

Representing and supporting members with mental health problems at work

Guidance for trade union representatives



Disability Forward Limited is proud to have worked with the TUC to produce this guidance document. We hope that workplace representatives will find it easy to understand and easy to use.



Foreword

Hundreds of thousands of people at work face ignorance, prejudice and stigma because of mental health problems. Even more – who are both able and willing to work – cannot get a job if they have or have had a mental health problem because of discrimination by employers. This goes on even though it is illegal under the Disability Discrimination Act.

Dealing with discrimination effectively means challenging the prejudices that underpin it. In workplaces trade union reps tackle the problems faced by their members every day not by turning to the law, but by negotiation.

This new guidance has been published to help trade union reps and officials provide a good service to members with mental health problems. It aims to equip reps in workplaces with the information they need to deal as well with mental health issues as they do with the other issues that crop up on daily basis.

If in the process of resolving mental health issues in the workplace, reps can persuade managers and employers to adopt a less prejudiced attitude to mental health in general, they can also be part of changing the overall picture for the better.



A handwritten signature in black ink that reads "Brendan Barber". The signature is written in a cursive style.

Brendan Barber,
General Secretary, TUC

Summary

People with mental health problems experience some of the most severe disability discrimination in the workplace. There is a lot of advice for employers on how to ensure that their policies and practices are more inclusive for recruits and employees with mental health problems. However, there is less guidance specifically tailored to trade union reps.

This booklet enables reps to understand the Disability Discrimination Act (DDA) as it applies to people with mental health problems, and provides straightforward advice and guidance for workplace reps on how to support members with mental health problems and tackle discrimination in the workplace.

The Disability Rights Commission (DRC) ceased to exist in 2007, and has become part of the Equality and Human Rights Commission (EHRC). However, this guidance document has been based, in part, on a document co-produced by the TUC, the Sainsbury Centre for Mental Health, MINDFUL EMPLOYER and the DRC. This booklet is published by the TUC, but the Equality and Human Rights Commission has been pleased to endorse it. It has been written for the TUC by Michelle Valentine, Director, Disability Forward Limited, www.disabilityfwd.co.uk

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Section 1

Introduction

Good working lives are a positive thing. They offer a way for everyone to feel valued, to reach their full potential, and to develop and maintain valuable social networks. This is equally true for people with mental health problems, who with the right support and adjustments can enjoy the benefits of work along with everyone else.

This booklet has been produced to give trade union reps the information and guidance they need to help members with mental health problems keep their jobs and develop in their careers.

This guidance uses the term 'union reps', to cover a range of roles, including shop steward, union official, lay workplace rep and other types of rep. The term could also be applied to members of disabled staff networks who act as representatives for other group members.

This booklet uses the term 'mental health problems', as this is a term most people will understand and find easy to use. However, be aware that some people may not be happy with the term, and reps should therefore talk with their members about what terminology they would prefer to use.

Reps should also be aware that other diversity issues may have an impact on someone's mental health. For example, a person may have another disability, or they may face additional barriers because of, for example, their gender identity or sexual orientation.

Many people experience mental health problems at some point in their lives (see Appendix 3), and most reps will know somebody with a common mental health problem. Therefore, knowing how to make adjustments in the workplace for people with these health problems can benefit a wide range of union members. Unions can also help employers not to lose valuable and skilled staff.

There is an overview of mental health problems in Appendix 4.



Section 2

How to tackle some common workplace problems

The purpose of this section is to explore common areas of difficulty faced by reps dealing with members who have mental health problems. It explains, through examples, how it is possible to resolve issues. Finding solutions will benefit not just the member in question – but also employers.

■ Recruitment

Unions may have little or no influence on recruitment policies or processes. But where the employer has devised policies that acknowledge disability (they may use the ‘two ticks’ symbol, for example), unions are in a good position to advise employers to:

- Actively encourage job applications from people with mental health problems.
- Ensure that medical checks are either required for every applicant or not at all – employers should not medically check only those they think may be disabled as this may amount to unlawful discrimination.
- Ensure that medical checks are only used to find out if people need reasonable adjustments at work.

Further advice on recruitment issues can be obtained from organisations listed in Appendix 1.

In a rep’s day-to-day work, however, there are four key areas that members with mental health problems may need guidance with:

- the disclosure of a mental health problem
- reasonable adjustments in the workplace
- sickness absence, and
- health and safety (H&S) issues.

■ Disclosure of a mental health problem

People with mental health problems may be reluctant to disclose their impairment because they fear that it would impact negatively on their chances of getting a job, or keeping a job once they are employed.

