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Disability Rights Commission

Getting the best out of the employment experience

Guidance for trade unions on supporting members with mental health problems to resolve workplace issues, and how to create a 'mentally healthy workplace'.

Produced by the Disability Rights Commission (DRC) in association with the Trades Union Congress (TUC), MINDFUL EMPLOYER and The Sainsbury Centre for Mental Health.



The Sainsbury Centre

for Mental Health



Foreword

This is an important guide to an important subject. We know that hundreds of thousands of people with mental health problems who want jobs are excluded from the world of work by fear, uncertainty and blatant discrimination. We know that this exclusion rests on myths, stereotypes and ignorance.

People of good will all agree that people with mental health problems should not face extreme levels of discrimination and that the current situation is unacceptable. The question is how do we change that situation?

The Disability Discrimination Act (DDA) gives all disabled people rights, including people with mental health problems; but legal rights need action to make them a reality, and that is what this guide is all about. The social partners – employers and unions – are in a strong position to do this. Businesses and the trade union movement are ideally placed to challenge myths and stereotypes and to counter ignorance with information.

In this guide you will find facts and figures, practical advice about the law, information to counter bigoted attitudes and stereotypes and really useful ideas about practical adjustments that can eliminate obstacles to employing people with mental health problems – and ways in which unions can make it easier for all their members to contribute to the life of the union.

Unions and businesses are the experts on health and safety at work, and both will welcome the section of this guide on making workplaces mentally healthy. Union officers and managers are sometimes less confident about mental health in the workplace than they are about physical health, and this guide provides an ideal starting point for anyone who wants to remedy this.

The DRC and the TUC have worked together on campaigns for equality and fair treatment ever since the DRC was established. This guide marks a new stage in this work, and we hope that disabled and non-disabled members and full-time officers will all find it useful.

Brendan Barber, General Secretary, TUC
Bert Massie, Chairman, DRC

Summary

People with mental health problems experience some of the most severe disability discrimination in the workplace. There is a growing body of advice for employers on how to ensure that their policy and practice is more inclusive for recruits and employees with mental health problems. However, there is very little authoritative guidance which is specifically aimed at Trade Union representatives.

The document will:

- equip Trade Union representatives to challenge discrimination faced by many people with mental health problems in the workplace
- provide advice to Trade Union representatives on the Disability Discrimination Act and reasonable adjustments, to enable them to support employers to improve the recruitment and retention of people with mental health problems
- provide advice to Trade Union representatives about how to meet their duties as a Trade Organisation in relation to the DDA
- provide information to Trade Union representatives on the employment rights of disabled people under the DDA
- provide case studies for use in training
- provide summaries of relevant case law and signposts to further information and contacts.

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Section 1 - Introduction

Work is good for everyone's mental health and well being¹, and this applies equally to people with mental health problems. It is important to understand that many people recover fully from their mental health problems. Also, the longer people with mental health problems are off work, the harder it is for them to get back to work. Therefore, with the right support at the right time, delivered in the right way, people with mental health problems can develop full and rewarding careers in any field.

The purpose of this guidance is to help Union representatives to understand what the right support at the right time means for them in their role as an adviser and advocate for their member with mental health problems. The advice in this document should also enable Union representatives to work positively with employers to develop workplaces that are supportive and inclusive.

The DRC consulted people with mental health problems who have experienced difficulties at work and have sought the support of their unions to resolve them. The consultees made a number of recommendations which have been incorporated into this document. Union representatives can also find some real life case studies in Appendix 1.

This document uses the term Union representatives, to cover a range of roles such as shop steward, union official, lay workplace representative or other type of representative. The term could also be applied to members of disabled staff networks who may act as representatives for other group members.

Although discrimination against disabled people in employment has been unlawful since the introduction of the Disability Discrimination Act (1995), people with mental health problems in particular, continue to experience significant discrimination in seeking and retaining work.

¹ Is Work Good for your Health and Well-being? By Graham Waddell and Kim Burton, available from <http://www.health-and-work.gov.uk>

Many of the barriers to employment faced by people with mental health problems are attitudinal, arising from an employers' lack of knowledge, or from them holding misconceived ideas about people with mental health problems. It has also been shown that working generally is much more positive for people with mental health problems than not being in work².

Mental health problems are actually experienced by many people at some point in their lives, and therefore by understanding how to support members with mental health problems, Unions will be much more effective in their role in the workplace. Also by working with employers to help them to positively support employees with mental health problems, Unions can help employers to access a largely untapped pool of resource and skill.

² Is Work Good for your Health and Well-being? By Graham Waddell and Kim Burton, available from <http://www.health-and-work.gov.uk>

Section 2 – The Social Context of Mental Health Problems

So what is a mental health problem?

The DRC and the TUC are aware that there is much debate around terminology. This guidance uses the term ‘mental health problems’, as we think it’s a term most people will understand and find easy to use. However, we are aware that some people may not be happy with this term, and we therefore recommend that Union representatives discuss with their members what terminology they would prefer them to use.

Everybody responds differently to the stresses and strains of modern life and it is common to describe ourselves as ‘depressed’, ‘stressed’ or ‘anxious’ at times. For some, these feelings can become serious enough to make it difficult to carry on with everyday life.

The most common mental health problems are briefly described below.

Stress

Pressure is an essential motivating force but may become stress, and therefore a problem, when a person feels they don’t have the resources to cope with the demands placed upon them. Symptoms may be emotional (e.g. irritability, tearfulness) and physical (aches and pains, high blood pressure etc). The person may find it difficult to make decisions or perform tasks and may be unable to attend work.

Depression

Depression is on a spectrum from mild to severe. Depression is common in the general and working population³. Symptoms include low mood and lack of energy. Motivation can be affected

³ See Seymour and Grove ‘Workplace Interventions for People with Common Mental Health Problems’ available from http://www.bohrf.org.uk/downloads/cmh_rev.pdf

and people may experience thoughts of life not being worth living, which in extreme cases can lead to suicidal behaviour.

Anxiety

Anxiety becomes a problem when feelings of tension and fear prevent a person from carrying out everyday tasks. In extreme cases people may suffer panic attacks or phobias. Obsessive Compulsive Disorder (OCD) is a form of anxiety where people have recurrent, intrusive thoughts, which they may feel 'forced' to act on (e.g. fears of contamination leading to repetitive hand washing).

Psychotic conditions/Schizophrenia

In contrast to depression and anxiety which are common in the general and the working population, psychosis is very uncommon. Psychosis is a term used when a person appears to lose touch with reality. People may hear, see or believe things that aren't real to others (e.g. hearing voices, thinking that others are 'out to get them'). If the illness becomes chronic (long term) the person may withdraw from the outside world and neglect themselves. In these circumstances a psychiatrist may diagnose schizophrenia. This emphatically does not mean a 'split personality'. Worldwide about 1% of the population has a diagnosis of Schizophrenia⁴. It is important to remember however that many more people experience the symptoms of psychosis than actually seek help for them. 2-3% of the population regularly hear voices but are not troubled by them or else attribute them to benign causes – such as religious revelation. Some scientists think of psychosis as being at one end of the normal spectrum of experience – thereby reducing the stark differentiation between “us” and “them”*. It is also important to remember that many people with schizophrenia have the illness under control most of the time and with the right support are able to lead normal lives – including being employed

Bi-Polar Disorder/Manic Depressive Illness

Both terms are used to describe this condition where a person may 'swing' between episodes of extreme low mood and depressive

⁴ See Madness Explained: Psychosis and Human Nature, Bentall R.P and Beck A.T

symptoms to being 'high' or elated. During a manic episode a person may have high energy levels, grand or unrealistic ideas and become reckless (e.g. taking risks, overspending). People may go through the mood cycles at different rates and times.

Self Harm and Suicide

People may hurt themselves deliberately in order to deal with problem emotions. Methods might include self-neglect, cutting, burning or overdosing. Suicidal behaviour may occur when a person feels they have no other options. It may be a cry for help, a mistake or a deliberate act.

Each person will experience mental health problems differently, even if they have the same condition 'in name'. People with mental health problems will often employ different techniques to help them manage their mental health problem, including use of medical services, secondary mental health support services, counsellors and getting support from family, friends and colleagues

Many people with mental health problems will have conditions that fluctuate, and it may well be that they can go for long periods without having any particular difficulties.

This means that many more people with mental health problems can obtain and retain employment successfully, provided that employers are positive about developing an inclusive work culture and back this up by making effective reasonable adjustments.

Models of Disability

In order to better understand why people with mental health problems may experience discrimination at work, as well as in the rest of their lives, Unions might find it helpful to be aware of two 'models' of disability.

There are two dominant models of disability which are commonly used to describe the way society has structured itself in relation to disabled people. The application of these models in practice can have serious impacts on the way disabled people experience the world.

The Medical Model

The medical model of disability sees disabled people being defined and automatically disadvantaged by their medical conditions. This model means that the problem is the disabled person, and so they need medical interventions and treatment to make them more like non-disabled people.

The Social Model

The social model of disability says that disabled people are excluded from society because it has not evolved to include disabled people, in terms of attitude, social policy, the built environment and employment structures. In order to tackle the exclusion faced by disabled people, this model firmly places the onus on society in general to change to make itself inclusive.

