

Health and Safety for Disabled People and their Employers:

Case Study Examples



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About this guide

This document has been developed as a companion resource to the position statement (see page 4) and web guidance produced jointly by the Health and Safety Executive (HSE) and Disability Rights Commission (now superseded by the Equality and Human Rights Commission, EHRC in September 2007.) The statement and guidance can be found on the Health and Safety Executive's website www.hse.gov.uk/disability.

The document can be used as a training tool, both by risk assessors and by those who deal more generally with health and safety issues in the workplace. It also provides practical advice for disabled people who want a better understanding of what to expect in terms of health and safety issues at work.

Using case studies, it shows how the principles contained within the joint statement and web guidance can be applied in practice. It includes examples based on real work situations and uses case studies to explore the kinds of issues that employers and disabled people may face. It provides examples of both good and bad practice and outlines what the right approach should be. It should be used in conjunction with the guidance and is not a stand-alone product.

The guidance is designed for employers, disabled people and for individuals and organisations advising on risk assessment and disability, including trade unions, professional bodies and

organisations of and for disabled people. It will also be beneficial to line managers in understanding how to support disabled people in the workplace.

The document has been written for the Equality and Human Rights Commission by 'The At Work Partnership' and 'Disability Forward Limited.'

Statement on overarching principles of health and safety management and disability, January 2007

'We believe that health and safety law and its implementation is in the interests of all employees, whether disabled or non-disabled, and of the employer. Disabled people should expect effective and enabling risk management in the workplace.

Health and Safety law and the Disability Discrimination Act, when used appropriately, will work together to increase the employability and retention of disabled people. A positive and sensible approach to risk management can and should, in most circumstances, encourage the inclusion of disabled people in the workplace.

Risk assessment should not focus unduly on an individual's disability. It should look more broadly at the overall demands of the work and how best to manage associated risk.

We want:

- Employers to develop a working environment in which employees feel safe and supported to disclose and able to

discuss the impact of the environment (including potential barriers to engagement, development and advancement within the workplace) on the management of their disability or long term health condition.

- Employees to work collaboratively with employers to help manage risk and to discuss positively with their employer approaches to making reasonable adjustments.
- The findings of risk assessments to provide clear recommendations wherever appropriate on how reasonable adjustments and timescales for implementing them are to be built into successful risk management.

Health and safety should never be used as a false excuse to justify discriminatory treatment. It will be the exception rather than the rule to exclude disabled people from particular jobs and tasks.'

Source: Health and Safety Executive, Disability Rights Commission, 2007.

Background

Employers must comply with health and safety legislation, including various regulations made under the Health and Safety at Work etc Act 1974. They cover all kinds of work hazards, from exposure to hazardous substances and working at height, to manual handling and working time. Employers are required to assess the risks to health and safety and to take steps to manage these risks.

Employers are also required to comply with the Disability Discrimination Act (DDA) 1995 (as amended). Employers should not directly discriminate against disabled people, and they must also make reasonable adjustments to enable disabled people to perform to the best of their ability in the workplace. Employers must not discriminate against disabled people because of an issue related to their disability (known as disability related discrimination) or subject them to harassment or victimisation. For a full explanation of these terms, refer to 'The Law' section of the Health and Safety Executive web guidance.

There is a common misconception that disabled people constitute a health and safety hazard and there are many cases where health and safety has been used as a 'excuse' for discriminating against disabled employees and job applicants¹. In most cases, general measures taken to ensure the health and safety of all employees will address risks to disabled people. Where these general measures may not be enough to ensure the health and safety of a disabled employee, further measures will often ensure that these risks are overcome. A simple example would be the provision of a vibrating pager linked to a fire-alarm system to ensure that an employee with a hearing impairment is able to respond to an emergency warning. Many other examples are given in this guide.

It is rare that an employee's disability will present an insurmountable obstacle to health and safety practice, either to the disabled individual or to his or her colleagues. Nevertheless, employers are required to conduct risk assessments as an essential part of the management of health and safety at work and must ensure that risks to all employees (and others affected by the work) are assessed and managed. When carrying out these assessments, employers should, wherever possible, aim to reduce the risk, not focus on the disabled employee as a problem.

¹ 'The extent of use of health and safety requirements as a false excuse for not employing sick or disabled people' – research report by the Health and Safety Executive, the Disability Rights Commission and the Institute of Employment Research, Research Report 167, 2003.

Even where an employee's health condition or disability presents a real (not assumed) risk to the health and safety of others, perhaps because they are undertaking safety-critical work, the risk-assessment process should identify ways to overcome these risks by making reasonable adjustments; removing the disabled worker from the work should be a last resort.

The Health and Safety Executive has produced guidance for employers on carrying out risk assessments – including its Five Steps to risk assessment guidance². The five steps are:

1. Identify the hazards.
2. Decide who might be harmed and how.
3. Evaluate the risks and decide on precautions.
4. Record the findings and implement them.
5. Review the risk assessment and update if necessary.

The Health and Safety Executive web guidance section entitled 'Guidance for those doing risk assessments' provides some key pointers on how to ensure the right approach to risk assessment for a disabled employee.

The guidance advises that by working together, employers and disabled workers engage with disability and health and safety. The process therefore works best when the employer involves the

² Five steps to risk assessment. Health and Safety Executive, www.hse.gov.uk/risk/fivesteps.htm

disabled worker (they are likely to have the greatest level of expertise on the barriers they face and how to overcome them) and considers their individual circumstances. Working together can help avoid people making assumptions about disabled people, which can lead to poor practice or discrimination. It will also promote a positive working environment where disabled people feel that they do not need to hide an impairment that might have health and safety implications' for fear that they won't get or keep a job.

Some do's and don'ts from the Health and Safety Executive guidance are included on the following page.

Health and safety risk assessments: some do's and don't's

Do:

- **Involve** disabled applicants and employees – appreciate the skills and insight they may have to find the best outcome.
- **Work together** with disabled applicants and employees if it is necessary to assess whether their disability affects health and safety and, if so, to what extent. In other words, work together when doing risk assessments that consider the effects of the person's disability and when thinking about the 'reasonable adjustments' needed for them to enter or stay in work.
- **Take account** of any **adjustments already in place**, so your conclusions are based on any remaining risks, if they exist;
- **Make new 'reasonable adjustments'** to overcome remaining risks, remembering to work with the disabled person to tailor the adjustments to their needs.
- **Be sensitive and timely** to support the disabled person and avoid delays. Where delay can't be helped (for instance, if you are waiting for an Access to Work grant) you may have to make short-term temporary arrangements so they are not at a disadvantage in their work.
- **Involve others**, such as specialists (e.g. disability employment Advisers, Occupational Health advisors) or the employee's representative or advocate, if you need to gain a better understanding. Many disabled people are experts in their disability, but others, for instance people with certain learning disabilities or people new to a long-term health condition, may be less familiar. Attend professional disability-awareness training if needed.
- **Check** that advisors, such as safety consultants or the

occupational health ('works') doctors, understand disability discrimination;

- **Share** with the disabled person (and their representative, if they have one) any specialist information to give them a say in its contribution to the assessment.
- **Make sure** you can give good reasons for decisions you make about how to manage health and safety risks in relation to a disabled person. Otherwise you risk discriminating illegally.

Following this guide will help.

- **Create a working environment** that allows disabled people to feel comfortable talking about their disability.
- **Be sensible.** Remember our lives can never be free from risks and for disabled people, overcoming them can be harder. This doesn't mean being overly protective. You should **enable disabled people** to enter and stay in work. So check with the person that workplace adjustments are a help not a hindrance.

Don't:

- Make assumptions about the health and safety implications of a person's disability as it might not make a difference to workplace risks. If you do a risk assessment with no good reason you might discriminate illegally.
- Have 'blanket' policies that treat disabled people differently. For instance, a ban on applicants with, say, epilepsy, diabetes or mental health problems is likely to be direct discrimination. Be aware that disabilities often affect people in very individual ways.
- Have unnecessary criteria for a job, e.g. the need for a Group 2 driving licence when a Group 1 licence would do. This could

unfairly discriminate.

- Insist on employees revealing details of their disability. Disabled people have rights to confidentiality. However, they also have health and safety responsibilities, so may have to tell you about the consequences of a condition if there are health and safety effects. Then they can work with you on 'reasonable adjustments'.

And finally, don't panic: yes you may have to do things differently, but with the right levels of involvement and support, you should find you are on the right track to meet your legal duties. Following this guidance will help.

Source: Guidance for people doing risk assessments. Health and Safety Executive, www.hse.gov.uk/disability/risk.htm

Key messages for employers

In your approach to managing health, safety and disability at work, you should consider some overarching principles that will help you meet your legal obligations and help maintain good employee relations.

In general:

- Consider what you can do to better manage health and safety risks for all staff.
- Consult staff, or their representatives, about health and safety at work.