Disabled people are not under a legal obligation to disclose their disability or long-term health condition, although if they choose not to do so this may affect their ability to assert their legal rights under the Disability Discrimination Act (DDA). (See paragraphs 7.27 and 7.28 of the DRC's Statutory Code of Practice on Employment and Occupation available from the Equality and Human Rights Commission website www.equalityhumanrights.com)

Decisions over disclosure are deeply personal, but unions should encourage members to disclose their mental health problem to the employer, as the onus is then on the employer to make reasonable adjustments.

An employee may disclose a mental health problem to a number of people, including:

- a trade union rep
- a colleague
- occupational health/medical advisers acting for the employer
- a line manager
- during anonymous disability monitoring exercises.

Question

■ As a union rep what should I do if a member tells me that they are feeling depressed or more stressed than usual?

1. Be aware that the member may not recognise that they have a mental health problem. They may simply say that they feel stressed or depressed, that they are losing sleep or experiencing mood swings, or have a number of other problems. It may also be that the person is reacting to a recent event, such as the loss of a loved one or the break up of a long-term relationship.
2. Reassure the member that you and the union will support the member as much as you can.
3. Give the person time to explain things to you in their own way; don't feel that you need to provide instant solutions – sometimes people just need to talk.
4. Try to be honest. If you don't know what to say to the person or how to respond to them then don't pretend you do. Tell them you want to support them and that you will work together to do this, and that you may need to find out more information to help both of you.
5. Provide the member with some information about the sort of adjustments that might help them, and help them to decide how they would like you to work with them to discuss the issue with the employer if appropriate.

A good starting point when a member asks for help is for reps to give them some basic information about their rights under the DDA (you can find this on the TUC's website, www.tuc.org.uk). It may not be clear to the rep whether the member is covered by the DDA, but the TUC advises unions to assume that a person may have rights under the DDA, because then the discussion can move onto what reasonable adjustments might support the individual at work.

The rep might also ask the member whether they would like signposts to other helpful organisations. See the list in Appendix 1 for contacts, or suggest they use their employee assistance programme (if the employer has one).

Unions need to ensure that reps have someone else in the union who they can talk to about how to help their member most effectively. Unions should remember that some reps may find that working with a member with mental health problems is difficult for them, so they should provide reps with the right support and advice.



Reasonable adjustments

The DDA gives disabled people the right to ask for 'reasonable adjustments' in their workplace.

Reasonable adjustments are defined in other guidance available from the TUC or the Equality and Human Rights Commission (see Appendix 1), and deciding what is 'reasonable' can be tricky. Here are some examples of reasonable adjustments that have helped members:

A

■ Allowing the employee to adjust their working hours

A member of PCS union had a depressive illness. She took medication in the mornings that did not take effect for a few hours. This, combined with the fact that she did not sleep well at night, meant that she was often not capable of getting to work before usual work hours began. She would call in sick and this led to the employer enacting attendance management procedures.

Her rep worked with the employer to agree that the member could arrive at the office later, once the medication had started working, and that she could work later in the evenings to make up the time during the period of her illness. This meant that she could complete her work on time, improve her sickness record and lessen the pressures on her.

B

■ Allowing the person to take more frequent breaks than other people

A PCS member who was also a union rep, was diagnosed with anxiety disorder, which was specifically recognised as work-related (linked to some difficult cases he had to deal with). The member was signed off work for a total of four months, placed on sedatives and received counselling. The member's GP was wary of him returning to work if he had to work on difficult cases again, but the member wanted to carry on with his union work.



It was agreed that the member would return to work on a part-time basis. It was also agreed that if the member felt stressed at any point, he was to leave the situation and go for a walk, off site, for an hour if necessary. Then on his return, he was to talk to a nominated person in HR, who would discuss with him what the problem was and look into it on the member's behalf. The member only used the provision once, but the security of knowing that he could do it if he needed to enabled him to cope much better with difficult work situations.

C

■ Providing a workplace 'buddy'

A member of TGWU had a sight impairment and a history of depression. She found that when her workplace was restructured, she was given tasks to do that were difficult to complete without the right reasonable adjustments for her eyesight. It took a long time for the adjustments to be put into place, and all the while work was piling up. She became stressed and depressed and began to take more and more time off.

She spoke to her rep while she was off work because she wanted to reassure them that with the right adjustments and supportive colleagues she was more than capable of adjusting to the new working patterns and demands.

The rep arranged for the adjustments she needed to be put in place quickly and agreed a period of review with the employer so that the member had time to get used to the adjustments and new working practices. The rep also arranged that a colleague who the member felt comfortable with would act as an informal 'buddy'. If the member felt things were getting difficult, the buddy would provide friendly support, and would also raise issues with the union if this was appropriate. The buddy had a short training session before taking up the role so that they felt confident about how it would work.