It is important that Union representatives are aware of these different approaches to thinking about disability, so that using the social model of disability as their starting point, they can promote measures which focus on organisational change rather than the disabled person.

A few facts about employment and mental health problems

- People with mental health problems have the lowest employment rates of any of the main groups of disabled people – using Labour Force Survey statistics on disability, only 24 per cent of those with mental health problems are currently in work in England⁵.
- Many people with mental health problems have aspirations to work⁶.
- Each year 91 million working days are lost due to mental health problems⁷.
- 1 in 6 people will have depression at some point in their life. Depression is most common in people aged 25-44 years⁸.
- 20 per cent of women and 14 per cent of men in England report some form of mental health problems⁹.
- People from an ethnic background are up to 44 per cent more likely to be detained under the Mental Health Act¹⁰.

⁵ Office for National Statistics Labour Force Survey, Spring 2003, figures for England only.

⁶ **A New Thinking About Mental Health And Employment**
By Patience Seebohm, Bob Grove, Jenny Secker, Radcliffe Publishing, 12 January 2005.

⁷ Dr Penny Gray (1999) Mental Health in the Workplace, The Mental Health Foundation;
http://www.mentalhealth.org.uk/html/content/mh_workplace.pdf

⁸ From the Mental Health Foundation website;
www.mentalhealth.org.uk

⁹ From the Mental Health Foundation website;
www.mentalhealth.org.uk

¹⁰ From the (MHAC Mental Health and Ethnicity Census 2005)

Section 3 – How Unions can support members and their employers to tackle some common areas of discrimination

The purpose of this section is to provide information about how Unions can positively support members with mental health problems and how they can influence employers to execute their duties under the DDA in relation to recruits and employees with mental health problems. Rather than setting out all the requirements of the DDA as they relate to employment, this section focuses on four common areas of discrimination;

- Disclosure of a mental health problem
- Reasonable Adjustments
- Sickness Absence and
- Health and Safety issues.

The DRC and TUC websites contain much more information about the employment requirements of the DDA see Appendix 2.

The TUC and DRC understand that Union representatives may not be in a position to ensure that employers 'do the right thing', but very often employers do the wrong thing because they may not understand what the right thing would be. Therefore, if Unions have reliable information about practical solutions that can be tried, then they are in a good position to influence employers in the right direction.

Disclosure of a mental health problem

Disclosing a mental health problem, either in the recruitment process, or whilst in employment, can be one of the most difficult issues to deal with. People with mental health problems may be very reluctant to disclose their impairment, because they fear that it would impact negatively on their chances of getting a job, or keeping a job once they are employed.

The decision about whether or not to disclose is one of personal choice, but the TUC and DRC would encourage people to disclose where possible, as the employer is then in a much better position to make reasonable adjustments

It is not unlawful for employers to ask job applicants whether they have a disability (see paragraphs 7.27 and 7.28 of the DRC's Statutory Code of Practice on Employment and Occupation). It is also not unlawful for disabled people to choose not to disclose their disability.

Often Unions may not be in a position to exert much influence over the employer's recruitment practices. However, sometimes there may arise an opportunity to discuss these issues, and there are some key inputs that Unions can make, should the opportunity arise.

Disclosure in recruitment

- Unions should encourage employers not to make assumptions about what tasks a recruit with mental health problems could or could not undertake. For example, it might be incorrectly assumed that a person with a mental health problem would have difficulty undertaking a stressful role, or one which involves dealing with the distress of others.
- If Unions have an opportunity to discuss recruitment processes with an employer, they should try to promote positive examples of people with mental health problems who work in a variety of roles, and encourage employers to assess recruits as individuals.
- Unions could encourage employers to make clear statements in any recruitment literature about the employer's willingness to make reasonable adjustments to enable people with mental health problems to perform the role. Such statements may also serve to instill confidence in recruits to disclose their condition. For example they could sign up to the MINDFUL EMPLOYER Charter for Employers who are positive about Mental Health'. For more information see Appendix 2.
- Unions could ask employers to nominate a designated person within the recruitment team to be a point of contact for disabled people and people with mental health problems. This person would be trained on the DDA and on reasonable adjustments for people with mental health problems, and

could provide an informed but friendly ear for people with mental health problems to discuss the requirements of the selection process and the role they are applying for, and to help them decide on whether they might need to request reasonable adjustments.

- Unions should try to influence employers not to take decisions on the recruitment of a person with a mental health problem wholly on medical advice, but to take a rounded view, which would include input from a variety of functions and departments.
- Unions should try to encourage employers to fully document the selection process, especially with regard to whether the employer has made adjustments for people with mental health problems and how the employer made a recruitment decision about a person with mental health problems, whether that decision was positive or negative.

Disclosure whilst employed

There are many routes by which an employee may disclose a mental health problem. It may be to a workplace representative, the occupational health department, their line manager or another colleague. Employers may also undertake routine staff monitoring exercises, to improve their knowledge on the diversity of their employees, and people with mental health problems may disclose at this stage, especially if the monitoring process is anonymous. They may, of course, disclose to more than one party, for example they may tell their workplace representative but may also have spoken to a colleague informally.

What should a Union official or workplace representative do if a person tells them that they have, or may have, a mental health problem?

Unions should be aware that many people may not be aware that they have a mental health problem and what its 'label' is, they may simply say that they feel stressed or depressed, that they are losing sleep or experiencing mood swings, or a number of other issues. It may also be that the person is reacting to a recent event, such as the loss of a loved one or the break up of a long term relationship.

Unions should:

- Try to respond sensitively to the individual. It may have taken a great deal of courage to come forward, because of the stigma and stereotyping of people with mental health problems. This can mean:
 - listening to and trying to understand what the person is telling you without interruption unless to ask for clarification
 - not being in a hurry to offer solutions
 - not rushing to pass the buck on to someone else, admitting that you find some of the things the person is saying difficult to deal with
 - offering reassurance that what they are saying and feeling is not at all unusual and that all the problems can be dealt with – even though it doesn't feel that way at the time.
- Ask the person whether they would like signposts to medical or other support services. Again, in the following section, there is more about how Unions can improve their knowledge of what services may be available and how people can access them. The employee may of course already be receiving some form of medical or other intervention, but Union representatives should discuss with them whether they feel this is meeting their requirements. Union representatives may not be able to do anything about this themselves, but by linking with outside organisations as suggested in the following section, they can help to signpost people to places where they can get support to get the services they need.
- Provide the individual with some information about the sort of adjustments that might help them, and help them to decide how they would like a Union representative to work with them to discuss the issue with their employer. If individuals have information about reasonable adjustments, and can be reassured that these should be provided by the employer, they may feel more able to work with the Union to talk to their employer.

- Provide the person with some basic information about their rights under the DDA, for example from the DRC's or TUC's website. It may not be clear to the Union representative whether the person is covered by the DDA, but the TUC and DRC would always advise employers and Unions to assume that a person may have rights under the DDA, because then the discussion can move onto what reasonable adjustments might support that individual in the workplace.
- Work more closely with occupational health or medical advisers, to encourage them to support individuals with mental health problems by seeking expert advice on support mechanisms, and by encouraging them to understand the concept of reasonable adjustments and the social model approach.
- Unions should train their representatives in active and reflective listening skills and enable them to practice them on actors and each other. Unions should ensure that a representative has someone who they can debrief with after a difficult interview for example, where a member was threatening self harm.

Reasonable adjustments – what are they and how do you know if something is 'reasonable'?

Reasonable adjustments are basically changing a provision, criterion, practice or feature of the physical work environment which would otherwise place the disabled person at a substantial disadvantage. In other words, any arrangement that the employer makes about recruiting people, or organising its employees, is subject to the duty to make reasonable adjustments. Where the duty arises, an employer cannot justify a failure to make a *reasonable* adjustment.

How do you know what is reasonable?

Perhaps the most perplexing issue for Unions to deal with is deciding what might be considered a reasonable adjustment. Ultimately of course, it is an Employment Tribunal which determines what a reasonable adjustment is, and useful examples

can be obtained from case law. Ultimately, though, what is reasonable will depend on the individual circumstances of a case. Useful cases on mental health are included in Appendix 3.

However, there are a number of considerations that Unions should make when working with members with mental health problems to decide on when an adjustment is likely to be reasonable.

1. How effective is the adjustment in preventing the disadvantage?

It is unlikely to be reasonable for an employer to have to make an adjustment that wouldn't really solve the problem for a person with mental health problems. For example, a person who experiences severe and frequent episodes of depression, requests that they should be allowed to take as much time off as they like when they feel unwell with no sanctions being placed upon them. The employer would have to make plans to ensure that the work of this person was covered by other members of staff, and this might be very difficult to plan if that person can suddenly be absent from work for long periods with no clear plan of when they might return. In this situation, Unions should advise the employer to tackle the problem in the following way:

- Firstly consider what workplace support the person might require. With reasonable adjustments at work, the person with mental health problems can often be enabled to manage their condition more effectively thus reducing the frequency of absence in the first place, which is best for everyone.
- Allow the person to take more time off than non-disabled employees would before sanctions apply. It would not be advisable to do this in terms of 'you can have an extra ten days off a year and that's it', much better to negotiate with the employee a package of support and adjustments that both sides can support, and which are reviewed regularly.
- If the employer still feels that even when they have made as many adjustments as they can, and the employee is still taking a lot of time off, then the employer might be able to consider re-deployment or possibly termination of employment. The trap that many employers fall into is assuming they have done all they can, long before this is actually the case. Therefore a well informed Union representative can encourage employers to proactively

improve their knowledge and understanding of good practice on managing employees with mental health problems.