When thinking about health and safety risk assessments in relation to disabled employees specifically:

- Fully engage disabled employees in discussions about health and safety issues.
- Always consider whether a risk assessment is necessary – ensure that risk assessments are being carried out in relation to all staff and that health and safety is not being used as a ‘false excuse’ for not making appropriate adjustments for disabled employees.
- Ensure you are making a risk assessment about the work environment and the job tasks, NOT the disabled person.
- Don’t make assumptions about the health and safety implications of a person’s impairment, as in most cases it will make little or no difference to workplace risks.
- Ensure you have made reasonable adjustments for disabled employees and that they are working well – if reasonable adjustments are in place you may find that any disability-related health and safety risks are minimised.
- Make additional reasonable adjustments to overcome any remaining health and safety risks – and work with the disabled person to tailor the adjustments to their needs.
- Ensure risk assessments are conducted by someone who understands the Disability Discrimination Act (DDA) and the duty to make reasonable adjustments.
- Ensure assumptions are not made about the effects of a disabled person’s condition on their ability to do their job safely – always assess the risks objectively.

- Ensure actions agreed as part of the risk assessment are implemented effectively.
- Ensure the risk assessment and any management mechanisms put in place are reviewed regularly.
- Risk assessments should take into account the effect of reasonable adjustments.

A good health and safety risk assessment will have taken place if:

- Workplace health and safety risks are identified and appropriate measures planned and implemented.
- Conclusions are based on genuine risks, not false or stereotypical assumptions about disabled people.
- The disabled person feels that they have been treated with respect and dignity, and have not been 'singled out'.
- The process has not taken excessive time.
- The disabled person has not been 'put on ice' whilst the process is completed.
- The organisation has confidence that the disabled person can take control of their own safety, and will comply with health and safety policies within the organisation.
- If the risk-assessment process has identified general issues or barriers that may affect other disabled people in the future, measures have been put in place to address these.

Case Scenarios

Case 1 - Officer worker with epilepsy – failure to make reasonable adjustments

Key points

- A new employee has a mild seizure outside working hours and also has problems with short-term memory.
- The employer, concerned with safety and capability, wanted to extend the employee's probationary period.

Delia started work as an administrative officer in the Land Charges Department of her local council. She declared her disability at pre-employment (epilepsy and some loss of cognitive function following surgery) and explained that she had some short-term memory problems. Later in her employment, Delia encountered problems with remembering staff members' names, identifying departmental postal trays and from where to collect the post. This was causing problems for other staff.

Almost six months after joining the council, and before finishing her probationary period, Delia had a seizure outside working hours. She had three days off sick, on the advice of her GP. On her return to work she had an informal meeting with her supervisor, who told Delia that they had concerns about her health and were aware that she was often forgetting certain procedures, particularly in relation to sorting the internal mail. Her supervisor surmised that she might also forget the correct procedures in relation to an on-site

emergency or evacuation, or misplace documents that could be sensitive or confidential.

The supervisor said she was frustrated with Delia's performance at work, as she had been getting complaints from other staff. She also said that because of Delia's seizure, and because of her forgetfulness, she would need to do a health and safety risk assessment before allowing Delia to resume all her duties; some of her work involved walking around the council complex where workers using machinery were often present.

At the end of the meeting, the supervisor decided to extend Delia's probation period by a further three months to give her time to show that she could do the job well and was not a 'safety risk'. Delia was very disappointed with the way the supervisor had treated her and complained to the Human Resources department.

Delia waited more than three months for an outcome, with no formal risk assessment being done. Nine months into her employment, the employer decided that she was incapable of fulfilling the duties of her job and said they were considering disciplinary action, which could lead to Delia's dismissal.

What are the issues?

This case study is typical of many situations where there are both capability and safety issues to be considered – and it may be helpful to consider them separately. However, the key issue was that the employer had not considered what reasonable

adjustments could have been put in place right from the start to help Delia in her work.

Importantly, the employer appears to have decided that the out-of-hours seizure – and short-term memory problems – means that Delia constitutes a health and safety risk. The response to both the safety and capability issues is to extend the probationary period to see what happens, rather than carry out the promised risk assessment and look for reasonable adjustments that would help Delia to work productively and safely.

What is the right approach?

When Delia took up her post, the employer should have undertaken a discussion with her about what adjustments and support Delia might find helpful to perform productively at work. All new members of staff should have been given a general workplace risk assessment, covering such issues as her workstation, chair and lighting. Because Delia had disclosed her disability at pre-employment, the local authority's occupational health adviser would have been in a position to assess whether it raised any additional safety concerns. However, because Delia was undertaking low-hazard office work it is unlikely that special risks would have been identified.

Delia's supervisor is frustrated because of the impact that Delia's condition appears to be having on her work. However, the employer must consider what reasonable adjustments be put in place to support Delia before looking at her capability to perform

the duties of her role. Reasonable adjustments might include, for example, providing lists of people in each department with accompanying passport-style photographs, and procedure 'crib sheets' to help her remember how to do things correctly, including compliance with emergency procedures.

The employer's decision to extend the probationary period could amount to unlawful disability-related discrimination if the reason for the extension is because of the employer's failure to make reasonable adjustments. An appropriate response, therefore, would have been to put in place the reasonable adjustments, rather than waiting to see how Delia coped without them.

It seems likely that the supervisor's concern over the emergency procedures was being used to exaggerate the implications of Delia's short-term memory problems.

The employer must not deal with issues about performance and capability by using health and safety as 'excuse', for example to terminate or deny employment to a disabled person without first having assessed the genuine risks to health and safety and put in place measures to address those risks.

The out-of-work seizure may raise concerns for the employer, but they could be making assumptions without considering the actual risks. The seizure might have been related to stress Delia was undergoing at work, or it might have been entirely unrelated. Delia may have been aware that she was about to have a seizure and able to take action to minimise the consequences. The employer

should not assume that she is now automatically 'more risky'. Some people with epilepsy know when they are going to have a seizure and can take themselves to a place of safety; and some people have fairly minor seizures that cause them to appear 'distracted' for a short time without any major consequences. The employer should have discussed this with Delia and if there were genuine concerns about her health and safety, the employer should have investigated what adjustments may help Delia.

The supervisor should have considered in advance of the return-to-work meeting what adjustments could be put in place to help Delia, being careful to avoid making assumptions about Delia's impairment, and its likely impact on her at work. She should talk to Delia about how she manages things when she is not at work and how the organisation can support her at work. The supervisor could seek advice from the occupational health adviser to ensure that she approaches the issues appropriately and sensitively.

Delia and the supervisor should agree a date for review of the adjustments to check that they are helping Delia. While the employer must respect Delia's confidentiality about her health condition, in this instance Delia might feel more comfortable working with colleagues if they had some understanding of her disability and how it might impact on her work. An occupational health professional would be able to discuss these issues with Delia and consider what information might be given to colleagues in order to support her at work.

Case 2 - Employee with Multiple Sclerosis (MS) at risk of falling – failure to make reasonable adjustments

Key points

- An employee with MS has fallen in the office.
- The employee prefers to use crutches to get around rather than a wheelchair.
- Can the employer compel him to use the wheelchair on grounds of 'health and safety'?

Peter is a solicitor with a law firm and has progressive multiple sclerosis (MS). He uses a wheelchair on occasions but prefers to use elbow crutches to get around the office. He has fallen on a couple of occasions and colleagues have had to help him up. He also has problems carrying documents and other items around the office when he uses crutches. The firm's health and safety co-ordinator has expressed their view that he would like him to use a wheelchair for his own safety and that of others. Peter works on the first floor and there are lifts to other floors. The company is hoping to transfer Peter's office to the ground floor, but this depends upon a lengthy lease negotiation arrangement, and, in any case, working on the ground floor would not make a difference to him falling. The health and safety co-ordinator says that they have to compel some other staff to use certain equipment for health and safety reasons and so this might also be the case for Peter.

What are the issues?

There are obvious health and safety issues in relation to Peter's risk of falling while using his crutches to get around the office, particularly while carrying documents. A health and safety risk assessment would be appropriate.

The first thing to consider is whether Peter actually needs to carry any documents as he moves around the office. Are there alternative ways to allow him to access case files and documents – administrative help, for example? Secondly, what are the health safety risks of Peter falling, both to him and to others?

It should be borne in mind that Peter may prefer to use crutches because he associates using a wheelchair with being 'incapable'. He may also want to try to retain his body mobility and strength for as long as possible and fears that using a wheelchair will accelerate his impairment.

It is true that employers can require employees to use certain equipment for health and safety reasons, but would compelling him to use a wheelchair be a proportionate response, even as a health and safety measure?

What is the right approach?

First and foremost, the employer should ensure that its general health and safety risk assessments are up to date. Basic health

and safety issues, such as making sure that there are no tripping hazards around the office – trailing wires, documents left lying on the floor and so on – would benefit all employees' safety.