Back in
30 mins

D

■ Changing the person's work duties

A member of UNISON who had a mental health problem found it difficult to deal with members of the public. His job role was mostly desk-based clerical work, but he was increasingly asked to cover the reception desk because of staff shortages. This caused him anxiety, which had a knock-on effect on his confidence to perform the rest of his role.

His rep talked to the employer and said that they understood that the situation was difficult, but that they were concerned about their member.

The union agreed with the employer that reception duties would be transferred to another member of staff. To ensure a fair workload on other staff, and to ensure that the member did not feel that they were letting anyone down or being difficult, the rep agreed that the member took on some of the desk-based admin duties that the other employee would fall behind on if they did more reception work. Some of the reassigned tasks were new to the member, so the rep made sure that their member was given some support and training to develop his confidence in dealing with the new work.

E

■ Altering supervision or appraisal methods

A union member with a history of depression worked for an employer that required all employees to meet set targets each month. A new set of targets was introduced, and everyone found things more difficult. The member felt very pressured by the targets, especially as they also had problems at home. They became fearful of telling the employer that they were worried in case they were seen as being incompetent. They were also afraid of talking to their colleagues as they thought they would be seen as weak because everyone had to meet the targets.





The rep suggested that they arrange a meeting with the employer before the member was due for their monthly assessment.

The rep, with the agreement of the member, agreed with the employer that:

- a.** the member would be allowed a longer period of time to adjust to the new target regime
- b.** if the member still found things difficult the employer would look at whether the member's work targets could be adjusted
- c.** the member could raise concerns at any time, rather than waiting for their monthly assessment like other staff.

F

■ Redeploying the person into a different role

A member of PCS developed a serious psychological problem following an accident. On his return to work the type of work he had been doing for a long time was centralised in another office. He was given new duties, but struggled from the outset and instead of providing the support he needed, the employer invoked performance management procedures. This resulted in the member taking more time off.

The union rep established that the member wanted a change of job, and researched suitable jobs that would involve minimal training and as few aspects of unknown work as possible. The most suitable one was in another office. They then convened a case conference meeting with the line manager and successfully negotiated a move for the member as a reasonable adjustment.

The rep accompanied the member to their occupational health referral and influenced the contents of the report so that it endorsed the move of office/role as a positive move, and that it should be made permanent.

As a result the member now enjoys his job, has taken very little sick leave and has not experienced a recurrence of his psychological problems.

A legal case

■ Talbot vs WAGN Railways

(Appeal no. UKEAT/0770/04/DA)

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

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

Sickness absence management

Sickness absence management procedures should be flexible. Ideally they should:

a. Incorporate a provision for allowing people to take disability leave.

Disability leave allows an employee to plan with the employer for any regular absences, such as needing to attend counselling appointments that can only be provided by the NHS during work hours.

b. Record absence clearly related to a person's disability separately from other sickness absence

Reps should encourage employers to discount disability-related absence from the person's overall sickness record. If the employee is likely to be absent for a long time, even if the absence is disability-related, it may be lawful for the employer to invoke attendance management procedures, but only if they have made *every effort* to make reasonable adjustments to enable the person to return to work.



Return to work management

This can be a difficult process for everyone, but there are some good practice approaches that can help.

■ Keeping in contact with an employee

A member of PCS had been off sick for a couple of months. The employer was wary of contacting them in case the person felt pressured to come back to work when they were not ready.

The union rep advised the employer that they could make contact with the member to find out how they were, and to update them on things at work. The rep also suggested that the employer might want to reassure the member that they wanted to keep the person in their job and would work with their rep to make this happen.

The rep also discussed a possible return-to-work strategy with the employer and suggested some reasonable adjustments that could help their member return to work, such as:

- a phased return
- buddy support from another staff member
- time off to attend counselling.

The rep then had an informal chat with their member so that they felt wanted and supported, and reassured them that there were things that could be put into place to help them return to work.

A member of UNISON had been absent, and had submitted a letter from their GP stating that they had 'anxiety' and should not be at work. The member told their rep what the GP had said.

The rep advised their member that the GP may not be aware of an employer's duty to make reasonable adjustments, and what things employers can do to help people back to work.

The rep suggested that they keep in touch with the employee, and that they would investigate some reasonable adjustments that could help the member return to work.

■ Tackling barriers to return to work

A member of USDAW worked as a regional security manager. He had responsibility for managing security staff in several stores as well as working as a security guard in one of the stores himself. He had experienced episodes of depression when he was younger but had been free of them for many years. He approached his union for advice after a recurrence which led to him being off sick for six months.