2. How practical is the adjustment?

Employers must consider if an adjustment would be practical. For example, an employee with a mental health problem requests that every member of staff only communicate with them by email as they find face to face meetings hard to deal with. In an organisation where much of the contact is by email, this might be possible. However, there will always be times when people need to attend meetings, or simply share less important information and comments face to face. Unions could encourage the employer to:

- seek support or training for the employee to enable them to feel more confident about dealing with face to face contact
- provide some guidance and training to that employee's colleagues so that they can better support the person
- consider whether a home working option, with some supported interaction with colleagues could help.

3. What are the financial and resource costs of making the adjustment?

Many adjustments that support people with mental health problems don't cost anything at all, as they require a change in policy or a way of doing things. Some adjustments may incur a cost, for example a person might find it useful to have a support worker to help them organise tasks and set aside times when they can concentrate on particular tasks and pieces of work. This could be paid for by the Access to Work scheme run by JobCentre Plus (see Appendix 2)

4. How much disruption to the employer's overall business will the adjustment cause?

An adjustment which reduces the ability of the employer to perform effectively is unlikely to be reasonable. A person with mental health problems may request an adjustment to their working times, for example if they are affected by medication, or have problems using public transport at peak times. Unions supporting members in larger organisations should encourage the employer to do all it can to accommodate such requests. However, if the request was made

by an employee in a very small organisation, then the employer has less room for maneuver. However, Unions should encourage the employer not to refuse the request outright, but to discuss with the employee what other options could be available.

5. What is the extent of the employer's overall resources?

The question of what is reasonable in law takes into account the resources the employer has at its disposal. For example, what might be reasonable for a large local authority to do will differ from what a small shop can do, because the latter may have less flexibility with resources and personnel. However, all employers should try to be as flexible as possible.

6. What help and advice is available to the employer to help make the adjustment?

The law does not expect employers or Unions to know everything about disability generally, or mental health problems specifically. There are support services that can be used by Unions and employers, such as services provided by JobCentre Plus, or other specialist mental health organisations (see Appendix 2). Obviously, employees with experience of mental health problems may be able to provide suggestions themselves, but they may not be aware of what kinds of adjustments can be made. Unions should play a key role here in helping employers to access proper advice on supporting the employee with mental health problems at work.

7. What is the nature of the employer's business and what is the size of their undertaking?

The concept of reasonableness also takes into account the type of organisation the employer is operating. The issues that a police force or accident and emergency department in a hospital must consider when making adjustments will be different to an employer who does not operate in such a risk critical environment (such as an office based employer). However, Unions should be vigilant to ensure that employers do not use this as an automatic 'get out clause' when considering adjustments.

8. What would the effect be on other employees of making the adjustment?

The purpose of making reasonable adjustments is to help individual disabled people to carry out their jobs. Some adjustments would impact on other staff, For example, a request to change work hours or shift patterns because of a disability may place an unacceptable burden on other employees (who may also have additional issues such as having care responsibilities). Unions will have duties to support and protect the rights of all their members, not just those with mental health problems, and they may find that other members complain if their work tasks are changed to enable the employer to support an employee with mental health problems.

In this situation, Unions need to understand that the employer may have made the adjustment for the disabled staff member without ensuring that any impact on that person's colleagues has been thought through and resourced properly. It may be that what is needed is some mental health awareness training for the staff, so that they understand why the adjustment is important.

Unions are thus in a key position to make a positive impact on the situation. They can suggest a number of measures to the employer, such as further training, or possibly seeking Access to Work support for the disabled person. They can also help non-disabled employees to understand why adjustments are necessary, and reassure them that they will work with the employer to try and ensure that everyone's work experience is positive. The person with mental health problems may or may not be aware of how their colleagues feel, and it may be that the Union representative can seek expert advice on helping the employee to work with the reasonable adjustments.

9. How much cooperation has the employee given to make an adjustment work in practice?

Employers may make many efforts to make adjustments, for example for an employee to return to work after a long period of absence due to a mental health problem. However, if the employee does not attempt to cooperate with their employer, there will be limited measures that the employer could reasonably be expected to undertake.

Unions should be aware that the onus to make reasonable adjustments rests firmly with the employer and not the disabled

person, but that to make the situation work for everyone, a degree of co-operation from the employee will be needed. For example, a person with mental health problems may feel that their employer has offered a solution which suits the employer, but that it has been agreed without involving them. Here the Union representative should try to support the disabled person to be positive about wanting a mutually beneficial solution to the situation, but should also support them to request changes to the reasonable adjustment provision if the person with mental health problems does not feel it will be effective. Unions should also make the person with mental health problems aware of their rights under the DDA, so that if they feel that the employer is not complying with the DDA, they are aware of what measures the Union could help them to take to deal with this.

10. How much would it cost to recruit and train a replacement?

Lastly, when considering an adjustment, employers should consider what the cost of replacing the employee might be. There will be costs associated with ill health retirement and further costs incurred in replacing the employee. The adjustments needed may actually incur far less work and cost than simply putting someone onto ill health retirement. It would also mean the employer does not lose the skills and experience of the disabled person. Given that there are adjustments that can be made for people with mental health problems, Unions should not assume that the only option is to seek a good ill health retirement package for the person, as many people may in fact want to stay in work as long as possible. Again Unions should seek expert advice about what options and support might be available.

The following section provides some practical suggestions about reasonable adjustments that can help employees with mental health problems in the recruitment process and then in the workplace. What is suggested is by no means an exhaustive list, and Unions will need to ensure that they take time to discuss with the individual what issues at work are causing them problems or distress, and what they think might help them. Unions may of course need to take more expert advice before proceeding, and linking with other organisations as suggested in Section 4 will help them to do this.

Reasonable adjustments in recruitment

Unions should encourage employers to seek information from applicants about what reasonable adjustment requirements they may have and ensure these are catered for at all stages of the recruitment process. To help applicants identify what adjustments they may need, Unions should encourage employers to provide as much information as possible about what the interview involves - how long it will be, how many people on the panel, any requirements to do presentations etc, and a contact name who can provide more information about the process.

When involved in negotiations with employers about terms and conditions offered to people joining the organisation, Unions should help employers to ensure that any appointee with mental health problems is not employed on terms and conditions which are less favourable than those which would be offered to non-disabled people. This includes access to occupational insurance and pension schemes.

Employers are allowed to ask a person with mental health problems to have a medical examination as part of the recruitment process. However they are only allowed to do this if they ask every applicant, not just those that they think may be disabled people.

Unions should encourage employers who use medical checks in the recruitment process, to consider why they make these checks. The DRC and TUC recommend that employers should only use medical checks as an opportunity to help them to identify any adjustments that a potential employee with mental health problems might require.

Reasonable adjustments in work

Below are some reasonable adjustments that Unions might find helpful for employees with mental health problems. Although it is the employer's duty to make adjustments, Unions can use the information below to inform the negotiation process between the employer and their member with mental health problems.

- Good induction and clear instructions about the role

People with mental health problems often find that a source of added stress can be where they are not clear about what is expected of them by their employer, not in general terms, but in specific terms such as what tasks should be done and by when. That is not to say that people cannot manage their own time, but they may find that greater clarity about what is required helps them to feel confident about their work.

- Flexible working patterns such as working part time, job sharing, changing start or finish times, taking short breaks, and home working.

Some people with mental health problems may find these adjustments helpful, for example if they take medication that makes them feel groggy first thing in the morning, or if they have severe anxiety in travelling in the rush hour. Also, people may need time to go to medical appointments or counselling sessions. It's important to bear in mind that for those receiving treatment or other support through the NHS, it can often be difficult to get appointments that fall outside of normal working hours, and people may have to wait a long time for an appointment and so don't want to miss them, even though they may be in work time. Some flexibility from employers can be very helpful here.

- Regular supervision and feedback on performance.

This should be positive and negative. Employers shouldn't assume that in order to support a person with mental health problems, they have to pretend that everything is OK with their performance when it isn't, i.e. 'handling them with kid gloves'. People can pick up on gossip and rumours, and if they feel that the employer is not being straight with them about what is needed, then that can undermine their self esteem and make matters worse. Unions should help employers to be clear about performance issues, and try to support employers to be proactive about offering adjustments if work performance becomes an issue. Unions should try to work with the employer to ensure that where there are problems, these are dealt with openly and supportively.

- Provision of a quiet room, away from noise, for a tea break or chance to relax

As already stated, people with mental health problems can do demanding and stressful jobs, every individual is different. Some people though may find it helpful to have a quiet place to go, even for a short time, to enable them to take a mental break from their work and to help them to feel calmer. Unions will probably find that many of their members would benefit from such a provision made by the employer.

- Some one to speak with in privacy, buddy system.

Although employers will have formal procedures, such as raising problems with a member of the HR or equalities team, many people with mental health problems may feel this process to be a bit too 'official' and 'formal'. Often what they need is to talk to someone who is perhaps removed from their immediate work team or section, who can provide an opportunity for confidential but informal chats about issues or worries. Union representatives can of course offer this, but they could also help their members to link with other people in the workplace who can be a good listener.

