



University of Strathclyde
LAW CLINIC

9C Types of claim: (3) Discrimination arising from disability

A guide for the general public

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Introduction

When completing your ET1, you will be asked to identify which claims you are making. This is at Section 8.1 of the ET1.

You will be ticking the box that says discrimination and then the box below that identifies 'disability'. **This may be alongside other complaints.**

However it will also be necessary to be able to identify which type of disability discrimination you are claiming. The earlier you can do this the better so that you can be sure that the type of discrimination you are complaining of is included within the time limit.

You can do this at Section 8.2 of the ET1 where you are asked to set out the background and details of your claim. For more information about completing the claim form see slideshows 3A and 10D.

Types of discrimination

There are six possible claims for disability discrimination. These are:

- ▶ Direct Discrimination
- ▶ Indirect Discrimination
- ▶ Discrimination arising from disability
- ▶ Harassment
- ▶ Victimisation
- ▶ Failure to make reasonable adjustments

You can claim for any combination of these six claims. This series of slideshows aims to explain what these six possible claims are so that you can work out which ones might apply in your case.

What is discrimination arising from disability?

Under Section 15 of the Equality Act 2010, employers are under a duty not to treat disabled people unfavourably because of something connected with their disability.

This type of discrimination occurs when:

- An employer treats the disabled person unfavourably;
- This treatment is because of something arising in consequence of the disabled person's disability; and,
- The employer cannot show that this is a proportionate means of achieving a legitimate aim.

Unless the employer did not know, and could not reasonably be expected to know, that the person has the disability.

How is it different from other types of discrimination?

Direct discrimination occurs when the employer treats someone less favourably because of disability itself.

By contrast, in discrimination arising from disability, the question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability.

This means that you do not need to have a real or hypothetical comparator as you do in direct discrimination claims.

(1) What is 'unfavourable treatment'?

For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

(2) What does ‘something arising in consequence of disability’ mean?

The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

The consequences of a disability include anything which is the result, effect or outcome of a disabled person’s disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to use certain work equipment, a requirement for time off to attend medical appointments or sick leave, or inability to arrive at work at the required time.

So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know or could not reasonably have been expected to know that the person was disabled.

Two-stage test

It has been held that there are two distinct steps to be applied by Tribunals in deciding whether discrimination arising from disability has occurred. Applying this test to your own circumstances will help you to understand and explain your complaint to the Tribunal.

- (1) Did your disability cause, have the consequence of, or result in, “something”?
- (2) Did the employer treat you unfavourably because of that “something”?

Examples of discrimination arising from disability

An employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave).

A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.

A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

(3) Can the employer show the unfavourable treatment is a proportionate means of achieving a legitimate aim?

If the person applying the treatment can show that it is ‘a proportionate means of achieving a legitimate aim’, then it will not amount to discrimination arising from disability. This is often known as the ‘objective justification’ test.

The question of whether the unfavourable treatment is a proportionate means of achieving a legitimate aim should be approached in two stages:

- Is the aim of the treatment legal and non-discriminatory, and one that represents a real, objective consideration?
- If the aim is legitimate, is the means of achieving it proportionate - that is, appropriate and necessary in all the circumstances?

What is a legitimate aim?

The health, welfare and safety of individuals may qualify as legitimate aims provided that the risks are clearly specified and supported by evidence. One legitimate aim commonly used by Respondents in disability discrimination claims relating to capability and absence management is the efficient and effective management of the workforce.

Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test.

For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.

What is proportionate?

Even if the aim is a legitimate one, the means of achieving it must be proportionate.

Deciding whether the means used to achieve the legitimate aim is proportionate involves a balancing exercise.

An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the unfavourable treatment as against the employer's reasons for applying it, taking into account all the relevant facts.

Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the Court of Justice of the European Union (formerly the ECJ). EU law views treatment as proportionate if it is an '**appropriate and necessary**' means of achieving a legitimate aim. But 'necessary' does not mean that the unfavourable treatment is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

What if the employer did not know that the person was disabled?

If the employer can show that they:

- ▶ did not know that the disabled person had the disability in question; and
- ▶ could not reasonably have been expected to know that the disabled person had the disability,

Then the unfavourable treatment does not amount to discrimination arising from disability.

Employers should be considering whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'. An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Reasonable adjustments

Unfavourable treatment amounting to discrimination arising from disability can often be avoided by implementing reasonable adjustments. If you are still in employment and believe you are being discriminated against because of something arising from your disability, it is worth having a discussion with your employer to see whether you can reach an agreement on implementing reasonable adjustments to remove the disadvantage. For example, agreeing a later start time at work or using time off in lieu to attend medical appointments. Giving the employer an opportunity to rectify the situation at an early stage could save you having to raise a claim at the Employment Tribunal and, even if unsuccessful, it will show the Tribunal that you have been open to resolving the issue from an early stage.

If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

Proving a discrimination arising from disability claim