His sick notes confirmed a diagnosis of depression/anxiety and stress. He explained that he believed the reason for the recurrence of his depressive illness was the fact that he was being bullied by his line manager. The bullying had been going on for some time but he hadn't felt able to raise this with anyone at work before going off sick, nor did he feel able to return to work whilst that same manager was in post.

The rep decided to submit a grievance and an investigation was carried out. As a result the manager left the organisation. This meant the member was able to consider returning to work. He returned to work part-time for the first fortnight, and then started full-time. His employer also made an 'ex gratia' payment to him; a lump sum payment that was the difference between statutory sick pay (SSP) and his average weekly contractual earnings for the eight months he was off sick.



Health and safety issues

Employers owe a duty of care both to the employee and to other workers and members of the public, but this should not be used as a reason to stop a person with mental health problems doing their job.

Employers must not use health and safety (H&S) issues as a false excuse for discriminating against an employee with mental health problems. There is more advice on H&S issues and disability at work from the Health and Safety Executive, see Appendix 1.

There is a legal requirement on employers to conduct a comprehensive risk assessment of the workplace. If any workers either introduce additional risks, or are found to be at additional risk themselves, employers must take this into account. Indeed H&S regulations state that the needs of pregnant women and young workers must be specifically looked at.

In most cases employees with a mental health problem pose no additional risk to either themselves or others, so it is important unions understand that just because a person has a mental health problem they should not assume that a risk assessment must be undertaken. This is particularly true if people without a mental health problem would not be subject to a risk assessment in the same situation.

Often general measures aimed at supporting all staff will be equally effective for people with mental health problems (by allowing for debriefs after dealing with a difficult client or situation at work, for example).

If a specific risk assessment is carried out it must:

- fully involve the employee with mental health problems
- be clear about what it is intending to achieve
- be conducted by someone who understands both H&S requirements and the DDA, and the duty to make reasonable adjustments
- not make assumptions about the effects of the person's condition on their ability to do their job
- only be undertaken to identify what reasonable adjustments can be made to enable a person to do their job

- only be conducted when any adjustments already identified have been shown to be effective
- identify actions and persons responsible
- include a review mechanism for any actions implemented to ensure that they remain effective.

■ Example

A union member had Bipolar disorder. She enjoyed working with the public as an adviser to colleagues working with clients in receipt of social care support. The member wanted to move into a role where she took on her own client caseload. A vacancy arose and the member applied. She was successful in her application, but the employer said that they should do a risk assessment before she took up the role because the job could be stressful.

The union rep reminded the employer that undertaking risk assessments about a disabled person when they would not do so about a non-disabled employee taking up the role could amount to unlawful discrimination.

Instead the rep suggested a number of alternative measures:

- a.** They discussed with the employee whether they felt worried about any aspect of the new role, and what adjustments could help them. The rep noted that planning ahead in this way would make things easier for everyone.
- b.** They examined with the employer what the standard checking procedures were that all employees doing client work had to undertake, and discussed how adjustments could be built into this process.
- c.** They confirmed that there were proper support procedures in place for all staff dealing with difficult and complex client cases, and suggested that this support might be suitable for the member too.
- d.** They told the member that if any problems did arise, then they could talk to their rep, who could support them in asking for adjustments.

The rep advised the employer that they could only refuse to make an adjustment if it would be unreasonable because the H&S risk to employee or clients would be unacceptably high.

Disciplinary issues

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

1. Employers should avoid disciplining a person with mental health problems for a reason related to their disability, if adjustments have not been made to support the employee.
2. Employers must ensure that any discipline or grievance procedure is accessible to people with mental health problems.

■ Example

A rep noticed that a member was often making mistakes in their work and missed deadlines. They talked to the member and raised their concerns. The rep said they understood that sometimes people make mistakes and miss deadlines because they are stressed and are not being supported in their work. The rep asked the employee if they would like to discuss adjustments that could help them to concentrate on their work and so help them meet work deadlines.

The member said they found it difficult to concentrate in the office environment and so they found it difficult to organise and plan their work. They also told the rep that they had been diagnosed with depression in the past.

The rep and member agreed that the member would have the use of a small meeting room for an hour at the start and end of each day so that they could plan their work in a less stressful and quieter environment.

■ Example

A member who has recurring depression joins a new team. After several months, they complain to their rep that other team members are making comments about people who 'want an easy life' and 'will use any excuse not to come to work'. The member feels that they cannot be honest about their depression and that they feel isolated and threatened. The rep agrees with their member that they will support them to talk to their line manager. They agree but the manager does not take the issue seriously and says the member needs to get on with others. The rep advises their member that because they have given the employer a chance to change things and this had not happened they should submit a grievance.

