an impairment which has a substantial and long-term adverse effect on the young person's ability to carry out normal day-to-day activities, would be a disability for the purposes of the Act. The young man is not entitled to the protection of the Act in relation to any discrimination he experiences as a consequence of his exhibitionism, because that is an excluded condition under the Act. However, he would be protected in relation to any discrimination that he experiences in relation to the non-excluded effects of his condition, such as inability to concentrate. For example, he would be entitled to any reasonable adjustments that are required as a consequence of those effects.

## 2. Substantial adverse effect on day-to-day activities



Once you have shown what the impairment is, you need to show that it has a substantial adverse effect on day-to-day activities.

A substantial effect means an effect that is more than minor or trivial.

# Substantial adverse effect

When determining whether the impairment affects your ability to carry out normal day-to-day activities, the following questions are relevant:

1. Does it take you much longer to carry out the activity? For example, if you can still get dressed, but as a result of your impairment it takes you much longer than it would take someone who does not have your impairment, this is likely to be a substantial adverse effect.
2. How do you carry out the activity? If the way you carry out an activity is very different as a result of the impairment, it is more likely to be a substantial adverse effect.

When determining if your impairment constitutes a disability, you should disregard the effects of any medication or treatment.

How would you be without medication or treatment?

# Normal day-to-day activities

The guidance to the Equality Act lists some examples of normal day-to-day activities. It includes things like shopping, cooking, eating, watching TV, putting on makeup, washing and dressing and using public transport.

A person works in a small retail store. His duties include maintaining stock in a stock room, dealing with customers and suppliers in person and by telephone, and closing the store at the end of the day. Each of these elements of the job would be regarded as a normal day-to-day activity, which could be adversely affected by an impairment.

# Normal day-to-day activities

The guidance also lists some activities which will not count as day-to-day activities, including playing a musical instrument to a very high standard, playing sport to a very high or professional standard.

A woman plays the piano to a high standard, and often takes part in public performances. She has developed carpal tunnel syndrome in her wrists. This does not prevent her from playing the piano, but she cannot achieve such a high standard. This restriction would not be an adverse effect on a normal day-to-day activity, because playing the piano to such a specialised level would not be normal for most people.

# 3. Long term effect

In order for an impairment to have long term effect, it needs to have lasted at least 12 months or be likely to last longer than 12 months.

When arguing that it should have been known that the impairment was likely to last longer than 12 months you need to show at what point this could have been known. E.g. date of diagnosis/prognosis, GP/consultant reports etc.

A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met.

# Long term effect and recurring conditions

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 stops within 12 months, the substantial effect is treated as continuing if it is likely to recur in future.

A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).

# Long term effect and recurring conditions

A person has Menière's Disease. This results in his experiencing mild tinnitus at times, which does not adversely affect his ability to carry out normal day-to-day activities. However, it also causes temporary periods of significant hearing loss every few months. The hearing loss substantially and adversely affects his ability to conduct conversations or listen to the radio or television. Although his condition does not continually have this adverse effect, it satisfies the long-term requirement because it has substantial adverse effects that are likely to recur beyond 12 months after he developed the impairment.

# Deemed disabilities

The [government guidance to the Equality Act 2010](#) lists a number of ‘deemed disabilities’.

What this means is that if you can prove you have one of the disabilities on that list, then the Tribunal has to accept that you have a disability. This means you do not have to go through the three parts of the definition set out in the previous slides if you have one of these conditions. At the moment, the disabilities which automatically give protection or are deemed to be disabilities are:

- ▶ Cancer Automatic protection from diagnosis
- ▶ HIV as above
- ▶ Multiple sclerosis as above
- ▶ Certified blindness
- ▶ Severe sight impairment. Provided the sight impairments cannot be corrected
- ▶ Sight impaired with glasses.
- ▶ Partially sighted

# Evidence

In order to persuade the Tribunal that you have a disability, it is not enough to just stand up and explain it to the judge.

You should also present some medical evidence. The more credible medical evidence you can present, the more likely it is the judge will agree that you have a disability. The kind of evidence you might present would include medical reports, relevant GP records, specialist nurse or consultant reports.

The decision of any benefits tribunal if you have applied for disability-related benefits such as PIP can also be helpful both in explaining the impairment and the impact of this on normal day to day activities.

This is then supplemented by your own evidence of the impact and you may have already set that out in an impact statement. See slideshow 8B on how to prepare an impact statement.

# How to prove disability status

1

What is the impairment?



Does it give automatic protection or is it a deemed disability?



Is it excluded from being an impairment?

2

Does it affect day-to-day activities?



Is the effect substantial? If not, would the effect be substantial if you did not receive treatment (including talking therapies and aides and adaptations)



If not, and you have a progressive condition, is the effect likely to become substantial in future?

3

Is the substantial adverse effect long-term (12 months or likely to last 12 months) or recurrent?