The employer may choose to link such a system to a more formal buddy or support system. If the employer your member works for sets up a scheme or already has one, you can suggest the member uses that. Unions could help employers keep a check on how the system is working, to maintain employee's confidence in it. Especially important is ensuring that people are confident to talk to buddies, or a use a more formal system, and that buddies or other support providers are trained, as a minimum, in mental health awareness.

- Support employers to set up internal or external support meetings with people with mental health problems reporting concerns and recommendations to managers.

Such meetings can enable employees to feel more supported and less isolated, if they can discuss issues with other people. Unions can support employers to set up such networks, and to ensure that those involved are trained on mental health awareness and the requirements of the DDA.

Many employers may have networks for disabled staff, and these can provide really good support to people with mental health problems. Unions may well be involved in such networks, or they

can operate these themselves. The key aim of such networks should be to provide support to staff, but also a means by which staff can seek advice and support to resolve issues positively at work.

- Encouragement and positive feedback from supervisors.

All employees benefit from positive feedback on their performance, and therefore supporting employees with mental health problems is really just good management practice. However, if someone has a mental health problem, particularly if they are new to a post or team of people, Unions can support them and their line manager by advising the manager of the need to be as supportive as possible, and find ways to help the person develop their capability, rather than simply identifying when targets have not been met. If a Union representative is required to act for an employee who has performance issues, they should always start by considering what reasonable adjustments they can support the member to get from the employer, as often the right adjustments can improve performance dramatically.

- Swapping jobs tasks with colleagues or altering job descriptions.

It might be that someone with a mental health problem finds certain aspects of their job particularly difficult because of their disability. Obviously, employers will have basic operational requirements that staff must fulfil, so there will be some limit on what can be done. However, many employers fall into the trap of thinking that an objective can only be achieved one way, the way it's always been done. So for example, if a person with a mental health problem found that dealing with the public was particularly difficult, the Union representative could suggest that his part of the job could be assigned to another person, and the disabled person could take on other duties to ensure a fair spread of work across the team. Obviously if the role that the person does is mostly customer facing, for example a cashier in a bank, then employers might need to look at redeployment as another option.

It's vitally important that when making this sort of adjustment, Unions help employers to understand the need to plan and resource it properly, so that colleagues understand why the adjustment is being made, and they don't start to resent the

disabled person for 'getting out of something' because of their disability.

- Awareness raising for all staff, via mental health training and disability equality training.

Unions should do as much as they can to raise awareness amongst their members, and other staff, of mental health issues, and encourage a positive and supportive approach.

- Encourage employers to set up a formal Employee Assistance Programme (EAP).

Many employers already operate a formal employee assistance programme of some kind. Such programmes can provide signposting to agencies that can deal with a wide range of issues. Unions should help employers to ensure that if they have such a programme, or plan to introduce one, that those running it have received disability equality training, and particularly training on mental health problems, and that the programme itself is able to provide effective advice and support to people with mental health problems.

Documenting decisions

It is imperative that Unions document any requests for reasonable adjustments that are made, including:

- what advice the Union representative sought about adjustments (this could include input from mental health organisations, JobCentre Plus advisers, other Union representatives with knowledge of mental health problems or occupational health advisers)
- evidence of how they supported their member to be involved in discussing and deciding upon what adjustments to propose
- documented evidence of meetings and the results of these.

This way, Unions will be able to demonstrate their positive role in the process.

Unions should also encourage employers to document decisions it takes about making adjustments. Both parties may need to provide this documentation for a grievance procedure or an Employment Tribunal.

It would also be advisable for the disabled person to have a record of any such requests and what the outcome was.

Sickness absence and return to work management

Most employers now have a policy on managing sickness absence. Some employers have developed policies that set a maximum number of days that employees can be off sick before sanctions or disciplinary processes begin.

If a person's absence is clearly disability related, and exceeds this set number of days, Unions should be aware that employers may be discriminating if they simply apply standard sanction or discipline procedures without considering reasonable adjustments, such as allowing a disabled person to have more time off, or providing other support.

Therefore, Unions should ensure that any absence management procedure used by the employer is flexible for disabled people.

Return to work management

Once an employee has been off sick for a longer period, the employer may fear contacting them. This may be a genuine concern on behalf of the employer about not wanting to 'hassle' or 'be seen to be keeping tabs' on an employee who is off sick. However, it's vital that employers do keep in touch with people who go off sick, because people can lose confidence in themselves very quickly. They can also feel excluded from what is happening at work, which can then make them feel powerless and anxious. Unions should encourage employers to keep regular contact with employees who are off sick (perhaps contact once every two weeks for example). Unions can also try to ensure that it is standard organisation policy to explain to every employee that if they are off sick for more than a few days. It is company/organisation procedure for someone to make regular contact in order to:

- find out how they are and if there is anything the employer can do to help
- update them on developments at work
- discuss possible return dates and any reasonable adjustments they might need
- agree a way to keep in regular contact.

Unions can of course act as a key link between the employer and the member who is off sick. They should try to support their member to understand that the Union will work with the employer to secure reasonable adjustments, and that the Union will also try to involve the member in working with the employer to make these adjustments.

Unions should be aware that medical practitioners may issue sickness certificates without discussing whether reasonable adjustments could enable a person to remain at work. Time constraints, lack of awareness and training, and misconceptions about the employability of people with mental health problems may lead health professionals to recommend retirement on ill health grounds rather than considering adjustments that could keep the person in work.

If employers are seeking medical information about a person's sickness absence, the Union, in supporting the individual, should work with the employer to request that information sought from medical and other advisers incorporates advice in regard to what reasonable adjustments would assist the individual.

Health and Safety Issues

Unions should be aware that employers must not use health and safety issues as a false excuse for excluding people with mental health problems from undertaking certain activities or roles within the workplace. They should also ensure that where health and safety issues relating to a member with mental health problems are dealt with by Union representatives these people:

- are fully aware of the requirements of the DDA
- are trained in mental health awareness
- do not make assumptions about the employee with mental health problems

- understand the need not only to identify risks but also how they can manage these through effective reasonable adjustments.

Unions should try to encourage employers to take the following approach:

- carefully consider what the potential health and safety issues are with regard to making an adjustment (including consultation with HR, medical advisers, operational managers, the Union and the disabled person)
- look at how these risks can be managed by making reasonable adjustments (again with the same group of people)
- if it is decided that there is an adjustment that could be made to manage the risk, the employer must make it.

The employer may only refuse to make an adjustment if it can show that the adjustment was not reasonable because even after making it, the health and safety risk would still be unacceptably high.

Risk Assessment

Union representatives may often be involved in making risk assessments about employees with mental health problems.

When undertaking such risk assessments, Union representatives should be aware that any risk assessment about an employee with mental health problems should be:

- individual to the disabled person, including their particular condition and should not make general assumptions about a particular work situation or the effects of that person's mental health problem
- carried out by a person or persons who are suitably trained. Preferably they should have an understanding of the duties of employers under the employment provisions of the DDA (Part 2), and an understanding of mental health problems in particular
- include actions about what reasonable adjustments will be made to manage any risks identified.

For further advice on disability and risk assessment please refer to the DRC's Statutory Code of Practice on Employment and Occupation sections 6.8 to 6.13.

The role of occupational health professionals

Occupational health professionals can play a vital role in enabling employers to create a supportive and enabling work environment for people with mental health problems. Unions could work with OH professionals to:

- work with them and the employer to improve their understanding of the DDA duties with regard to making reasonable adjustments
- improve their own knowledge of mental health problems and adjustments that can support people
- ensuring that employers do not use OH professionals as 'gatekeepers' to employment to or to keeping a job. Occupational health professionals can sometimes be made to feel like they are being asked to make difficult decisions that the employer does not want to make. This should never be the case
- ensuring that decisions about recruiting or dismissing a person with mental health problems are only made by line managers, in consultation with other parties
- help OH professionals to understand that they are in a good position to link employees with NHS mental health service teams who can provide counselling and other types of specialist support.

Disciplinary procedures

The DDA does not require employers to overlook issues of misconduct, or any matter for which other non-disabled employees would normally be subject to disciplinary procedures. However, Unions should be aware of two key issues:

- Generally employers should avoid disciplining a person with mental health problems for a reason related to their disability. For example, a person with mental health problems may be making mistakes in their work, because they are finding it

difficult to concentrate. Unions should encourage the employer to first consider what adjustments it has made, and whether making further adjustments would resolve the issue, rather than jumping to the conclusion that the person with mental health problems is at fault.

- Sometimes employees with mental health problems may conduct themselves in a manner that requires disciplinary procedures to be brought, for example upsetting other colleagues in some way, or ignoring the employer's policy or procedure on a particular matter. Union representatives must help the employer to establish whether the person's conduct was disability-related (for example they may have problems relating to colleagues socially because of a mental health problem, or they may not have been fully trained or supported in dealing with particular issues). Unions should be aware that employers should not discipline a person with mental health problems if their conduct was because reasonable adjustments were not made. Unions should try to work with their member and the employer to seek a positive solution to the issue, including reasonable adjustments and provision of other support (or referral to another support service).