The member agrees but is very nervous about facing a formal process. They ask whether a family member can attend meetings with them so that they feel supported. The rep agrees to this, and agrees with the employer that it is a reasonable adjustment. The employer, rep and member also agree that the family member will:

- a.** be briefed on the organisation's policy on grievance
- b.** be made aware of appropriate conduct during the process and agree to abide by this
- c.** be clear about their role as informal support to the union member and how this relates to the union reps official role.

The grievance process proceeds on this basis as everyone feels confident that the process will be supportive and aimed at finding a resolution for all parties.

■ **Hall vs Department for Work and Pensions**

Eat/0012/05

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

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

■ **Butterfield vs Edmund Nuttall Ltd**

UKEAT 0028/05/MAA & UKEAT 0865/05/MAA

While driving on business, Mr Butterfield committed two offences of indecent exposure and one of dangerous driving – all in one day. The next day he broke down and was admitted to hospital. He remained off work. He was sentenced to a community rehabilitation order and disqualified from driving. He met his employer to inform them of his disqualification, but did not inform them about the indecent exposure offences. The employer later found out and dismissed him. He lodged a successful claim for disability discrimination at tribunal.





The employer appealed the tribunal's finding. The EAT held that exhibitionism and sexual abuse of others are conditions specifically excluded from the DDA definition of disability.

It had been argued in tribunal that Mr Butterfield would not have committed these offences had he not had a disability – specifically depression. The EAT held that because the employer dismissed him due to the sexual offences, and his concealment of them, rather than his mental impairment, it had not discriminated against him on the grounds of his disability.

■ **Claydon House Ltd vs Hamilton Bradbury Employment Appeal Tribunal**

EAT/0315/04

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

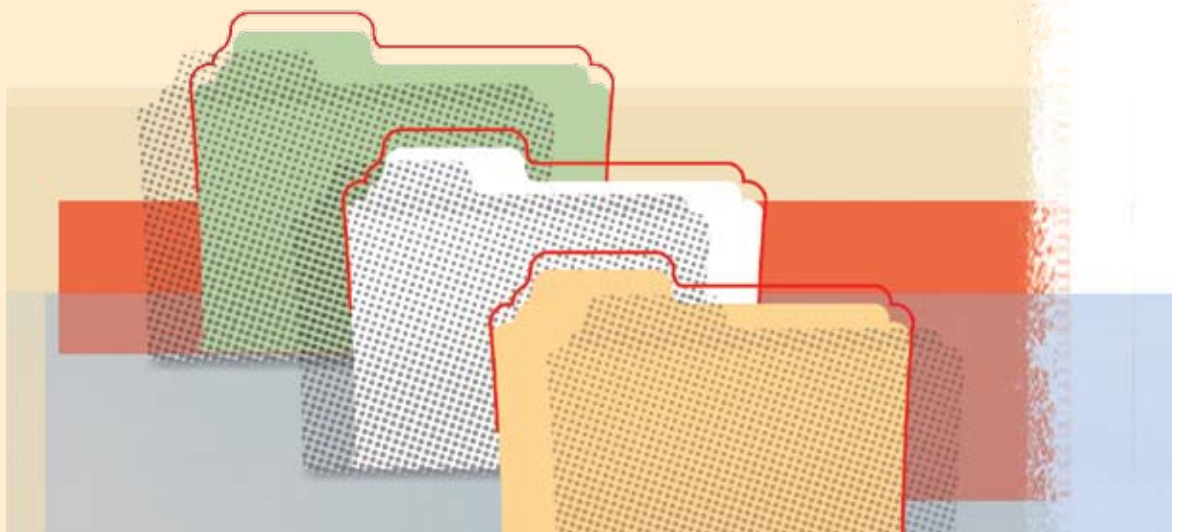
Documenting decisions

It is imperative that unions document any requests for, and decisions made about, making reasonable adjustments in relation to problems the member with mental health problems have in the workplace. Reps should make a note of:

- what work issues were of concern to the member
- what advice the rep sought about adjustments
- evidence of how they supported their member to discuss with the employer what adjustments would be put into place
- what adjustments were agreed and a process for reviewing arrangements.

Unions should also encourage employers to document decisions they take about making adjustments. Both parties may need to provide this documentation for a grievance procedure or an ET.

The member should also have a record of any such requests and what the outcome was.



Government support for disabled people in employment

There are a number of government schemes that encourage and facilitate disabled people to get into, and stay, in work. These are managed by JobCentre Plus. The most important of these schemes is Access to Work, which can help to pay for reasonable adjustments. For more information on Access to Work, see Appendix 1.