The employer discusses with Peter in a supportive way to find out what they can do to help him at work. There may be some simple solutions that could reduce concerns for both Peter and the organisation. Individuals are often best placed to know how to overcome problems resulting from their impairment; Peter may be able to suggest adjustments that can be readily put in place.

Rather than ordering Peter to use his wheelchair at work, a more appropriate response may be to provide help with carrying documents, and advise him of the increased risks from trying to carry files while using his crutches. Some administrative support and help from colleagues may be all that is needed. The employer could also discuss with him the possibility of flexible working (for example, working at home) on those days when he felt worse, taking on board the practicalities of the client-driven nature of the work and what would or would not be reasonable and practical.

Any adjustments must be agreed with Peter, and the employer should work with him to ensure that they are effective. The issue of whether there are any remaining risks for Peter in the workplace cannot properly be considered until the reasonable adjustments have been put in place to support him generally – and the employer has made sure that it has properly managed health and safety risks to all staff.

Further help may be available through Access to Work (which provides grants through government to pay for extra costs arising from a person's disability in the workplace), and this may become more important as Peter's condition progresses. The employer should discuss with Peter about arranging for a workplace assessment, not only to look at the health and safety issues, but also to provide ongoing support to enable him to continue at work. Access to Work will look, for example, at whether or not Peter would benefit from any technical adaptations or even a support worker. It may also fund some or all of the costs of the adjustments.

Case 3 - Call Centre manager with post-natal depression – failure to make reasonable adjustments

Key points

- Employee has post-natal depression.
- Line manager fears that the stress of the job could make her condition worse, which would affect her dealings with customers.

Stella manages a team of about 30 people in a large Call Centre. After having her second child, and coming back from maternity leave, she went off sick for six weeks with post-natal depression. She received some counselling and returned to work. However, her new line manager, appointed while Stella was off sick, has advised that Stella should not manage her team anymore because 'the stress could re-activate her condition'. The Human Resources manager agrees and states that the company has a duty of care to its employees. The Human Resources team are worried that Stella may get too stressed in her management role and in dealing with customers. They also worry that Stella might upset a customer if she is 'having a bad day'.

The Human Resources department decide that a health and safety risk assessment should be undertaken by the health and safety officer. They also conclude that a good reasonable adjustment would be to move Stella to a smaller team where she would share some management duties with another person.

What are the issues?

Stella's mental health problem has not occurred in relation to anything that happened at work, but the employer has assumed that it will have implications and that her health will be at risk because of her work.

Stella's post-natal depression has not lasted for 12 months, and does not look likely to last for 12 months. It is unlikely, therefore, that she will be protected by the Disability Discrimination Act; however, if her depression continues in the long term, she may be covered.

What is the right approach?

Stella's manager should have arranged for a return-to-work interview, at which they would offer Stella support if she needed it. This might include allowing her to take more frequent breaks, advising her of support services that the employer offered to all employees – such as an employee assistance programme, access to counselling and support through an occupational health provider, or even informal 'buddy' support from other staff members.

The 'risks' that Stella may deal with difficult customers badly is based on assumptions. Stella may indeed find that dealing with difficult clients is upsetting for her, but this is likely to be the same for other managers, so the employer needs to think how better to

support all managers rather than focussing on Stella as being a 'special case'.

While it is true that a short-term impairment may not be covered by the DDA, employers have general duties under health and safety law, and in common law, to protect the health, safety and wellbeing of employees and should take account of individuals who may be at special risk. Supporting employees with health conditions, whether or not they are covered by the Disability Discrimination Act, is good practice and will help ensure that employers get the best out of their workforce.

Case 4 - Electrician with history of mental health problems – possible disability-related discrimination

Key points

- An employee had mental health problems as a teenager.
- The employee has an ongoing need for prescribed medication.
- Is the employee a risk to others, particularly children?

Dean is an electrician. He works with the estates department of a public sector employer, doing minor electrical repairs, but he also helps his father in the family construction firm. Dean had mental health problems when he was younger (psychotic episodes, some of which were violent, partly as a reaction to the death of his younger sister in a car accident). He has been told that these might recur, depending on his life experience and whether he takes prescribed medication.

Dean is assigned a new line manager, who wants the team Dean works in to concentrate on repairs to a public building used frequently by families with children. The line manager learns about Dean's medical history from a work colleague, and says that he shouldn't work on the team that is re-fitting the building, as he is a risk to the children. The line manager fears that Dean may stop taking his medication, as happened with another employee with mental health problems, and this would make him even more of a risk to the children. The manager also thinks that Dean is putting

himself under pressure by working additional hours in his father's firm and thus more likely to suffer a relapse in his condition.

What are the issues?

Dean has a long-standing mental health condition and it is clear that he should continue with this medication. The employer assumes that Dean's mental health condition constitutes a risk to the safety of children playing in the vicinity of their building work. The manager also believes that the extra work pressure Dean is under from doing additional hours with his father's firm risks him suffering a relapse.

Should the employer consider redeploying Dean from the current project? Should it bar Dean from doing extra hours with the family building firm?

What is the right approach?

Dean's mental health problems are linked to a specific event in his life, but it is not clear whether these episodes could recur. Dean may not have had the counselling or other support he needs to deal with the issues he faces; equally, he may be well supported and very able to deal with the pressures of work and life in general. Assumptions should not be made about any of these things.

The employer should not assume that Dean's mental health condition means he is a danger to children. The employer may fear the consequences if it 'got out' that Dean was working near

children, because many people in society hold misconceived ideas about people with mental health problems. There is also no reason to suppose that Dean's work with his father is putting him under any pressure. It may, in fact, be something he needs to do for financial reasons or to increase his skills and knowledge. Working with his family may help to provide the social support he needs, rather than putting him under increased strain, as the employer has assumed.

The line manager should advise Dean's colleague that he should not make assumptions about Dean. If the manager still has concerns, one positive response would be to highlight to the whole team that the organisation can offer support to anyone with health problems, including stress, mental health, alcohol addiction and so on, through the occupational health department of confidential counselling service. This takes the focus away from Dean as an individual.

It is important for the manager to remember that there is no evidence at all that there are any safety risk issues.

Case 5 - Construction worker with epilepsy – making reasonable adjustments

Key points

- An applicant with epilepsy applies for job with a civil engineering firm.
- Can the employer reject the applicant simply because he has epilepsy and will be required to work at heights?
- Is the employee entitled to accept a certain level of risk in relation to his condition?

Steven is a recently qualified civil engineer who has epilepsy. He has applied for a post as a project worker. Because of the hazards presented while working near moving plant machinery or at heights, the recruitment standards for the post adopted by the company excludes employment of applicants with epilepsy. When this policy was challenged by the Human Resources manager, the company's health and safety officer confirmed that the vacant job was likely to involve work at height and around hazardous machinery and that it would not be safe for someone with epilepsy to work in that environment.

Concerned about compliance with the Disability Discrimination Act, the Human Resources manager requested:

- A management report on the practicalities and cost of eliminating the hazards from the post.
- A specialist medical assessment of Steven's prognosis and its relevance to the responsibilities of the post.

The management report concluded that while the work in hazardous situations could not be eliminated, it could be substantially reduced with comparatively little cost by reallocating responsibilities involving working at heights to other members of the team and rescheduling duties in the vicinity of plant machinery to times when the machines would not be operating. Hazardous work could effectively be minimised to no more than a few hours annually.

The specialist medical report identified that Steven's epilepsy was well controlled and placed the annual risk of seizure recurrence between low and moderate. The report enabled the personnel officer, the management team and the individual to agree that with reasonable adjustments, and a review if circumstances changed, the residual risks to the applicant of accident or injury would be well below that accepted on a daily basis in activities such as driving, and the risks to others would be negligible. Steven was recruited to the post.

What are the issues?

This case study raises issues for employers concerned to fulfil their obligations both under health and safety and under disability legislation. But these issues should not be in conflict. The company knew that it had to take extra care over the employment of people in high-risk jobs, but had misunderstood health and safety legislation. There are few cases where health and safety law requires the exclusion of specific groups of people from certain

types of activity (healthcare workers with blood borne virus infection must not be employed in work which involves invasive surgical procedures, for example). The company had made assumptions about people with epilepsy without considering their duties under the Disability Discrimination Act.

What is the right approach?

The company achieved the right outcome despite initially tackling the issue inappropriately. Health and safety law does not preclude the employment of someone with epilepsy from working in construction, though it does require that employers carry out a thorough assessment of the risks to health and safety of workers and others affected by the work. The Disability Discrimination Act makes it unlawful to automatically exclude a disabled person, or a group of disabled people from a particular job because of their impairment. This is termed direct discrimination and cannot be justified in law. The employer should amend its recruitment standards to ensure that people are not ruled out automatically on the basis of a health condition or disability.