Government support for disabled people seeking employment

There are a number of government schemes that encourage and facilitate disabled people to get into, and stay, in work. These are managed by JobCentre Plus. The most important of these schemes is Access to Work, which can help to pay for reasonable adjustments. For more information on Access to Work, see Appendix 2.

The Disability Equality Duty

The Disability Equality Duty (DED) which comes into force in December 2006 requires public authorities under the General Duty have due regard to the need to;

- promote equality of opportunity between disabled people and others
- eliminate discrimination that is unlawful under the DDA
- eliminate disability related harassment
- encourage participation of disabled people in public life

- promote positive attitudes towards disabled people
- take steps to take account of disabled people's disabilities, even when that involves treating disabled people more favourably than others.

In addition to the general duty, there are also specific duties which are set out in regulations. The main requirement for public authorities subject to the specific duty is to:

- publish a Disability Equality Scheme (including within it an action plan)
- involve disabled people in producing the scheme and action plan
- demonstrate they have taken actions in the scheme and achieved appropriate outcomes
- report on progress
- review and revise scheme.

This is a real step forward for disabled people's rights, and the DRC and the TUC believe that the duty can be used positively by Unions working with organisations covered by the duty, as a lever for change with employers. At present, Unions may only feel able to press employers to meet their minimum legal duties under the DDA. The equality duty should enable Unions to work more proactively with employers to achieve change in the workplace, and beyond.

More information on what sort of proactive measures Unions can work with employers to take are in the next section. For more information about the specifics of the duty, please refer to the DRC's Statutory Codes of Practice. They can be found on www.dotheduty.org. The TUC has also developed guidance on the DED, see Appendix 2.

Section 4 - How can Unions work with employers to create a mentally healthy workplace for all?

The purpose of this section is to focus on good practice, and to explore what union representatives can do to help the employers that they work with to create a mentally healthy workplace for all.

What is a mentally healthy workplace?

A mentally healthy workplace is one where the workplace is safe, productive, comfortable, and retains its high quality staff. It is also a place where people feel empowered to discuss mental health problems in an enabling manner, and where staff, including those with mental health problems, feel supported and included. It is also a place where discussing personal experience of mental health problems is easier to do, and where people feel supported if they do disclose a mental health problem. This approach makes sense, because at some time in our lives, most of us will experience some form of mental health problem, for example as a reaction to a bereavement, relationship break-up, family difficulties, redundancy, financial problems etc. Therefore creating a mentally healthy workplace can benefit everybody.

It's also important to remember that many people experience difficulties at work, because of their age, gender, sexual orientation, religious belief or race, family situation and many other reasons. People with mental health problems may also experience barriers in relation to these issues, but they may experience specific issues in relation to their mental health problem because of:

- fear of the stigma attached to mental health problems resulting in low self esteem and confidence
- ignorance and assumptions about mental health problems
- fear of abuse at work and when travelling to and from work
- low expectation of employers and colleagues about what people with mental health problems can do
- stigmatising media coverage of people with mental health problems.

Many of these barriers can be tackled by raising awareness and encouraging understanding and positive attitudes towards people with mental health problems, whilst some of them will require other approaches to be taken.

Unions working together for change

Here are some things that Unions could do within their own organisation:

- make sure that all Union representatives have had basic training on mental health awareness and disability equality as well as the DDA. This can be provided in many ways such as electronic learning materials through to seminars and discussion groups. Many mental health promotion organisations can provide this sort of training, see Appendix 2
- promote positive attitudes to mental health problems in the workplace and in Union activities
- train one or two people in each branch or area to be mental health champions. These people can have a more thorough understanding of mental health problems and how people can be better supported in the working environment
- build networks with other Unions and other union mental health groups. Such networks could develop collective action on mental health and share information on how reasonable adjustments that have been made have successfully enabled people with mental health problems to remain in work
- build networks with agencies who can provide your members with reliable and trustworthy advice on:
 - state benefits for people with mental health problems
 - appropriate careers advice
 - information about training, education, volunteering and other employment opportunities.
- involve people with mental health problems in training Union representatives on anti-discriminatory practices
- ensure that the Unions own policies and practices are reviewed to ensure that they are fair and non-discriminatory

- promote peer support or buddy schemes within the Union organisation
- create opportunities within the Union for work placement, volunteering and positive action training for people with mental health problems.

Unions working positively with employers

Unions have a very powerful role to play in influencing employers to take on issues of mental health in a positive and effective way.

Unions are well placed to promote a work culture where people with mental health problems are encouraged to talk about themselves and their impairments, to dispel stigma and promote rights to fair employment. They are also in a very powerful position to promote collaborative solutions to workplace difficulties. Below are some things that Unions can work with employers to do:

1. Help employers to be more sensitive to the mental health of their workforce, and to promote training in mental health awareness in all levels of the organisation
2. Help employers to take the right approach to supporting an employee they feel may be having problems.

If employers have specific grounds for concern — e.g. a report of impaired performance, it is important that Unions support the employer to address these quickly before the situation escalates.

If employers do identify an issue after having spoken with the employee Unions should:

- reassure the employee that the Union will support them to ask for reasonable adjustments or referral to a support service. It is vital that Union representatives are aware of employee's rights under the DDA
- reassure the employee that the Union will take a positive approach with the employer to resolve the issue, but that they are aware of the need to balance this with protecting the rights of the employee

- use knowledge gained from this guide and other sources, union representatives can suggest adjustments that the employee might find helpful
- suggest to the employee that they request an informal chat with their line manager, with the Union representative present to support them to ask for adjustments.

Be aware that the emphasis for both parties should be on trying to find a 'non fussy' solution to the issue. Employers, especially those not confident or experienced at dealing with mental health problems, may want to push the employee towards medical diagnosis and 'treatment', rather than considering what adjustments they could make to working practices to support the employee.

If, after discussion, it seems that the employee may need more specialist medical support, this can be obtained through the organisation's own occupational health service (if they have one), but there are also mental health organisations who can signpost to appropriate services (see Appendix 2).

3. Support employers positively in specific processes for example.

- encourage and support employers to ensure that reasonable adjustments are properly resourced and communicated about, particularly if it could impact on the workload or responsibilities of other colleagues. Unions can effectively support employers to tackle any hostility to adjustments from other employees. They can do this by explaining why adjustments are needed and ensuring that they help employers to make adjustments work for other employees too
- encourage employers to have a disability leave policy. This allows the employee and the employer to plan absences that may result from a person's disability. For example, it might allow time off for medical appointments or treatment, counselling or other support
- unions could work with employers to produce accessible information about the employer's procedures, for example, about the process for negotiating return to work after

sickness absence and outline how the union will support the employee and the employer in this process

- unions can be effective in encouraging employers to avoid seeing that the best way to help employees is to seek an ill health retirement settlement as a first course of action. Whilst some employees may want this, many will want to stay in employment.

4. Help employers to identify and promote good practice in the employment and retention of people with mental health problems. They can do this in many different ways, for example through local networks, or by setting up new networks and working arrangements with outside organisations.

5. Unions could work with employers to implement the Health and Safety Executive's stress management standards. The HSE has produced a wide range of resources to help everyone manage stress better, for more see their dedicated website www.hse.gov.uk/stress

6. Unions could work with employers to implement the National Framework for Vocational Rehabilitation, This is a Government strategy which should enable more people to return to work. For more information see www.dwp.gov.uk/publications/vrframework/

Section 5 - Trade Unions' duties under the DDA

Trade Unions as Trade Organisations have legal duties not to discriminate against their disabled members, and thus it is important that Union representatives understand how their own duties under the DDA should be put into practice. By ensuring that Unions can meet the requirements of their disabled members and applicants for membership, Unions are likely not only to improve the quality of their service but also to become more representative of their members.

What is a trade organisation?

Part 2 of the DDA places duties on Trade Organisations not to discriminate against disabled people. A Trade Organisation is defined as an organisation of workers or, of employers, or any other organisation, whose members carry on a particular profession or trade for the purposes of which the organisation exists. Bodies such as Trade Unions are all Trade Organisations because they exist for the purposes of the profession or trade which their members carry on.

If an employee or representative of a Trade Union unlawfully discriminates against a disabled person, the trade union may be held responsible for their actions.

Who is protected?

The DDA protects disabled people who are Union members or who have notified the Union that they are, or may be applicants for membership.

What does the DDA say about discrimination by trade unions?

The DDA says that it is unlawful for a Trade Union to discriminate against a disabled person:

- in the arrangements it makes for the purpose of determining who should be offered membership of the organisation; or
- in the terms on which it is prepared to admit the person to membership; or
- by refusing to accept, or deliberately not accepting, an application for membership; or

- in the way it affords the member access to any benefits or by refusing or deliberately omitting to afford access to them; or
- by depriving the member of membership, or varying the terms of membership; or
- by subjecting the member to any other detriment.

The DDA does not define what a benefit is. However, the following are likely to amount to benefits;

- training facilities
- welfare advice
- insurance services
- social activities
- assistance to members during the employers disciplinary or dismissal procedures
- legal services procured by the Union on behalf of its members.