Section 3

The Disability Discrimination Act 1995 (as amended) and the employment of people with mental health problems

■ This section provides a brief guide to:

1. who is covered by the DDA
2. what the legal duties are for employers
3. what the legal duties are for trade unions.

■ Introduction

Part 1 of the DDA describes who would be defined as 'disabled' according to the Act. Part 2 sets out the legal duties for those who employ disabled people.

The DRC produced a statutory Code of Practice that explains the application of the law, and this can be referred to by ETs. The TUC has also provided guidance in its publication *Disability at Work*, which can be downloaded from the equality section of the TUC website.



1. Who is covered?

According to the DDA a disabled person is someone who has a:

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

A mental impairment is a condition that affects ‘mental functioning’, for example a learning disability or mental health condition such as depression.

Substantial means: • more than minor or trivial.

Long-term means: • has lasted 12 months,
• is likely to last 12 months from the onset,
or
• will last for the rest of the person’s life.

Normal day-to-day activities means: An activity which involves any of the following:

- mobility
- doing something with your hands
- physical co-ordination
- continence (controlling your bladder and bowels)
- ability to lift, carry or move everyday objects
- speech, hearing or eyesight
- memory or ability to concentrate, learn or understand, or
- perception of the risk of physical danger.

People who have a mental health problem may or may not be covered by the DDA – it depends on how severe their problem is and how it affects them in their lives. They no longer have to have a medical label for their mental health condition; they just have to show that the effects of the condition would meet the DDA criteria. There is guidance available on this, see Appendix 1.

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

One difficult area is recurrent conditions. The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur: in other words, if it is more likely than not that the effect will recur. Conditions with effects that recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term'.

■ Example

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

■ Example

A woman has two separate episodes of depression within a 10-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she suffers bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression that is likely to recur beyond the 12-month period.

■ The DDA definition and self-identity

It is important to recognise that many people who are likely to have rights under the DDA may not wish to identify themselves using the term 'disabled person', and may be reluctant to disclose their disability to their employer or potential employer. This could be because they fear the consequences of using this label about themselves, or they may simply not feel that they are 'disabled'. It is important that reps make their members aware that if a person is not disabled under the DDA they cannot claim protection from the law.

2. Employer's duties under the DDA

Employers have a duty not to discriminate against disabled people in all aspects of work. There are five types of discrimination:

■ Direct discrimination

This is treating someone less favorably simply because they have a disability. Direct discrimination cannot be justified in law.

■ Example

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

■ Failure to make reasonable adjustments

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

■ Example

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

■ Disability-related discrimination

Disability-related discrimination is more complicated but very common. It occurs when the reason for the discrimination relates to the person's disability, for example, when a general policy or practice used by an employer ends up having a discriminatory effect on a disabled job applicant, employee or ex-employee. To decide if disability-related discrimination has occurred, the employer's treatment of the disabled person must be compared with that of a person to whom the disability-related reason does not apply.

■ Example

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



■ Harassment

The Act says that harassment of disabled people is unlawful. Harassment can happen when another person talks or behaves in a way that:

- violates the disabled person's dignity,

or

- creates an intimidating, hostile, degrading, humiliating or offensive environment for them.

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

■ Victimization

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

- brought, or given evidence or information in connection with, proceedings under the Act (whether or not proceedings are later withdrawn),

or

- done anything else under or by reference to the Act,

or

- alleged someone has contravened the Act (whether or not the allegation is later dropped).

■ Example

An employee takes their employer to ET claiming disability discrimination because they believe they have been discriminated against. The disabled employee seeks the support of a colleague who knows about the case. The colleague attends the tribunal hearing and gives evidence in support of the disabled person's case, in good faith. After the hearing, the employer brands the colleague 'a troublemaker' and tries to undermine them because they gave evidence against the employer at the tribunal hearing. This is likely to amount to victimisation.

The Disability Equality Duty

The Disability Equality Duty (DED) came into force in December 2006, and required all public authorities to meet the 'general' and 'specific' duty.

The general duty requires public authorities or those carrying out work of a public nature to:

- promote equality of opportunity between disabled persons and other persons
- eliminate discrimination that is unlawful under the Act
- eliminate harassment of disabled persons that is related to their disabilities
- promote positive attitudes towards disabled persons
- encourage participation by disabled persons in public life
- take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons.

Public authorities subject to the specific duty have to produce and publish a disability equality scheme to provide evidence of how they have involved disabled people in drawing up the scheme and what activity they intend to undertake to meet the duty. For more information on this, refer to the TUC's publication on the DED.

Trade union duties under the DDA

Trade unions, referred to as 'Trade Organisations' in the DRC's guidance (see Appendix 1) should be aware that they too have duties under the DDA.