However, it can be justifiable to reject an individual applicant on health grounds, but only after a proper assessment of the risks associated with their particular impairment. In other words, the employer must look at the facts of each individual case and should seek competent advice, for example from an occupational health practitioner in deciding whether an applicant is fit for work; taking into account the impact of any possible reasonable adjustments. It is also good practice to delay any pre-employment decisions on

health grounds until after it has been established that the individual meets all the other essential requirements of the job and a provisional job offer can be made.

Steven's case was looked at on an individual basis and the health and safety risks assessed properly. By putting in place a number of reasonable adjustments, as required by the Disability Discrimination Act, the risks identified in the assessment were overcome. Thus, with relatively little reorganisation of the work, and at little cost to the employer, Steven was able to join the company.

Case 6- Food processing operative develops neurological condition – making reasonable adjustments

Key points

- Employee in food processing job develops a motor nerve condition.
- Employer is concerned that an employee is a risk to herself and others but does not know how to proceed.

Meena works in a food-processing unit and part of her job requires her to use knives to de-bone meat. She develops a motor nerve disorder and her employers, with little knowledge of the condition, are concerned that her condition puts herself and others at risk. The employer feels that she may injure herself when using knives and that she might be a risk to others when handling trays of hot food. The employer advises Meena that she may not be able to continue in her role, because of the health and safety issues. They suggest that she should be moved to less dangerous work.

What are the issues?

Meena's employer is very concerned about the effect of her condition on her ability to do some parts of her job. They feel it would be better to take the dangerous tasks out of Meena's role to ensure her safety. However, the employer has not considered a number of questions:

- Have the general risks to all employees been assessed and either prevented or adequately controlled?
- Does her condition create an increased risk to her health and safety or the health and safety of others?

- If it does, can these risks be prevented or adequately controlled through normal health and safety management?
- If not, what reasonable adjustments could be put in place to prevent or adequately control the residual risks?

What is the right approach?

The employer in this situation should first of all ensure that all the risks have been assessed and managed regardless of Meena's disability – it may be that appropriate changes to the work equipment and environment could significantly reduce the risk and take the issue of the disability completely out of the equation. The Health and Safety Executive, for example, suggests that hazards in meat cutting can be managed by providing knife-proof arm guards and gloves for the non-knife hand as well as knife-proof aprons. These would protect all workers from a risk that is significant for both disabled and non-disabled workers.

Assuming that the employer has fulfilled its general obligations to manage health and safety, the specific risk assessment might look at how, or if, Meena's impairment has affected her safety. The risk assessment might find that, because her condition was fairly benign, or that she had ample warning of any occasional mobility problems, it did not create a significant health and safety risk. The employer might conclude that it should revisit the risk assessment at regular intervals to check that the situation had not changed.

Finally, the risk assessment might indeed show that there was a risk to health and safety – for example in handling the hot trays of

cooked food. In this case, the employer might conclude that a reasonable adjustment could be put in place to overcome the safety issue. Possible adjustments might be to buy in new equipment that automates the process – so that she no longer has to handle the hot trays manually – or to allow a colleague to do the manual handling duties of the job. The employer might even be able to apply for financial assistance through the Government's Access to Work scheme to cover the cost of new equipment.

Case 7 - Security van driver with progressive arthritis – making reasonable adjustments

Key points

- A security van driver has recently diagnosed arthritis and the firm wants to give him ill-health retirement.
- The employer has assumed that the employee's condition poses a risk to health and safety.
- Reasonable adjustments have not been considered.

Owen is 53 years old and has recently been diagnosed with arthritis. He finds it difficult to walk up and down stairs, and it causes him pain, particularly first thing in the morning. He works for a security firm as the driver of an armoured van and his supervisor has noticed that he is having trouble getting into and out of the vehicle, though there have been no concerns over his driving ability. On discussion with the site manager, the supervisor informs Owen that he will have to accept ill-health retirement because his condition compromises his health and safety, and that of his colleagues and members of the public. The supervisor says there are no alternative jobs. Owen's doctor believes that his condition will settle down once he gets used to the medication, but the supervisor says he cannot afford to take that chance and has recommended to the personnel officer that the ill-health retirement plans be set in motion.

What are the issues?

The employer assumed that because Owen has problems getting into and out of the van, that he is incapable of doing his job safely and that ill-health retirement is the only option. The employer has not said why they think he is a danger to members of the public or his colleagues. The employer has not considered any reasonable adjustments that could help Owen. It may be that they feel that ill health retirement is a much simpler and cost effective option, but in fact this is unlikely to be the case, because there may be adjustments that could help Owen (including support from Access to Work) and the cost of his retirement, and the recruitment of a replacement worker, is going to be much more expensive than making adjustments to enable him to continue working.

What is the right approach?

A discussion between the supervisor and the site manager does not amount to a health and safety risk assessment. There may indeed be risks to safety associated with Owen's arthritis but these need to be assessed, by a qualified person. The employer needs to identify what the real risks are and not assume that Owen's arthritis compromises health and safety, even if the supervisor has noted that Owen finds it difficult to get into and out of the van. The employer needs to look at measures that it can put in place to prevent or control those risks.

Before coming to any decision about Owen's employment, he should be referred to a qualified occupational health practitioner

who will be able to help assess the likely impact of the arthritis on his ability to carry out the job. Owen will need to inform the practitioner about his medication and the physician may advise that he be temporarily reassigned to other work with a follow-up evaluation to assess his fitness for work once the treatment has had chance to alleviate the symptoms.

Owen is likely to be protected under the Disability Discrimination Act even though the condition has only recently been diagnosed, arthritis is a chronic condition and therefore likely to last more than 12 months (one of the qualifying conditions of the legislation) and it affects his day-to-day mobility (climbing stairs is difficult). The employer must consider putting in place any reasonable adjustments to help Owen work safely and productively. Possible adjustments could include minor modifications to the armoured van to help Owen with entry and exit, assigning some of his duties to colleagues and considering flexible working, for example recognising that he may need to do different jobs on days where his condition worsens. Another reasonable adjustment may be to find him suitable alternative work – with appropriate training if necessary – and the employer should explore other job options thoroughly before asserting that no positions are available. An occupational health practitioner will be able to make recommendations about his fitness for work, taking on board the impact of reasonable adjustments.

It is important that the employer doesn't make assumptions about Owen's condition and that any decisions are made on proper assessments of his fitness and capability – which may need to be

modified in future if his arthritis worsens – and of the risks to health and safety.

If the employer insists on pursuing the ill-health retirement, Owen may wish to challenge its decision. He should put his request in writing. The two parties may be able to resolve the dispute at this stage, particularly if the employer has made assumptions about the impairment without thinking through the true implications for the work. The best way to do this is to arrange a meeting between the employee, any representative that they wish to be present (for example a union official), the line manager, Human Resources and equality representatives, occupational health and any other advisers that can help to resolve the issues.

If the employer fails to give Owen a reasonable response and he suspects that he has been treated less favourably because of his disability he can then make a formal, written grievance under the terms of the employer's grievance procedure. Once he has exhausted the internal grievance procedure (which should include an appeals mechanism) he must then decide if he wants to take the matter further by taking his case to an employment tribunal. In a tribunal, the onus will be on the employer to show that it had fulfilled its obligation to put in place reasonable adjustments, including alternative work.

Case 8 - Laboratory worker develops Parkinson's disease – failure to make reasonable adjustments

Key points

- A laboratory worker has continued to work for five years after being diagnosed with Parkinson's disease.
- A new manager takes over her department and, on grounds of safety, decides that she should be moved to a library job.
- The employee is distressed by the enforced redeployment and goes off sick with a stress-related illness.

Jasmine is a laboratory worker and researcher in a university microbiology department and has lived with Parkinson's disease for five years. She has been at the university for 18 years. She has made a point of keeping the occupational health department fully informed of her condition, and with medication has been able to remain at work, with very little associated sickness absence. Her previous boss had been very supportive, but her new boss feels that her condition – which he understands is progressive – makes it dangerous for her to continue working in the laboratory and decides that she would be better off working in the library.

Jasmine has always enjoyed her job in the laboratory and feels that the proposed new role would leave her isolated from her colleagues. However, when her informal request to continue working in the laboratory is turned down, she lodges a grievance through the employer's grievance procedure. Three weeks after the grievance was made, the Human Resources manager informs Jasmine that since the decision to redeploy was made on grounds

of safety she would have to accept the transfer. The only alternative the university can offer is that Jasmine can apply for early medical retirement.

Jasmine is very upset by the decision, and eventually goes off sick with stress, which she blames on the work situation. She does not return to work and, after six months the employer writes to her saying that the six-month period of full paid sick leave has now ended and warns her that if she does not return to work she may be dismissed on grounds of not being capable for work.

What are the issues?

This is a complex case involving an employee who has continued to perform at work while coping with a progressive medical condition. A new manager has come into the department and has made assumptions about Jasmine's condition, her ability to manage it, and her safe working. The manager has also assumed that there are no measures that can be put into place to assist Jasmine.