Unions are also required to make reasonable adjustments for their disabled members. Some examples of helpful adjustments are:

- making adjustments to times and venue of branch meetings
- when dealing with personal cases, where required, allow extended appointment times
- be flexible about where meetings take place (it may be more suitable to meet someone outside of the work environment or at their home)
- allow the member to take breaks in meetings if required
- give consideration to the scheduling of appointments/meetings (some people may prefer meetings in the afternoon as the effects of medication may be more prevalent in the morning)
- allow advocates/friends to be present
- allow meetings to be taped or provide written minutes/notes afterwards
- if the worker is off sick, try not to pressure them by setting deadlines for return to work
- if the worker is off sick unions may need to take certain legal measures on a protective basis in accordance with statutory time limits, if this is the case try to explain to the member why you are doing this and reassure them that you will

continue to work with them and their employer to reach a positive solution

- ensure that any services you buy in for your members are appropriate, for example ensuring that solicitors that provide legal advice to your members are fully aware of their duties under the DDA and of good practice approaches as regards people with mental health problems

Reasonable Adjustments & Knowledge of Disabled members

A Trade Union (as is the case with an employer) is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that an applicant for membership or member of their Union has a disability. Therefore, Unions should, at every opportunity, ask about any adjustments that members might need. It would not be necessary for the Union to know all the details of the person's disability, for example Depression, but they might ask for certain adjustments to a meeting or conference that would help that member to participate fully.

Avoiding discrimination

Many Unions will have duties under the DDA as employers, as well as duties as a Trade Organisation. The following points should assist in making sure that Unions do all they can to operate in a non-discriminatory manner:

- have a Union wide policy which is positive about supporting and including members with mental health problems
- avoid making assumptions about disabled members
- listen carefully to disabled members/employees to find out the best way of making the service/employment that the Unions provide accessible to them
- to achieve the best outcome, involve disabled members/employee at the earliest opportunity
- consider what expert advice may be needed and use any personal or in-house knowledge
- plan ahead to ensure Union communications and events are accessible
- provide disability equality training, and mental health awareness training to all Union staff, both paid and unpaid

- have a complaints procedure that is accessible to disabled people
- carry out audits and regular reviews of whether membership services and benefits are accessible to disabled members.

Section 6 – Employment and Disabled people’s rights under the DDA

This section provides information about what rights people with mental health problems have under the employment provisions of the DDA.

The employment provisions of the Act are contained in Part 2. All employers, except for the armed forces, have duties under part 2, no matter how many people they employ.

The Disability Rights Commission has produced a statutory Code of Practice that explains the application of the law. The Code encourages employers to avoid workplace disputes, adopt best practice and work towards eliminating discrimination. Unions can use the Code of Practice as guidance on the law when assisting disabled people but is not an authoritative statement of the law; that is a matter for the Courts and Tribunals to decide. However, Courts and Tribunals must have regard to the Code when relevant and in fact many use it regularly, it is often cited in Tribunal and appeal cases.

Who are disabled people?

Part 1 of the DDA sets out the definition of disability, i.e. it clarifies who has rights under this law. According to the Act a disabled person is someone who has a

‘physical or mental impairment which has a substantial, adverse, long term effect on his or her ability to carry out normal day to day activities’.

In 2005, an important amendment was made to the DDA, which now means that people with mental health problems no longer have to have a condition that is ‘clinically well recognised’, provided that the effect of that mental health condition would mean they are covered by the Act.

People who have had a disability in the past are also protected from discrimination even if they no longer have the disability.

Example 1

A woman who, four years ago, experienced a mental health problem that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities, but who has experienced no recurrence of the condition, is still entitled to the protection afforded by the Act, as a person with a past disability.

One difficult area is recurrent conditions. The Act states that, 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, the substantial effect is treated as continuing if it is likely to recur. In other words, it is more likely than not that the effect will recur. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term'.

Example 2

A young man has bi-polar disorder sometimes known as manic 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)

Example 3

A woman has two separate episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she suffers bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period.

The Government has published statutory guidance to assist adjudicating bodies like courts and tribunals in deciding whether a person is a disabled person for the purposes of the DDA. The latest version of 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' is available to download from the DRC's website.

It should be noted that the Act uses a medical model of disability, i.e. it focuses the problem on the disabled person not being able to do something that other people can. At the time of writing, the DRC has made recommendations to the government on a new definition of disability and is awaiting the government's response.

The DDA definition and self-identity

It is important to recognise that many people who are likely to have rights under the DDA, may not wish to identify themselves using the term 'disabled person', and may be very reluctant to disclose their disability to their employer or potential employer. This may be because they fear the consequences of using this label about themselves, or they may simply not feel that they are 'disabled'.

What is discrimination?

There are three main forms of discrimination under part 2 of the DDA.

Direct discrimination

The law says that an employer's treatment of a disabled person amounts to direct discrimination if:

- it is on the ground of their disability and
- the treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated and
- the relevant circumstances, including the abilities, of the person with whom the comparison is made are the same as, or not materially different from, those of the disabled person.

Direct discrimination cannot be justified.

Example

An employer is selecting candidates to appoint as project managers in various departments. There are a number of candidates who have similar levels of qualification and experience, however, one of these candidates has a mental health problem. The employer decides not to employ that person because an assumption is made that it would be too stressful for that person to take up a role which is as demanding as project manager. This is likely to amount to direct discrimination because the employer is making the decision not to recruit based (solely) upon the person's disability, and is making assumptions about them that they would not make about a non-disabled person.

Failure to make reasonable adjustments

Under the DDA, employers have a duty to make reasonable adjustments for disabled job applicants and for disabled employees to enable them to effectively execute their current role or progress through the organisation. Put simply, the DDA does not permit the employer to justify a failure to comply with the duty to make reasonable adjustments.

Example

An employee who has severe anxiety sometimes finds it difficult to concentrate at work due to being in a large, busy open plan office. They ask their employer for the provision of a quieter desk to enable them to work effectively. There are some spare desks in the office that the person could use, and although the person would not be sitting right next to their team, they would be not be very far away. This adjustment is likely to be seen as reasonable because it does not cause the employer any real disruption to achieve. As such the employer would then have a duty to make this adjustment.

Disability-related discrimination

Disability-related discrimination occurs when the reason for the discrimination relates to the person's disability. Often, this can occur when a general policy or practice used by an employer ends up having a discriminatory effect upon a disabled job applicant, employee or ex-employee. In determining whether disability-related discrimination has occurred, the employer's treatment of the disabled person must be compared with that of a person to whom the disability-related reason does not apply.

Example

A person with depression is dismissed for taking regular periods of sick leave that is disability-related. The employer's policy, which has been applied equally to all staff (whether disabled or not) is to dismiss all employees who have taken this amount of sick leave. The disability-related reason for the less favourable treatment of the disabled person is the fact of having taken regular periods of sick leave. The correct comparator is a person to whom that reason does not apply – that is, someone who has not taken this amount of sick leave. Unless the employer can show that the treatment is justified, it will amount to disability-related discrimination because the comparator would not have been dismissed. However, the reason for the treatment is not the disability itself (it is something related to it, namely the amount of sick leave taken) so there is no direct discrimination.

Harassment and victimisation are also unlawful.

Harassment

The Act says that harassment occurs where, for a reason which relates to a person's disability, another person engages in unwanted conduct which has the purpose or effect of:

- violating the disabled person's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Example

A person with Schizophrenia is often referred to by colleagues, in a joking manner, as being 'an oddball' and 'a bit off the wall'. People with Schizophrenia may experience the world differently to most people, and this may at times impact upon their behaviour at work or in other settings. However, regardless of the fact that the colleagues may not have intended any offence, the disabled person feels that these remarks erode their self-confidence and make them feel nervous about the work environment. The conduct of the disabled person's colleague is likely to amount to harassment and employers would have a duty to deal with this.

Victimisation

Victimisation is a special form of discrimination. The concept of victimisation should not be confused with the ordinary meaning of this term in everyday language; it has a different and more specific meaning under the DDA. The Act makes it unlawful for one person to treat another ('the victim') less favourably than they treat or would treat other people in the same circumstances because the victim has in good faith:

- brought, or given evidence or information in connection with, proceedings under the Act (whether or not proceedings are later withdrawn), or
- done anything else under or by reference to the Act, or
- alleged someone has contravened the Act (whether or not the allegation is later dropped).

Example

An employee takes their employer to an Employment Tribunal, claiming disability discrimination because they believe they have been discriminated against. The disabled employee seeks the support of a colleague, who knows about the case. The colleague attends the Tribunal hearing and gives evidence in support of the disabled person's case, in good faith. After the Tribunal hearing,

the employer brands the colleague 'a troublemaker' and tries to undermine them because they gave evidence against the employer at the tribunal hearing. This is likely to amount to victimisation.

Appendix 1 – Case studies

These case studies are based upon consultation with a group of people with mental health problems, who had experience of using their Union to get support with problems in the workplace. The case studies provide some pointers on what the consultees felt would have led to a more positive outcome.

Union representatives might find these case studies useful to promote discussion, for example, in a training context.

Maureen

Maureen had started a new job. However, only six months later her mother attempted suicide whilst Maureen was present, which resulted in Maureen being diagnosed with Post Traumatic Stress Disorder and having a complete breakdown. Maureen had some therapy and took nine weeks off work. She was worried about returning to work after having this time off, so went back before she was really ready, which resulted in her going off sick again shortly afterwards.

Maureen did not feel supported by her employers, and was told that if she took more than eight days sickness over the next twelve months, she would be dismissed. Subsequently Maureen was too scared to take time off, even for important medical appointments.

