

Appendix A - Disability Discrimination Act and Sickness Absence Management

1. Introduction

The Disability Discrimination Act (DDA) provides protection for disabled people against discrimination. As a major piece of employment legislation, the DDA has significant and wide-ranging implications for the Council's HR practices. The following guidelines advise managers on particular issues which may arise in relation to sickness absence management under the DDA. The Council acknowledges that disability is by no means generally synonymous with sickness and therefore not with sickness absence. However, the guidelines recognise that some disabled people will have conditions which are from time to time relevant in terms of sickness absence management. In addition the Council wishes to maintain absence and sickness management procedures which are consistent with the general requirements of the DDA.

2. The Issues

The DDA impacts on current sickness absence management in three key ways:

- The Act provided a new legal definition of a 'disabled person' and repealed the previous system of 'registration' under the 'green-card' scheme. Employers can no longer rely solely on information that someone has previously been or not been 'registered' disabled in order to assess them as having a relevant disability.
- Under the DDA, an employer unlawfully discriminates against a disabled person where, for a reason "related" to their having a disability, they receive (unjustified) less favourable treatment than they would otherwise receive.
- HR procedures (including sickness absence management procedures) which have a potentially detrimental effect on a disabled person (for a reason 'related' to their having a disability) may now be tested for justification under the terms of the DDA.
- An employer also unlawfully discriminates if they fail (unjustifiably) to meet any duty to make a "reasonable adjustment" in relation to a disabled person under section 6 of the Act.

3. Disability under the DDA

Under the DDA a disabled person is now defined as a person with:

"A physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities".

Within the range of disabilities covered by the Act some may raise particular issues in terms of sickness absence management. For instance, there may be special considerations when managing people with mental impairments or progressive conditions e.g. people with multiple sclerosis, cancer or HIV infection. There is however no general requirement for managers to become experts on disability - as the overriding issue under the DDA is that they do not unlawfully discriminate.

This approach is consistent with advice on good sickness absence management practices. Managers are not encouraged to delve into the medical cause or source of an employee's sickness - this may lead them to make unfounded judgements or an unsubstantiated prognosis. This should be left to advice from relevant medical personnel. Under sickness absence management the management concern is with the implications of the employee's absence. Under the DDA, the concern will be to

avoid discriminatory treatment while also managing the disabled person in terms of sickness absence management objectives. In both cases, managers need to consider the effect of the person's sickness / disability in terms of their employment (or potential employment). They then need to respond appropriately within the context of the individual and particular circumstances of, or surrounding, the post involved.

4. Disability and Sickness (Related) Absence

As underlined in the introduction above disability should not be automatically associated with sickness. Unfortunately, the term 'disability' can sometimes be confused wrongly with the concept of illness / poor health and consequently 'sickness'. Certainly, there is a key difference between many forms of disability and illness. For instance, a person who is blind or deaf should not be regarded as being 'sick' but as disabled due to their having an 'impairment'. It is important for managers to realise this, as confusion could cause an affront to many disabled persons who quite rightly do not consider being disabled a 'sickness'.

This is not to say that someone may not have a disability which is in practice associated with some level of sickness absence due to incapacity. For example, an employee with severe asthma or epilepsy - covered under the Act - who is unable to attend work, due to an attack or seizure, will be absent due to disability related sickness. (In practice it is important to stress that many such disabilities will in fact be 'controlled' by medication or treatment negating the need for sickness absence). The same disabled person could nevertheless also be absent due to a common cold, flu, sprained or broken limb.

The key issue in relation to sickness absence management is that, where the effects of a person's disability results in a need to be absent from work due to illness or where a disabled person requires leave which is directly associated with their disability this will need to be accommodated within the terms of the DDA. A failure on the part of an employer to acknowledge these needs could amount to a failure to make a 'reasonable adjustment'.

General sickness absence - which will apply to disabled and non-disabled people - is unaffected by the DDA and local sickness absence management procedures will apply.

5. Reasonable Adjustments under Sickness Absence Management

Under the DDA employers have a positive duty to make "reasonable adjustments" where any aspects of working arrangements (including premises) place a disabled person at a substantial disadvantage.

This key obligation under the Act is likely to arise in two respects within the sickness absence management context:

- firstly the job itself may need to be adjusted in order that the employee may return to work following a period of sickness absence;
- secondly, it may be deemed a "reasonable adjustment" to accept that the disabled person will need some level of absence from their work;

The DDA sets out a range of specific types of 'reasonable adjustment' that an employer may need to make. These include:

- making adjustment to premises;
- allocating some of the disabled person's duties to another person;
- transferring the person to fill an existing vacancy;
- altering the person's working hours;
- assigning the person to a different place of work;
- allowing the person to be absent during working hours for rehabilitation, assessment or treatment;

- giving the person, or arranging for them to be given, training;
- acquiring or modifying equipment;
- modifying instructions or reference manuals;
- modifying procedures for testing or assessment;
- providing a reader or interpreter; and
- providing supervision.

The basis of the requirement to make a reasonable adjustment is to prevent the disabled person from facing a “substantial disadvantage” compared to people who do not have their disability. This is to give a disabled person a fairer opportunity to be assessed on their true merits and not purely from the perspective of their disability. However, where even after an adjustment is considered or made the person still cannot fulfil the requirements of the job - or where the adjustment is not reasonable for the employer to make, then (in these circumstances) it need not be carried out by the employer.

The assessment of ‘reasonableness’ will be based on all the relevant circumstances including effectiveness, practicability and financial consequences. The Code of Practice advises that an adverse reaction from other employees will not be a justifiable reason for not making an otherwise ‘reasonable adjustment’. Larger employers such as local authorities are likely to face a higher burden of proof in this regard.

6. Suitable Redeployment and Reasonable Adjustment

It is well established under general employment law, that an employer should first seek ‘wherever possible’ to redeploy, prior to dismissal of an employee (on capability grounds) due to their sickness absence record. This does not mean that the employer has to create a special post but that suitable ‘redeployment’ should be offered, if available.

Under the DDA the requirement of reasonable adjustment may lead to potentially greater obligations on the employer - this could mean either making significant alterations to a disabled person’s original post to prevent ‘substantial disadvantage’ or redeployment to a more suitable position. This new post may also require reasonable adjustments to be made.

In practice the requirement to make reasonable adjustment and redeployment will warrant similar consideration, since the outcome will, in all likelihood, be either to allow for greater flexibility in the original job requirements or to redeployment to a different more ‘suitable’ post. In most cases, the main impact of the DDA will be the detailed obligation to consider the steps outlined earlier (see Reasonable Adjustments under Sickness Absence Management).

7. Unrelated Sickness Absence

Where absence or leave requirements are unrelated to the employee’s disability they will not fall under the scope and protection of the DDA. As indicated above, general cases of sickness absence affecting disabled or non-disabled people should be dealt with according to general sickness absence management and employment law guidelines.