Being told that she cannot continue with a job that she loves and is good at understandably upsets Jasmine. She rightly did not take a formal grievance straight away and hoped to resolve the issue informally. However, the Human Resources manager does not seem to have understood that just because decisions are made on grounds of 'safety' that they cannot or should not be challenged. The employer is then at risk of further discriminating against Jasmine because her employer has not looked at adjustments to

keep her in her job, and this has led to her being off sick. The continued failure to make adjustments and then penalising Jasmine for not being at work because of this is likely to lead to further discrimination.

What is the right approach?

It appears that a new manager has made an assumption about the health and safety implications of Jasmine's impairment without undertaking a proper assessment of the risks, and without considering what safeguards and adjustments can be put in place to address genuine safety issues. It is very likely that Jasmine would be protected under the Disability Discrimination Act, which means that the employer is under a duty to put in place reasonable adjustments.

The manager should have contacted the occupational health department, which has been kept fully informed by Jasmine about her condition. The occupational health department would have been able to make an informed assessment of Jasmine and advise the employer on her continued fitness for her current role, taking on board any possible adjustments, such as reallocating some of her duties to colleagues, flexible working, or considering if there are any technical solutions to enable her to work safely. The occupational health department may advise that the situation should be kept under review, given the progressive nature of Parkinson's disease.

Even if a risk assessment had concluded that it was no longer safe for Jasmine to continue with laboratory work, and that the health and safety risks could not be overcome, a reasonable adjustment would then have been to consider what other roles could be offered. The manager should not have simply moved Jasmine to a library post, when there may have been other suitable alternative employment.

Jasmine is now on long-term sickness absence, and attributes her stress-related illness to the pressures associated with her enforced redeployment. Occupational health advice should be sought to determine how best to facilitate a return to work. However, if the situation has indeed led to the stress-related illness, Jasmine might argue that it was the employer's failure to put in place reasonable adjustments to enable her to continue in her present role, or to explore properly what alternative employment might be suitable. An employee whose absence from work is caused by an employer's failure to put in place reasonable adjustments would be entitled to receive full pay for the period of her absence. An employment tribunal is likely to rule in her favour if she can show that she has been treated less favourably because of her disability.

The case highlights what can go wrong if employers make assumptions about the health and safety implications of an employee's impairment; the worst case would be for it to end up in an employment tribunal. The situation could have been avoided if a risk assessment had been carried out, with input from the occupational health team and, importantly, involving Jasmine in any discussions about suitable control measures and reasonable

adjustments. Jasmine will have been used to managing her condition, both at home and at work, and may well have invaluable insight in how best to ensure that she continues to contribute safely and productively at work. If her condition worsens, the employer would need to revisit the risk assessment and again take on board the views of the occupational health team and Jasmine herself.

Case 9 - Warehouse manager with balance problems - making reasonable adjustments

Key points

- A job applicant has an inner ear disorder that can affect her balance.
- The employer insists that she is 'risk assessed' and will require a medical examination.
- Pre-employment medicals are not standard practice at this firm.

Suzanne has a condition known as Ménière's disease, a disorder of the inner ear that can cause problems with balance, as well as tinnitus and dizziness. After disclosing her condition on a pre-employment health questionnaire she was told by the employer that it cannot confirm her appointment as a warehouse manager until she has been 'risk assessed', which involves her coming in for a medical. Suzanne's friend already works for this company and told her that he's never heard of anyone having a medical before joining the firm. Suzanne has been doing warehouse management work for another employer for more than 10 years and her condition has never been an issue.

What are the issues?

The employer has requested health information from the job applicant but has said that her appointment now depends on a risk assessment, which will involve a medical examination. They have asked her to attend for a medical assessment, which they do not

do for other recruits and this, of itself, is likely to be unlawful. It may be that the employer has concerns about Suzanne's safety, although they do not seem to have taken into account her previous work in the area, or talked with her about what adjustments and measures worked for her in her previous place of employment.

What is the right approach?

The employer should conduct a thorough risk assessment to ensure that it has identified the risks to the health and safety of all those who may be affected by its activities – including members of the public – and put in place measures to prevent or control those risks. The risk assessment should identify whether there may be additional risks to people with health conditions or impairments and, again, address these risks with appropriate control measures where possible.

The employer is in danger of subjecting Suzanne to unlawful discrimination by conducting a risk assessment that had no relevance to the safety of the job – the fact of having a disability is not grounds for assuming that there is a health and safety risk. The DDA Code of practice – employment and occupation³ makes clear that 'an employer should not subject a disabled person to a risk assessment if this is not merited by the particular circumstances of the case'.

³ The Code can be downloaded from the Equality and Human Rights Commission website www.equalityhumanrights.com.

With regard to Suzanne's pre-employment declaration, the occupational health professional responsible for assessing the health assessment forms will be able to advise the employer if any particular issues need to be addressed in relation to her condition. The occupational health nurse or physician may need to consult the employer or health and safety officer to find out more information on the nature of the job. Occupational health professionals should always seek consent from individuals before disclosing any confidential health details.

The occupational health professional may conclude that Suzanne's work is unlikely to raise any issues for her – assuming she is not required to work at height on raised platforms, for example. But even if some risks were identified, and these were not readily controlled by health and safety measures, the occupational health professional will be able to advise the employer on likely reasonable adjustments to address the remaining risks, such as reassigning certain parts of the job to other workers or allowing her to take time out when her condition worsens. Given Suzanne's long experience in this kind of work, the adjustments, if any, are likely to be fairly straightforward.

In the event that Susanne is turned down for the post because of her condition, and has good reason to believe that this is not justified given the nature of the job, she may be able to seek redress at an employment tribunal.

Case 10 - School caretaker is HIV positive – failure to make reasonable adjustments and possible harassment

Key points

- A school caretaker is HIV positive but his condition is well controlled by antiviral drug therapy.
- The employee's health condition becomes common knowledge, despite it being declared in confidence.
- The school faces concern from parents that their children are at risk.
- The Human Resources manager believes that the employee's condition would put first-aiders at risk if he were to have an accident and wants him redeployed to an office job.

Ash is a school caretaker and has been HIV-positive for at least five years. He is careful to follow his drug regimen and is asymptomatic. Although a 'confidential' health and safety risk assessment carried out by the occupational health and safety department found that his condition did not raise any health and safety issues at work – to himself, colleagues or to students – his HIV status is now common knowledge around the school. Some parents have complained to the head teacher that this puts their children's health at risk and there have been two incidents where Ash was verbally abused by parents, which caused him considerable distress. The Human Resources manager is now saying that, by being HIV-positive, Ash poses a risk to the school first-aiders if he has an accident at work; she recommends his removal from the caretaker's current job, with redeployment to a 'safe' office position.

What are the issues?

Firstly, the employer seems to have serious issues with regards to confidentiality of personal health information, breaches of this nature are likely to be unlawful under the Data Protection Act regardless of what the information actually was. The Data Protection Act 1998 also lays down rules on how employers should handle sensitive personal data, such as health and medical records, and an employer is likely to be in breach of the Act for failing to ensure that confidentiality is maintained. The employer has also breached a common law duty of confidentiality to its employee.

Some of the parents are making assumptions about Ash, and while the school has a duty to deal with real issues of concern for parents, it also has a duty to challenge assumptions about disabled employees. The abuse that Ash has suffered may amount to a hate crime, and the school may be required to report this to the police. The Human Resources manager has made assumptions about Ash being a risk to first-aiders, but has not explored what these issues are and how they should be managed.

What is the right approach?

Firstly, the employer needs to examine its processes for ensuring the proper handling of confidential medical information and should be discussing this with the occupational health and human

resources department to find out how the breach occurred and how similar events can be prevented.

With regards to the health and safety issues, the employer has already established that Ash's HIV infection poses no significant health and safety risks. The risk to qualified first aiders will have been assessed and they should have received training on minimising the risk of infection with blood-borne viruses.

It appears, however, that the Human Resources manager has ignored the competent risk assessment and is now treating Ash less favourably than his non-disabled colleagues – recommending that he be redeployed to a notionally 'safe' job. The employer should make absolutely clear to the Human Resources manager that its occupational health and safety department found Ash fit for work and did not highlight any health and safety concerns in the risk assessment. It should reassure Ash of his job and at the very least offer an apology.

The Disability Discrimination Act makes it unlawful to harass or victimise disabled employees or to allow other employees to do this. Anyone with HIV is automatically protected under the Disability Discrimination Act. The employer should investigate any complaints Ash raises regarding the verbal abuse from parents and do what it can to prevent any recurrence. Above all, it should be assessing any risks to Ash's mental health from the distress caused and make sure that appropriate support is in place.