At this point, Maureen approached her union representative, and although they were very busy, they assisted Maureen to lodge a grievance in relation to how her employers were dealing with her sickness absence. This was rejected by the employer who then made her attend a meeting. Their conduct towards her at the meeting was highly inappropriate. Maureen sought the support of her union, but did not feel that they responded in a helpful way.

What should the Union have done?

When Maureen first approached her Union, the representative may not have known that she had mental health problems. However, they should have found out about her situation, and asked her what kind of support and help she would like from her Union. The representative could also have helped Maureen to keep in contact

with her employer, and also helped her to think about what reasonable adjustments would help her return to work and manage her condition whilst at work.

Ben

Ben worked at a Further Education college, and experienced mental health problems after a number of events in his life. After one incident which Ben believes was the fault of his employer, he went off work because of a nervous breakdown. The Union representative did 'protect' Ben from inappropriate pressure from his employers. He tried to return to work, and some reasonable adjustments were negotiated for him. However, after another event at work in which Ben had a panic attack the employer did not want him on the premises. He was subsequently diagnosed with Post Traumatic Stress Disorder. Ben did not feel that the solicitors' provided to him by the Union were at all helpful. Ben also felt that the Union representative didn't really provide continuing support during his case, and didn't refer him to NHS experts who could provide the right support. The Union did not ask for feedback on the service provided by the Solicitors.

What should the Union have done?

When Ben went off work after the panic attack, his Union should have stepped in and helped the employer to understand Ben's mental health problems, and strongly advise them that their conduct towards him was inappropriate and possibly discriminatory. The Union should have asked Ben what kind of support he might need to take a case forward, including how he would like the solicitors dealing with the case to ensure that they understood his requirements as a person with mental health problems. The Union should have sought some advice on mental health problems, to ensure that they were able to support Ben appropriately. This might include signposting to other organisations which could assist or even being able to access specialist help, such as mental health advocacy. They should also have sought his views on the service received by the solicitor, and taken up issues with them to ensure that the solicitors acting for the Union were able to deliver an improved service to people with mental health problems in the future.

Nick

Nick has experienced stress and depression problems for most of his life. He also has a chronic back problem. Nick worked for a large organisation that was aware of his impairments. He achieved 'exceeded' in his appraisals, but was then moved to another office where the new post involved a bit more lifting. His employers saw that he was becoming stressed, so Nick was moved to another section as clerical support. He agreed to do some extra duties for the manager of the section, but after yet another change in his management chain, his new manager did not make the right adjustments to accommodate his back problem. Nick challenged the amount of work that he could do without causing undue risk to his back. His manager refused to make a compromise and imposed first stage disciplinary procedures, which made Nick very stressed and he eventually went off sick. The employer handled the situation very poorly and ignored medical advice offered by both their own medical advisors and Nick's own GP.

What could the Union have done?

Nick feels that his Union should have been more robust in dealing with his managers. If they had, maybe the case would not have dragged on so long and Nick may have been able to have made a successful return to work. Nick also feels that Union should have more representatives who are trained in mental health issues, who can offer full support and advice in case of difficulties experienced.

Sarah

Sarah experienced Post Traumatic Stress Disorder and a head injury after a road accident. She felt she couldn't travel between buildings or handle information well. Her manager was very supportive and she managed with a personal assistant. She also had time off ill but it wasn't counted as sickness. However, a new manager then came on the scene, removed Sarah's adjustments which meant she went off work sick. Sarah contacted her Union, but she didn't feel they knew much about mental health problems and reasonable adjustments. The representative did not help Sarah to tackle bullying from the manager about when she would go back to work, and did not provide support on asking for adjustments, because they didn't know what these might be.

What should the union have done?

The Union representatives should have found out more about Sarah's situation, and should have sought Sarah's view about how she would like to be supported. They should also have taken some expert advice on supporting people with mental health problems at work. The Union representative should have tackled the employer about their inappropriate manner towards Sarah. Sarah managed to remain positive about returning to work, so the Union representative should have tried to make the employer understand this so that they could all move on to look at solutions.

Roger

Roger was a post graduate student with a diploma in publishing, However, the company he joined after getting his qualification was in financial difficulties which the employer did not inform him about, and the employer also did not provide their real operating address until after the interview. Roger was promised two years of training at his interview, located in the office most convenient for him at the time. However, this was not provided by the company. Roger sought help from his Union to secure this training in a convenient place, but the Union seemed only to be able to discuss how they could help him secure a good redundancy package. The company then moved Roger's job and training to a long way from his home, which meant that he was unable to take it up. In the end he resigned.

What should the union have done?

Roger feels that the Union should have made his employers aware that their dealings with him were causing him severe stress. The Union should have done more to seek training for Roger based close to his home, and should have looked at other adjustments to support him in the workplace rather than only seeking redundancy settlement. He also thinks that the Union could have done much more to provide information to the employer at the start of his employment.

Barbara

Barbara works in the education sector. She requested reasonable adjustments at work, but felt that her employer was not helpful. She was required to attend a meeting to discuss adjustments, but felt that she was not being listened to, and that her Union did not provide her with advice about what to expect and how they would support her in the process. The only option she seemed to be offered was ill health retirement.

Barbara did manage to secure some reasonable adjustments, but she feel that it was a very hard fight, with managers and the Union not really understanding mental health problems and the employer's duty to make adjustments.

What should the Union have done?

Barbara feels that the Union did not provide her with effective and sensitive support, and did not give her information on the full range of options available and about her rights under the DDA as a disabled person.

Appendix 2 - Good practice resources and useful contacts

Disability Rights Commission (DRC)

The DRC Helpline is the first point of contact for all enquiries. You can contact the DRC Helpline by phone, fax, by post, or by using one of our mailforms. If you are contacting us by post about an issue for the first time, please do not send any documents with your letter. We will come back to you to let you know what documents we will need to see.

Telephone: 08457 622 633
Textphone: 08457 622 644

You can speak to an operator at any time between 8am and 8pm, Monday to Friday)

Fax: 08457 778 878
Post: DRC Helpline
FREEPOST MID02164
Stratford upon Avon
CV37 9BR

There are also other guidance documents and supporting materials;

‘The Duty to Promote Disability Equality: Statutory Code of Practice’

‘Statutory Code of Practice on Employment and Occupation’

The DRC’s website also has a section called ‘Using Your Rights’ which helps disabled people and their advisers tackle workplace issues.

Download free from the DRC’s dedicated Disability Equality Duty website: www.dotheduty.org

Trades Union Congress (TUC)

Congress House,
23-28 Great Russell Street.

London
WC1B 3LS

Telephone: 020 7636 4030
Fax: 020 7636 0632
Email: info@tuc.org.uk
Website: www.tuc.org.uk

Scottish Trades Union Congress (STUC)

333 Woodlands Rd
Glasgow
G3 6NG

Telephone: 0141 337 8100
Fax: 0141 337 8101
Email: info@stuc.org.uk
Website: www.stuc.org.uk

'Know Your Rights' Advice Line: 0870 600 4882
Website: www.worksmart.org.uk.

'Disability and Work: a trade union guide to the law and good practice 2006'

'Promoting Disability Equality Advice for Unions on the 2006 Public Sector Disability Equality Duty' (revised edition June 2006)
Download free from TUC website www.tuc.org.uk

Jobcentre Plus

'JobCentre Plus' operates the Access to Work scheme and other programmes to help disabled people get and keep work.

www.jobcentreplus.org.uk

'The Care Services Improvement Partnership' supports positive changes in services and in the wellbeing of vulnerable people with health and social care needs. You can find out who these are by going to their website www.csip.org.uk

Sainsbury Centre for Mental Health

134-138 Borough High Street
London
SE1 1LB

Telephone: 020 7827 8300
Fax: 020 7403 9482
Email: contact@scmh.org.uk
Website: www.scmh.org.uk

‘Leading by Example: Making the NHS a Good Corporate Citizen and Exemplar Employer of People with Mental Health Problems’

A practical guide by Patience Seebohm and Dr Bob Grove to support the recruitment and retention of people with mental health problems in the NHS workforce, but useful to many employers.

‘A Toolkit for Mental Health Promotion in the Workplace (Mentality, 2002)’

Available from www.scmh.org.uk, also available from the DRC’s website.

Mind

Granta House,
15-19 Broadway,
London
E15 5BQ

Telephone. 020 8519 2122
Fax: 020 8522 1725
Email: info@mind.org.uk
Website: www.mind.org.uk

Covers England and Wales

‘Managing for Mental Health: The Mind Employers’ Resource Pack’

For employers who want to ensure best practice in mental health promotion at work. It includes sections on where to get help, employment policies and background information on mental illness.

Available from 'Mind Publications'
Telephone: 020 8519 2122
Email: publications@mind.org.uk
Website: www.mind.org.uk.

Health and Safety Executive

'Stress Management standards (HSE, 2004)'
These are voluntary standards of good management practice to prevent work-related stress.

'Real Solutions, Real People: A Manager's Guide to Tackling Work-Related Stress (HSE, 2003)'
The guidance contains examples of clear, practical measures which provide a starting point for the workforce to agree how to tackle the findings of a stress risk assessment

Download for free from HSE website
www.hse.gov.uk/stress/standards.