If a union directly employs disabled people, it has the same duties as any other employer would have.

Unions also have duties to ensure that they do not discriminate against disabled people:

- when they decide who should be a member of the union
- in the terms of membership offered to a disabled person
- by refusing to accept, or deliberately not accepting, an application for membership from a disabled person
- in the way it provides any training, services or benefits to disabled union members.

Unions are also required to make reasonable adjustments for their disabled members. Some examples of helpful adjustments that members with mental health problems might find helpful are:

- making adjustments to times and venues of branch meetings, case conferences or other meetings (some people may prefer meetings in the afternoon as the effects of medication may be more prevalent in the morning)
- when dealing with personal cases, where required, allow extended appointment times
- allow the member to take breaks in meetings if required
- allow advocates/friends to be present at meetings
- allow meetings to be taped or provide written minutes/ notes afterwards
- ensure that any services you buy in for your members are appropriate – for example ensuring that solicitors who provide legal advice to your members are fully aware of their duties under the DDA and of good practice approaches to people with mental health problems.

Reasonable adjustments and knowledge of disabled members

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



Appendix 1

Useful information

C

■ Care Services Improvement Partnership (CSIP)

Advice on mental health and other issues.

- Website: www.csip.org.uk
- Email: ask@csip.org.uk
- Tel: 0113 2545127

D

■ Dealing with depression

Support network for people with depression.

- Website: www.dealingwithdepression.co.uk

■ Disability Forward Limited

Authoring organisation of this guidance, expertise in disability issues including mental health.

- Website: www.disabilityfwd.co.uk
- Email: enquiry@disabilityfwd.co.uk

E

■ Equality and Human Rights Commission (EHRC)

(This has replaced the Disability Rights Commission, the Equal Opportunities Commission and the Commission for Racial Equality).

- Website: www.equalityhumanrights.com
- Email: info@equalityhumanrights.com
- Tel: 0845 604 6610 (main number England)
- Disability helpline: 08457 622633

Textphone: 08457 622644

Relevant documents:

- *The Duty to Promote Disability Equality: Statutory Code of Practice*
- *Statutory Code of Practice on Employment and Occupation*
- Guidance on matters to be taken into account in determining questions relating to the definition of disability



H

■ Health and Safety Executive

Advice available on stress at work, stress management and on dealing with H&S and disability issues in the workplace.

- Website: www.hse.gov.uk
- Email: hse.infoline@natbrit.com
- Tel: 0845 345 0055

■ Healthy Minds at Work (Wales)

An advice service for employer in Wales.

Website:
www.healthymindsatwork.org.uk

J

■ Jobcentre Plus

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

- Website: www.jobcentreplus.org.uk
- Email: contact-us@jobcentreplus.gsi.gov.uk

M

■ MDF – the Bipolar Organisation

An organisation which provides advice on manic depression/Bipolar disorder.

- Website: www.mdf.org.uk
- Email: mdf@mdf.org.uk
- Tel: 020 7793 2600

■ Mind

Expert advice on mental health issues

- Website: www.mind.org.uk
- Email: info@mind.org.uk
- Tel: 020 8519 2122

■ MINDFUL EMPLOYER

Expert advice and guidance on mental health at work

- Website: www.mindfulemployer.net
- Email: info@mindfulemployer.net
- Tel: 01392 208833

N

■ National Phobics Society

Provides advice on anxiety disorders.

- Website: www.phobics-society.org.uk
- Email: info@phobics-society.org.uk
- Tel: 08444 775774

R

■ Rethink (formerly National Schizophrenia Fellowship)

Provides advice and guidance on mental health issues.

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

S

■ Sainsbury Centre for Mental Health

Expert advice on mental health and employment issues.

- Website: www.scmh.org.uk
- Email: contact@scmh.org.uk
- Tel: 020 7827 8300

■ SANE

Support, information and advice for anyone affected by mental health problems.

- Website: www.sane.org.uk
- Email: info@sane.org.uk
- Tel: 020 7375 1002

■ Scottish Association for Mental Health

Scotland's leading mental health charity.

- Website: www.samh.org.uk
- Email: enquiries@samh.org.uk
- Tel: 0141 568 7000

■ SHIFT – (part of) National Institute for Mental Health in England

Awareness raising and advice on mental health at work.

- Website: www.shift.org.uk
- Email: shift@csip.org.uk
- Tel: 0845 223 5447

T

■ **Trades Union Congress (TUC)**

- Website: www.tuc.org.uk
- Email: info@tuc.org.uk
- Tel: 020 7636 4030
- Rights at work:
www.workSMART.org.uk
- Know Your Rights:
0870 600 4882

■ **Scottish Trades Union Congress (STUC)**

- Website: www.stuc.org.uk
- Email: info@stuc.org.uk
- Tel: 0141 337 8100

Appendix 2

Other things unions can do

Unions want workplaces to be a good place to work for everyone, and there are things they can do to improve the workplace environment for everyone. This will not only support people who already have a mental health problem, but may also help others from developing them in the first place.