The employer should be aware that by discriminating against Ash on grounds of his HIV, he might consider taking legal action at an employment tribunal. Ash could also take action because of the disclosure of his personal medical information without consent. Normally, he would first take up the matter with his employer, but if he is not satisfied with the outcome, he can make a complaint to the Information Commissioner*. Under the Data Protection Act 1998, the Commissioner can advise, and ultimately order, the school to address breaches in its handling of personal data. The Information Commissioner cannot award compensation to Ash; for that he would need to sue the employer in court.

* Further information on how to complain about breaches of the *Data Protection Act* is available from the Information Commissioner's Office. Its guidance document *The Data Protection Act 1998: When and how to complain*, is available from the ICO website, www.ico.gov.uk

Case 11 – Customer services manager with sight and mental health impairments – possible disability related discrimination and failure to make reasonable adjustments

Key points

- Andrew is visually impaired and has a mental health problem.
- Andrew's company is taken over by another firm and the new manager fears that Andrew's health problems may pose health and safety risks.

Andrew has a visual impairment. He also has depression, for which he is occasionally prescribed medication. He makes no secret of his mental health condition.

Andrew works for a small private company that sells clothing and accessories. He has worked there for a long time and is well respected by his colleagues. His role is to handle customer queries and complaints that come in by telephone, email or letter. Andrew also visits clients to resolve issues, as the company is keen to maintain a good reputation with local and regional businesses. Andrew's company is taken over by a much bigger firm and they have concerns about his health and safety. The new manager decides that a risk assessment should be done.

One of the managers at the larger company is also responsible for health and safety, and he carries out the risk assessment. His report concludes that Andrew should not do any more client visits or deal directly with customer complaints, saying that he may trip or fall while out on visits to unfamiliar premises and that handling

angry customers may worsen his mental health problems. The company tells Andrew that it is liable for Andrew's health and safety when he is working off-site and that it cannot afford to take any chances.

What are the issues?

The larger company is right to prioritise the health and safety of its new employees and make sure that safety management is effective and up to date at the smaller firm. When carrying out its risk assessments, it needs to consider the health and safety issues of those working off site. Has the company considered the health and safety of all its employees, or is it making assumptions about Andrew's impairment and singling him out for a risk assessment?

The company has a manager designated with responsibility for health and safety. There is no legal requirement to have a full-time qualified health and safety officer, but employers should ensure that anyone responsible for undertaking risk assessments is competent to do so and received appropriate training. When dealing with complex health and safety matters, it may be appropriate to bring in competent advice from a specialist health and safety firm. Larger employers will often employ specialist safety practitioners registered with the Institution of Occupational Safety and Health (IOSH). In any case, employers should keep staff and, if in post, safety representatives, informed of the risk-assessment process and of the results and control measures put in place.

Andrew's new manager appears to have made some assumptions about his visual impairment and the implications of his depression. Andrew has to manage his sight impairment all the time, and so will have found ways of ensuring his own safety in his daily life. Andrew may have a group of clients that he works with, who will be aware of his visual impairment and have found solutions for working with him.

It is not clear what triggers Andrew's mental health problem, or what impact it has on his work. Both the line manager and the manager responsible for the risk assessment would be wrong to conclude automatically that work pressure makes it worse.

What is the right approach?

The new manager might not have come across anyone who is sight impaired in the sort of role Andrew is undertaking, but should not have assumed that there were any problems. Nothing has happened to suggest that he has any difficulties with his work or that his safety has been compromised on client visits. Neither the line manager nor the manager responsible for health and safety should be making assumptions about the impact of handling customer complaints has on his mental health condition.

The manager should arrange for a general risk assessment of client-visit procedures and complaint handling to ensure that the right risk management measures are in place for all staff. This would be good practice for the new company taking over the firm, particularly if there were no up-to-date records of existing risk

assessments. It should ensure that the assessments are carried out by a competent person – for example, a Registered Safety Practitioner (IOSH maintains a list of competent safety practitioners).

The right approach for the company, therefore, would be to review client visits and investigate whether there had been any issues concerning the safety of its employees when working off site. It should analyse what measures it needs to put in place to support *all* employees who have to deal with complaints and difficult customers as part of their job.

The employer should involve staff – and safety representatives if they are in place – in the risk-assessment process, thus creating an opportunity for individuals, such as Andrew, to raise issues, for example if they have particular concerns over safety that they should be considered. It should be possible to raise such issues in confidence, particularly if they concern health conditions. A responsible employer would then address any special risks to particular individuals as part of the general risk-assessment process. Importantly, Andrew should not be singled out for a risk assessment just because of his impairments.

The employer should feed back to staff the results of the assessments and measures it is putting in place to prevent or control risks.

The individual risk-assessment report in this case does not appear to have been considered. The impact of practical measures to

ensure Andrew's safety when working off site; it has merely concluded that he is at risk simply because he is visually impaired. The risk assessor has also decided that handling customer complaints poses a risk to Andrew's mental health. This approach is wrong.

A health and safety practitioner would work with Andrew to find solutions to address safety concerns and, where necessary seek specialist advice, for example from an organisation such as the RNIB, on what adaptations might be available to ensure that Andrew could meet the essential requirements of the job in a safe way. If, after discussing with Andrew, there were concerns over the impact of work pressure on his depression, the health and safety manager might suggest a consultation with an occupational health practitioner so that Andrew can discuss his condition in confidence and consider possible solutions to help him at work. A risk assessment would not be based on the kind of assumptions made in this case.

In order to ensure that the employer continues to meet its duties under the Disability Discrimination Act, it should review any existing adjustments that Andrew currently has to make sure that they remain effective in enabling him to do all aspects of his job safely and effectively.

Case 12 – Teacher with lower back pain – making reasonable adjustments

Key points

- Teacher develops lower back pain.
- Concerns about carrying teaching equipment around the classroom and sitting down for long periods doing marking.

Allan has taught science at a secondary school for the past 10 years. Recently, he has developed lower back pain, which is made worse if he has to move or lift heavy objects and sit down for long periods. He has also noticed that his symptoms are much worse in term time.

Allan has to use and move equipment for his job, and has to do a lot of marking and lesson preparation, which cannot be done by another teacher. He is worried that the school may think he cannot carry on his teaching role and that he will have to leave a job he loves.

All members of staff are given a laptop computer to do their lesson preparation at home. Many of the science lessons are delivered using an interactive whiteboard.

What are the issues?

Lower back problems are the most common health conditions amongst the working population, but back pain is still not well understood by many employers. Chronic back pain can be a

disability protected under the Disability Discrimination Act, if it affects their normal day-to-day activities. The Act generally defines disability not in terms of someone's ability to function at work, or in terms of specific clinical conditions, but in the effect it has on daily activities, such as climbing stairs, listening to the radio, taking a shower, social interaction or going to the shops.

Alan is clearly worried about how his condition will affect his career – and this anxiety could make his condition worse. He fears that the back pain might actually be caused by his work.

The school must assess the situation, consider what its legal obligations are as well as see what it can do to ensure that Allan's condition does not get worse, which could risk him being unable to work at all.

What is the right approach?

Allan works for a good employer, his school prides itself on how well it supports its staff in their teaching roles, and this includes disabled staff. When Allan speaks to the head teacher, she says that she is aware that back pain can be a serious issue and that the school will do what it can to help. She says that, in practice, she does not mind whether or not Allan would be covered by the Disability Discrimination Act, because she values him as a staff member and wants to keep him in his job. She suggests that they first seek advice from the local authority occupational health department.

Allan is referred to an occupational health practitioner who advises that he should not carry or move heavy items but that he should try to remain as active as possible. Remaining seated for prolonged periods is likely to exacerbate the condition. The practitioner gives Allan a booklet called *The back book*^{*}, which contains some general advice on coping with his condition and says that she will refer him for a short course of physiotherapy to help him with appropriate exercises and in coping with his condition. The practitioner will also write to Allan's GP outlining his advice.

The practitioner sends a report to the school head teacher, after discussing the contents of the report with Allan. She recommends that the school's health and safety officer assesses ways to reduce the manual handling component of the job and advises that Allan should not be required to remain seated for long periods at work. She advises that the school also considers ways to minimise any ergonomic risks associated with using a laptop. Allan currently has to look down at a small screen while typing – the associated posture is not helping, she says. The practitioner is unable to say whether Allan's work is the cause of his back pain – but agrees that, in the least, it is likely to be making it worst.

* *The back book* is available from The Stationery Office,
www.tsoshop.co.uk

The head arranges for the school's health and safety officer to meet with Alan and to look at his job and ways to reduce manual handling and other ergonomic risks. The officer produces an initial report and a meeting is arranged for the head teacher, the health and safety officer, the trade union safety representative and Allan to discuss the way forward. They agree a number of actions:

- If any equipment needs moving around at the start of the science lesson, the laboratory assistant will do this. The health and safety officer will make sure that the assistant's manual handling training is up to date.
- The head teacher suggests that they may be able to move some of Allan's classes so that the room is already set up for him to teach; she will investigate the current room allocations and timetables and make the necessary changes as soon as practicable.
- It is agreed that Allan will be provided with a new chair for his main classroom. The safety officer will arrange for Allan to try out a number of possible chairs so that one can be chosen that provides the right ergonomic support and comfort. He will be shown how to adjust it to the right height, tilt and armrest level. The school will also purchase a desktop PC for Alan to use at home where most of the lesson preparation takes place. Use of the laptop will be confined to when Allan uses the interactive whiteboard during lessons. It will also provide him with a suitable adjustable chair and desk that he can use at home.