Networks and useful initiatives

KMG Health Partners Ltd

Currently working with other partners in a major initiative in Wales – 'Healthy Minds at Work' - delivering packages of training to employers and accredited training in Job Retention Case Management. This activity builds on the training developed by Roger Butterworth & Dave Costello and is linked to the work being undertaken by the Vocational Rehabilitation Association to create national standards for vocational rehab. Working close with the Job Retention Network, over 200 people have received the initial 2 Day Training Course throughout the U.K. These 'trainees' are then supported and mentored through their regional networks. A diploma course in Job Retention Case Management will come on stream by autumn 2007.

For further information contact: Gail Kovacs
gail.kovacs@btinternet.com

Mindful Employer

An employer-led initiative which aims to increase awareness of mental health at work and provides ongoing support for employers

who wish to improve their employment practices. It has a comprehensive website including resources for employers, online discussion forum, local contacts and a Charter for Employers who are Positive About Mental Health.

The initiative is facilitated by WorkWays, a service of Devon Partnership NHS Trust and support by the National Institute for Mental Health England (NIMHE). There is no cost in being involved in the MINDFUL EMPLOYER initiative, which is open to any employer, public, private or voluntary sector, in the UK.

Telephone: 0139 220 8833

Website: www.mindfulemployer.net

SHIFT – National Institute for Mental Health in England

This aims to tackle the stigma attached to mental health problems. SHIFT has recently worked with the Department of Health to produce, 'Action on Stigma – Promoting Mental Health – Ending Discrimination at Work'.

The document can be downloaded from:

<http://kc.nimhe.org.uk/upload/Action%20on%20Stigma.pdf>

Job Retention Network

This network is divided into regional groups in England, Wales & Scotland. These forums have been established to offer advice, support and training for organisations wishing to develop mental health job retention services.

Contact: Roger Butterworth (UK wide)

Email: rogerbutterworth@hotmail.com

Mobile: 07727 676410

or

Mary Deacon (West Midlands)

Email: mary.deacon@bsmht.nhs.uk

Employmentlist:

An e-group for people interested in employment support for people with mental health problems and learning disability.

To join, go to: Employmentlist-subscribe@smartgroups.com

MDF – the Bi-Polar Organisation

Castle Works,
21 St George's Road,
London SE1 6ES

Telephone: 020 7793 2600
Fax: 020 7793 2639
Email: mdf@mdf.org.uk
Website: www.mdf.org.uk

'The Bi-Polar Organisation' is a national user-led organisation and registered charity for people whose lives are affected by manic depression.

Rethink (formerly National Schizophrenia Fellowship)

5th Floor
Royal London House
22-25 Finsbury Square
London
EC2A 1DX

Telephone: 0845 456 0455
Email: info@rethink.org
Website: www.rethink.org

Rethink is the largest severe mental illness charity in the UK. It is dedicated to improving the lives of everyone affected by severe mental illness, whether they have a condition themselves, care for others who do, or are professionals or volunteers working in the mental health field.

Scottish Association for Mental Health

Cumrae House,
15 Carlton Court,
Glasgow
G5 9JP

Telephone: 0141 568 7000
Fax: 0141 568 7001
Email: enquiries@samh.org.uk
Website: www.samh.org.uk

SAMH, Scotland's leading mental health charity, works to support people who experience mental health problems, homelessness, addictions and other forms of social exclusion. It provides direct services, including accommodation, support, employment and rehabilitation, and actively campaign to influence policy and improve care services in Scotland.

Government Strategy Papers

'Vocational Services for People with Severe Mental Health Problems: Commissioning Guidance (CSIP, 2006)'

The commissioning objectives issued by Dept for Work & Pensions (DWP) & Dept of Health (DH) are to implement the 'Individual Placement and Support'¹¹ approach to employment support within vocational services and to work towards access to an employment advisor for everyone with severe mental health problems.

'Mental Health and Employment in the NHS (Department of Health, 2002)'

This provides guidance on the role of occupational health in recruitment and retention to facilitate the contribution of people with personal experience of mental health problems to the NHS workforce, but will be useful for many employers.

Download from www.dh.gov.uk/PublicationsAndStatistics

Useful articles

- Creating Mentally Healthy Workplaces. Sarah Silcox. IRS Employment Review 21 May 2004
- Mental health and Employment: Shaping a new agenda. Bob Grove. Journal of Mental Health 1999 8, 2, 131-140
- Self-Organise and Survive: Disabled people in the British trade union movement. Jill C Humphrey.
- Disability and Society, Vol 13, No 4 998, 587-602

¹¹ Bond, G.R. (2004) Supported employment: Evidence for an evidence-based practice, Psychiatric Rehabilitation Journal 27 (4), pp 345-59

Appendix 3 – Case Law on Mental Health

Claydon House Ltd vs Hamilton Bradbury Employment Appeal Tribunal (EAT)

Manager of care home went off work with ‘acute stress reaction’ after she was in a meeting with local authority officers about the way that the care home was being managed. She was requested to attend a disciplinary meeting, and requested reasonable adjustments for the meeting in relation to her disability, namely a supportive person to be present. She was not satisfied with the adjustments proposed by the employer and did not attend. She was then dismissed for gross misconduct. The Employment Tribunal (ET) found in her favour, but the employer appealed. The EAT found that the employer had discriminated against the employee, in breach of the DDA, and that where it is clear that the reason for less favourable treatment is a person’s disability, Tribunals should assess compensation under the DDA provisions, which allows for unlimited compensation to be awarded.

Sweet vs Peugeot Citroen Automobile UK Ltd

Mr Sweet was a car assembler at the Employer’s car plant, He became ill and his GP diagnosed with stress and hypertension (high blood pressure). Mr Sweet did not wish to remain in the same section of the production line because of the working environment. He was transferred to another role which he found acceptable. He was later returned to his previous role, even though there was no evidence as to why the employer decided that Mr Sweet’s mental health would enable him to return to the unsatisfactory production line role. Mr Sweet went off sick again. He returned and was given yet another role. He refused to return to the production line role, and was dismissed for gross misconduct.

The ET found that the employer had discriminated against Mr Sweet because they had not allowed him to return to the role which he had found satisfactory. There was scant evidence to show that the employer could not make adjustments to allow this. The employer also failed to allow a period of unpaid leave for recuperation. The ET held that the dismissal was less favourable treatment and was not justified.

Talbot vs WAG Railways

Mr Talbot was a train operator with the company. A member of the public committed suicide by jumping under the train Mr Talbot was driving. As a result he suffered post traumatic stress disorder (PTSD). He was given a job on the ticket barrier, but after an altercation with a member of the public the occupational health physician stated that he should have role with limited contact with the public. He was given a satisfactory role in the customer relations department, but soon after there was a restructuring. Mr Talbot failed to get any of the jobs through the competitive process due to his limited experience in customer relations. He was then off sick and was subsequently dismissed.

The ET originally decided that the dismissal was justified, but after the Archibald v Fife Council ruling, Mr Talbot's appeal was allowed. The EAT found that failure to retain Mr Talbot in the customer relations department was a breach of the duty to make reasonable adjustments. The employer should have transferred him into a role in that department and considered adjustments to enable him to take up that role in the long term. He was awarded significant remedy, although the EAT did apply a reduction to the compensation awarded to Mr Talbot on the grounds that transfer to a suitable role and further training may still have failed in the long term.

Van der Gucht vs The General Social Care Council

Mr van der Gucht has Bipolar Affective Disorder, and applied to register as a social worker with the GSCC. The registration process requires people to be 'physically and mentally fit' to do the job competently and safely. The GSCC wrote to him, on being informed of his condition stating they would impose restrictions on his registration 'because of the nature of your condition and the potential risk to yourself and service users'. Mr van der Gucht appealed successfully to the Care Standards Tribunal and the restrictions were lifted.

Butterfield vs Edmund Nuttall Ltd

Whilst driving on business, Mr Butterfield committed two offences of indecent exposure and one of dangerous driving, all in one day. The next day he broke down and was admitted to hospital. He remained off work. He was sentenced to a community rehabilitation order and disqualified from driving. He met his

employer to inform them of his disqualification, but did not inform them about the indecent exposure offences. The employer later found out and dismissed him. He claimed Disability Discrimination in ET was the case was upheld.

The employer appealed. The EAT held that exhibitionism and sexual abuse of others are conditions specifically excluded from the DDA definition of disability. It had been argued in Tribunal that Mr Butterfield would not have committed these offences had he not had a disability, i.e. depression. The EAT held that because the employer dismissed him because of the sexual offences, and his concealment of them, rather than his mental impairment, it had not discriminated against him on the grounds of his disability.

Hall vs Department for Work and Pensions EAT

Ms Hall had a psychiatric condition which could have been controlled by medication, which she refused to take. On the health declaration form before being recruited she did not declare her condition. Within a few days she began to clash with colleagues, and after a series of these events she was suspended pending disciplinary action. Following a hearing she was dismissed for failure to comply with conduct standards. She claimed disability discrimination at Tribunal. She was deemed to be a disabled person, and the Tribunal found in her favour.

The employer appealed. The EAT held that there was a failure by the employer to address the question of reasonable adjustments. However, it also held that no reasonable adjustment could have been made because Ms Hall refused to take medication. It therefore limited compensation for this breach to injury to feelings as no financial loss resulted from it.