The following is not a definitive list and the organisations listed in Appendix 1 will be able to provide more advice on specific good practice.

- ✓ Ensure that as many reps as possible have had some training on mental health at work issue. Try to involve members with mental health problems in this training.
- ✓ Train one or two people in each branch or area to be mental health champions. These people can have a more thorough understanding of mental health problems and how people can be better supported in the working environment.
- ✓ Network with other unions to share knowledge and good practice.
- ✓ Review policies and procedures to ensure they are not discriminating against members with mental health problems.
- ✓ Develop a union position statement about being positive and supportive of members with mental health problems, and back this up with events and networking.
- ✓ Support employers to set up internal or external support meetings with people with mental health problems reporting concerns and recommendations to managers.
- ✓ Encourage employers to set up a formal Employee Assistance Programme (EAP).

Appendix 3

A few facts about employment and mental health problems

According to the Royal College of Psychiatrists, at some point in their life, around one in five women and one in 10 men will suffer from depression. At any given time, one in every 20 adults is experiencing a serious 'major' depression.

According to statistics from the September to December 2006 Labour Force Survey (quoting LFS terminology):

- Only 25.8 per cent of people with depression, bad nerves or anxiety who are of working age are actually in work.
- Only 13.5 per cent of people with mental illness, phobias, panics or other nervous disorders who are of working age are actually in work.
- People with mental health problems have the lowest employment rate of all disabled people of working age, at only 21 per cent.

According to the Chartered Institute of Personnel and Development's quarterly *Labour Market Outlook Survey* report (Autumn 2007), 61 per cent of employers who had hired staff with a history of mental ill-health, rated their experience as 'positive', while only 15 per cent reporting a negative experience.

According to an UnumProvident survey published in March 2007:

- The sectors that registered the highest level of mental health related illness were public administration, education and health, while the lowest level was found in construction.
- Ten million working days were lost due to stress, depression and anxiety in 2005/06.



Appendix 4

What are mental health problems?

It is important to distinguish between mild and moderate mental health problems – which are common and which union reps are likely to encounter regularly among members – and severe mental health problems, which they are much less likely to encounter.

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

Common mental health problems

These are the ones most likely to be encountered by Union representatives in their work.

■ Stress

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

■ Depression

Depression is on a spectrum from mild to severe, and is common in the general and working population. Symptoms include low mood and a lack of energy. Motivation can be affected and people may experience thoughts of life not being worth living, which in extreme cases can lead to suicidal behaviour.

■ Anxiety

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

Other mental health problems

These are much less likely to be encountered by union reps.

■ Psychotic conditions/schizophrenia

In contrast to depression and anxiety, which are common in the general and the working population, psychosis is very uncommon. Psychosis is a term used when a person appears to lose touch with reality. People may hear, see or believe things that aren't real to others (e.g. hearing voices, thinking that others are 'out to get them'). If the illness becomes chronic (long-term) the person may withdraw from the outside world and neglect themselves. In these circumstances a psychiatrist may diagnose schizophrenia. This emphatically does not mean a 'split personality'.

It is important to remember, however, that many more people experience the symptoms of psychosis than actually seek help for them. Two to three per cent of the population regularly hear voices but are not troubled by them – or they attribute them to benign causes such as religious revelation. Some scientists think of psychosis as being at one end of the normal spectrum of experience. It is also important to remember that many people with schizophrenia have the illness under control most of the time and with the right support are able to lead normal lives – including being employed.

■ **Bipolar disorder/manic depressive illness**

Both terms are used to describe this condition, where a person may 'swing' between episodes of extreme low mood and depressive symptoms to being 'high' or elated. During a manic episode a person may have high energy levels, grand or unrealistic ideas and become reckless (e.g. taking risks, overspending). People may go through the mood cycles at different rates and times.

■ **Self harm and suicide**

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

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

■ **Personality disorders**

The Royal College of Psychiatrists states that there are many types of personality disorder and that they can be difficult to diagnose accurately. Some people with a diagnosis of a personality disorder may be covered by the DDA, but this depends on the type of disorder they have, how it manifests itself and how this affects their lives.

■ **In general**

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

This means that many more people with mental health problems can obtain and retain employment successfully, provided that employers are positive about developing an inclusive work culture that focuses on supportive solutions for individuals and improving the work environment for everyone.



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