- The head of the science department will be asked to ascertain if it would be possible to share more teaching resources between the science teachers, to reduce the amount of computer-based preparation Allan needs to do.
- Allan agrees that he will try to remain as active as possible, and following the advice of the practitioner will try to deliver as much of the lesson as possible while standing up.
- The head teacher says that they will review the situation regularly to ensure that things are going well.

The school has taken a responsible approach to Allan's back condition and has started to put in place measures to support him at work and help prevent the situation worsening. Allan may well be covered by the Disability Discrimination Act, but as the head teacher points out they want to do what they can regardless of any legal obligations under the Act. It should be noted, however, that the employer does have obligations to Allan under health and safety laws, including the Management of Health and Safety at Work Regulations, the Manual Handling Operations Regulations and the Health and Safety (Display Screen Equipment) Regulations. Purchasing appropriate equipment, such as ergonomic seating and, in this case a desktop PC rather than a laptop, along with training in how to use the equipment safely, would be appropriate responses to the risk-assessment process. The costs of fulfilling these duties are, in any case, small compared with the potential huge costs associated with losing an experienced teacher. Allan has agreed to do what he can to ensure that his condition does not

get worse, taking on the advice of the occupational practitioner to remain active, avoid prolonged seating and go for physiotherapy.

The solutions to this case study are practical and have involved appropriate expert advice. The head teacher and Allan have been fully involved in finding a way forward, working with the health and safety officer and safety representative and seeking expert advice from the occupational practitioner. Although there are legal obligations to be addressed, the primary aim was to ensure that Allan can continue to function at work without exacerbating his back condition.

Frequently Asked Questions

Employers

The following questions are typical of those raised by employers in trying to fulfil their obligations under health and safety as well as disability law.

1. If a risk is identified that I think cannot be managed through reasonable adjustments, what should I do?

In considering health and safety risks to disabled employees, you must first ensure that you have fulfilled your obligations under health and safety laws to manage risks to all staff; ideally by removing the risk altogether or by altering the way the work is done to minimise exposure.

If there are remaining risks that arise from a disabled employee's impairment, it is important to ensure that you have involved the disabled person fully in the risk assessment process, to ensure that you have not made assumptions about them and how their disability may affect their ability to do their job safely.

Under health and safety law, you are not required to remove every risk from every job, but to ensure that work is done as safely as possible. Some jobs may carry a slightly raised risk for a disabled person, but if you have fulfilled your obligations under health and safety law to eliminate or control risks at work, and done

everything you can to support the disabled employee, it would not, in general, be a reasonable response to remove the individual from the job. Many disabled people have developed ways of managing the challenges presented by their impairment and some commonsense needs to be applied in the workplace to ensure that disabled people are not denied access to employment because of slight and largely controllable risks to health and safety.

Where the risk assessment makes clear that it would not be safe for the person to continue in their current job, particularly because of the risks to the health and safety of others, and where these risks cannot be controlled by health and safety measures or by reasonable adjustments, it may be appropriate to consider redeployment. The courts have established that employers can transfer a disabled employee to another job without a competitive process, even to higher-grade positions, provided that the individual is able to do that job*.

* Archibald v Fife Council. House of Lords, 1 July 2004 [2004] IRLR 651.

2. What should an employer do if they have made changes to the workplace, and have also made reasonable adjustments but there is still some risk to the disabled person in doing their job?

Employers must first establish that they have put in place all that is necessary to manage the health and safety of all staff and ensured that the disabled employee is provided with any reasonable

adjustments to enable him or her to work effectively. However, there may be some residual risk to the disabled person him/herself, which do not pose a risk to others. The courts have made it clear that generally speaking an employer should not act 'paternalistically' and remove the disabled person from the work. To a large extent, if the employer has done all they can to control the risks and the disabled person is competent and aware of these risks, it would be reasonable to allow the individual to choose to remain in work. Disabled people face barriers daily and this clearly gives them lots of experience and expertise in overcoming these barriers. It would not be justifiable to deny them access to employment because work also posed some higher risks. That said, the courts have also made clear that where there is a serious risk of death – they use the example of a person with epilepsy not being suitable for work as a 'spiderman' window cleaner on high-rise buildings – it may be justifiable to remove the person from such work. In such circumstances, the employer should look at modifying the work so that high-risk situations are avoided, or if necessary at redeployment.

3. When should a risk assessment be done?

In general, risk assessments should be carried out when there is a significant change to the working environment or working practices. A risk assessment for a disabled employee should only be done if general health and safety management measures would still mean that the disabled person was placed at an unacceptably high level of risk in their job. The focus should always be on the

work environment and activities as being potentially 'risky' rather than the disabled person being 'a risk'.

4. Do fire regulations preclude wheelchair users from using, say, the sixth floor of our office if we haven't got a lift?

There are no regulations automatically precluding a disabled person from using any part of a building and indeed to do so just because a person uses a wheelchair may amount to unlawful discrimination. The Regulatory Reform (Fire Safety) Order 2005 places the responsibility on building managers to undertake fire risk assessments and to put in place measures to ensure the safety of the building and those using the building, including disabled people. It is important to discuss with the disabled person what the options might be to ensure their safe exit from the building in the event of a fire. This might include a number of measures, such as the use of refuges as **temporary** place of safety⁴, the use of evacuation chairs (provided that the disabled staff member is happy to use these and that there are sufficient trained staff available to assist), or the disabled person may wish to self-evacuate. The last option would depend upon their level of

⁴ Volume 2 of the Approved Document B of the Building Regulations 2000 (fire safety) states in paragraph 4.7 that, 'Refuges are relatively safe waiting areas for short periods. They are not areas where disabled people should be left alone indefinitely until rescued by the fire and rescue service or until the fire is extinguished.'

disability, but some wheelchair users can walk a little or even move down stairs in 'sitting position' to effect an escape.

5. I am worried about asking other people to assist a disabled colleague out of his car or up the stairs to the office in case they injure themselves. What can I do?

Firstly, you may be making a misguided and unjustified assumption. The provision of assistance for a disabled colleague in this situation may be seen as a reasonable adjustment. To comply with health and safety responsibilities, a risk assessment in accordance with the Management of Health and Safety at Work Regulations and the Manual Handling Operations Regulations should identify what is necessary to avoid injury to yourselves or to your disabled colleague. Measures might include training staff in lifting techniques, provision of mechanical aids or non-involvement of any colleagues at special risks.

Normally, such measures would be regarded as reasonable adjustments or as reasonably practicable safeguards so, unless there are exceptional circumstances, you should try to ensure that assistance can be provided to the disabled person. You may be able to get funding through the Access to Work scheme for a personal assistant or other aids to enable the disabled person to access their workplace.

6. One of my employees has mental health problems but has been refusing to take his medication. I am worried about the

safety of my other staff as well as this employee. What should I do?

Medication prescribed for mental health conditions can often have significant side effects, which may be making the person's life very difficult. Often a person has to try several medication regimes before they find one that they can live with. You should talk to the employee about your concerns for their safety and the consequences of them not taking their medication, but you understand that they may have a good reason for not wanting to take it. You could suggest that they talk to their GP again about the issue, and discuss what could be done. If you have legitimate concerns about the safety of your staff, or your employee's continued fitness for work, you should refer the employee to an occupational health nurse or occupational physician for further assessment. The occupational health practitioner will be able to discuss concerns that the individual has, in strict confidence, and may wish to contact the individual's GP with their recommendations. You should discuss with the person whether there is anything else you could do to help them in their job, but you should make it clear that if any problems result out of the person not taking their medication, you may have to take disciplinary proceedings against them. You must only do this, if you have made all reasonable adjustments you could, but the problems persisted.

Disabled people

The following examples show typical questions raised by disabled people in relation to health and safety at work, with advice on how these often-difficult situations should be addressed.

1. I have difficulty with reading and my employer says that I am endangering others because I cannot understand the safety notices around the site. I am worried about losing my job.

Under health and safety law, the employer has a duty to give you suitable and sufficient information and training in order that you and your colleagues can work safely – this duty remains regardless of your reading ability. The employer should make the information available to you in a form that you can understand – perhaps with a specially tailored talk or a safety video, and using pictures to illustrate hazards. You are likely to be protected by the Disability Discrimination Act and the employer should consider ‘reasonable adjustments’ to your job to enable you to work safely. These could include allocating some of your duties to a colleague or arranging for a ‘buddy’ to help you with the safety information. If you are a member of a disability organisation or trade union ask them for more advice.

2. I have been offered a job as a quality control technician in a factory that manufactures pesticides, but the offer is subject to completing a satisfactory health questionnaire. I stated on the health questionnaire that I suffer from asthma. The employer has now said that they need to conduct a risk assessment to determine whether they can give me the job

**and wants my consent to write to my GP for a medical report.
Is this fair?**

Consideration of medical information at pre-employment – such as a doctor’s report or the answers to a pre-employment health questionnaire – is generally done in order to establish if a job applicant is unfit for work, fit, or fit with adjustments to the job. For most jobs it is, in practice, rare for an employer to reject a job applicant outright on grounds of a pre-employment health assessment).

The purpose of the risk assessment, however, should not be to determine if you are fit or unfit for the work, but should be carried out to assess the risks associated with the job and whether there are any additional risks that need to be taken on board in relation to a health condition or impairment. If risks are identified, the employer will need to consider what action to take to control them, such as modifying the work, equipment or work environment.

In practice, the employer should be assessing risks to all staff and any airborne contamination that could be a risk to individuals with asthma are likely to be hazardous to all members of staff; employers have a legal duty to prevent exposure to hazardous substances, or control them adequately. It should also have in place health surveillance, as required by the Control of Hazardous Substances to Health Regulations (or ‘COSHH’). Trying to control health risks by excluding people with respiratory conditions, such as atopic asthma, is unlikely to achieve the aim of ensuring health and safety since people tend to develop work-related health

conditions because of their exposure to substances at work, not because of any pre-existing condition.

The employer might consider cancelling its job offer if there were significant, life-threatening, risks to your health that could not be prevented or adequately controlled by preventive or protective measures, and after considering reasonable adjustments, such as assigning some job tasks to another member of staff. However, it would need to bear in mind that if you were able to show at an employment tribunal that you had been treated less favourably because of your disability, the onus would be on the employer to justify its decisions.

In giving your consent for a GP report, you should ensure that the GP records are handled confidentially and only by a healthcare professional competent to assess the risks – such as an occupational health nurse or doctor.

3. My son has a learning disability. He has been working in the local supermarket stacking shelves for five years since leaving school. He has a good attendance record, has never had an accident at work and his work has been praised. However, a new store manager has told him that he will have to go for a risk assessment because he might be a danger to himself or others. I've asked his colleagues and no one else has been told that they will be assessed. My son is very distressed and is worried that he might lose his job.

Employers should be carrying out health and safety risk assessments at regular intervals, especially when new work or equipment is brought in. However, these should apply to everyone and singling out your son in this way is unlikely to be warranted, and indeed may amount to 'direct discrimination' under the Disability Discrimination Act, which cannot be justified. You should seek advice from the Equality and Human Rights Commission (EHRC) or from the trade union, if your son is a member. Specialist organisation supporting people with learning difficulties may also be able to provide further guidance.

4. I have been out of work with mental illness but my condition is now entirely controlled by medication and my treating psychiatrist sees no reason why I should not return to work. I should like to return to my previous career as a social worker but I know that if I divulge my condition on a pre-employment health questionnaire I will be told that it is not safe for me to work in such a highly stressful job.

If you are asked to complete a pre-employment health questionnaire or attend a medical you should not withhold information about your condition, particularly as it may be very important in protecting your health and safety at work. You should seek written assurance from the employer that the information will be handled confidentially and by a health professional, ideally an occupational health physician or nurse (the health questionnaire may in fact be marked 'confidential to the occupational health department').

First and foremost, the employer must assess the risks to health and safety for all of its employees – rather than singling out those with particular health conditions – and put in place measures to ensure that identified risks are either prevented as far as reasonably practicable or adequately controlled. It must not assume that anyone with a previous history of mental ill health would automatically be at risk because of the nature of the work. However, it may wish to take advice from its occupational health department on whether anyone with a declared health condition is under any special risk owing to the nature of the work. The occupational health practitioner is likely to consider whether your previous condition was triggered by work stress or was entirely unrelated to work and whether the job for which you are applying for is likely to create unmanageable risks to your health because of your condition.

You are likely to be protected by the Disability Discrimination Act and an employer must consider reasonable adjustments that can enable you to meet the essential requirements of your job, including working safely. Possible reasonable adjustments that might be relevant for you in this kind of work could include enabling you to work flexible hours, allocating some duties of the job to another person and providing additional supervisory support – you and the employer may be able to suggest others. If you do not inform a prospective employer of your condition, they will not be able to put such adjustments in place. If the employer has an occupational health department it may be possible to discuss the details of your condition with the doctor and ask that these be kept

confidential, with only the details of any appropriate reasonable adjustments discussed with the employer.

If you do feel that you have been discriminated against by an employer you can consider lodging a complaint and possible legal action but you will need to take advice, perhaps from a trade union or from the Equality and Human Rights Commission (EHRC) before taking this forward.

5. I am a hairdresser and have developed an allergy to latex gloves. My boss says that because it only affects me at work I am not covered by the Disability Discrimination Act and that, therefore, they have no obligation to do anything for me. She has told me I should buy my own non-latex gloves if I can't use the ones that the salon provides.

Your boss is not qualified to say whether or not you are covered by the Disability Discrimination Act; this will depend on whether your condition has or is likely to last more than a year and has a substantial impact on your day-to-day activities (though it is true that the Act does not define disability in terms of your ability to carry out work tasks). The important point here, though, is that your employer has a duty under health and safety law to undertake a risk assessment and to put in place measures to prevent or adequately control risks to your health and safety.

A risk assessment will confirm the risks but the employer should then consider what measures they can put in place to manage those risks. These would include finding alternative non-allergenic

gloves as well as putting in place regular health surveillance. There is a range of gloves that would reduce the risk, including nitrile gloves and low-protein non-powdered latex gloves (some people only react to the powdered gloves, for example) and you could check the Health and Safety Executive's advice on preventing and managing latex allergy. (www.hse.gov.uk/latex/index.htm) Under the Health and Safety at Work Act, it would be unlawful for an employer to charge its employees for personal protective equipment – in other words, your employer must pay for the gloves, even if they are more expensive than the standard latex ones. The employer should also arrange for you to be seen by an occupational health doctor to confirm the cause of your allergy and to ensure that it has not been brought on by exposure to other agents in your work.

Practical Help

acas (Advisory, Conciliation and Arbitration Service)

<http://www.acas.org.uk>

Helpline: 08457 47 47 47

Textphone: 08456 06 16 00

Equality and Human Rights Commission

www.equalityhumanrights.com

info@equalityhumanrights.com

Equality and Human Rights Commission, Freepost RRLG-GHUX-
CTR, Arndale House, Arndale Centre, Manchester M4 3EQ

Telephone: 0845 604 6610

Textphone: 0845 604 6620

Wales:

Equality and Human Rights Commission Helpline Wales
Freepost RRLR-UEYB-UYZL, 1st Floor, 3 Callaghan Square,
Cardiff CF10 5BT

Telephone: 0845 604 8810

Textphone: 0845 604 8820

Scotland:

Equality and Human Rights Commission Helpline Scotland

Freepost RRLG-GYLB-UJTA, Optima Building, 58 Robertson Street, Glasgow G2 8DU

Telephone: 0845 604 5510

Textphone: 0845 604 5520

Health and Safety Executive

www.hse.gov.uk

HSE infoline: 0845 345 0055

HSE disability information: www.hse.gov.uk/disability/

HSE risk assessment guide: www.hse.gov.uk/risk/fivesteps.htm

Institution of Occupational Safety and Health (IOSH)

enquiries@iosh.co.uk

www.iosh.co.uk

The Information Commissioner's Office

www.ico.gov.uk

Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

ICO helpline: 08456 30 60 60 or 01625 54 57 45

Scotland Office:

28 Thistle Street, Edinburgh, EH2 1EN

Telephone: 0131 225 6341

email: scotland@ico.gsi.gov.uk

Wales Office:

Cambrian Buildings, Mount Stuart Square, Cardiff, CF10 5FL

Telephone: 029 2044 8044

email: wales@ico.gsi.gov.uk

Northern Ireland Office:

Room 101, Regus House, 33 Clarendon Dock, Laganside, Belfast,

BT1 3BG, Northern Ireland

Telephone: 028 9051 1270

email: ni@ico.gsi.gov.uk

The Ergonomics Society

<http://www.ergonomics.org.uk/>

The Ergonomics Society, Elms Court, Elms Grove, Loughborough

LE11 1RG, UK

Telephone: 01509 234904

Email: ergsoc@ergonomics.org.uk

The At Work Partnership

(Publications and employer training)

www.atworkpartnership.co.uk

The At Work Partnership Ltd, 42 Lytton Road, New Barnet, Herts

EN5 5BY

Telephone: 0845 017 6986

Email: info@atworkpartnership.co.uk