

# **STAMMERING, DISCRIMINATION & THE LAW**

# **S T A M M E R I N G A**

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Reg Charity Nos 1089967/SC038866

**June 2019**

# INTRODUCTION

This document contains information and guidance to help you understand the topic of stammering and the law, specifically of the law of discrimination. Depending on the severity of your stammer, you may meet the definition of disability under the Equality Act 2010, and be entitled to various rights and protections. The Equality Act applies in various situations, including employment, using public services (such as healthcare or education), using businesses that provide goods and services, using transport, joining a club or association and using public bodies (such as local authorities). The Equality Act is complex, and the exact rights and duties that apply in particular situations will depend on the circumstances. The aim of this guidance is to give you a general overview of the areas in which the Equality Act applies, and to explain some of the general principles which commonly apply in discrimination law.

As well as protection under the Equalities Act, people who stammer may also be entitled to Personal Independence Payments provided they meet the eligibility criteria set out by the Department for Work and Pensions.

The guidance has been prepared with the help of Ashurst LLP, which has provided research assistance to the British Stammering Association. This document is not intended to be a comprehensive statement of all relevant issues or a conclusion on the position in respect of this area of law and practice. Please get independent legal advice before applying any of this information to your issue or situation as neither the British Stammering Association nor Ashurst is responsible for any reliance on the information contained in this guidance.

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# DEFINITION OF DISABILITY

The Equality Act expressly accepts certain conditions to be disabilities. Stammering is not included among these 'deemed' disabilities. This means that individuals claiming disability discrimination because of a stammer must show that they (or, in some cases, someone else) have or had a disability for the purposes of the Equality Act at the relevant time.

The Equality Act definition is technical and does not necessarily correspond with common perceptions of disability or with the test of disability in other legal contexts. Whether or not a person meets the definition is ultimately a question to be decided by a court or tribunal (unless the parties agree that the definition is satisfied).

## Statutory Definition

There are four essential elements to the statutory definition of disability in the Equality Act:

1. The person must have a physical or mental impairment.
2. That impairment must have an adverse effect on the person's ability to carry out normal day-to-day activities.
3. That effect must be substantial.
4. That effect must also be long-term.

## Stammering

Stammering can fall within the definition of disability if the stammer is so severe that it has a substantial adverse effect on someone's ability to carry out normal day-to-day activities. This does not mean that a person who stammers will always meet the definition; the statutory definition of disability must be applied to each individual situation on a case-by-case basis as the test is fact specific.

Taking each element of the test in turn:

1. Stammering is a physical or mental impairment.
2. Stammering can have an adverse effect on a person's ability to carry out normal day-to-day activities. This might be the case if, for example, stammering impacts a person's ability to have conversations and/or that the person avoids everyday social interactions for fear of stammering.
3. The effect of stammering can be substantial. "Substantial" means "more than minor or trivial", which is a relatively low standard. This element of the definition could be satisfied by the person showing that they are unable to interact fully with others or avoid social situations for a fear of stammering. However, where a person has a stammer which does not substantially impact on their normal day-to-day life, they will probably not fall within the definition.

Where a condition is being treated and that treatment means the condition no longer has a substantial effect on the day-to-day activities of that person, it can still fall within the definition if the condition would have a substantial effect were it not for the treatment. This means that, even if a person is using therapies or techniques to

reduce their stammer, they are still able to fall within the Equality Act definition of disability if their stammer would have had a substantial effect without the techniques.

4. The effect of stammering can be long-term. To be long term, for the purpose of the definition, it must have lasted at least twelve months or be likely to last at least twelve months.

The Government's Guidance on the definition of disability under the Equality Act gives the following as an example of a situation where stammering does have substantial adverse effects on a person's ability to carry out normal day-to-day communication activities:

*A man has had a stammer since childhood. He does not stammer all the time, but his stammer, particularly in telephone calls, goes beyond the occasional lapses in fluency found in the speech of people who do not have the impairment. However, this effect can often be hidden by his avoidance strategies. He tries to avoid making or taking telephone calls where he believes he will stammer, or he does not speak as much during the calls. He sometimes tries to avoid stammering by substituting words, or by inserting extra words or phrases.*

## Case Law

The vast majority of discrimination claims settle before making it to court, which means there is not always case law on specific aspects of discrimination law. However, there is at least one case where stammering was found to amount to a disability.

In *HM Land Registry v Wakefield [2008]*, an Employment Tribunal accepted that the claimant's stammer was a disability. The evidence in this case showed that the claimant's stammer consisted of both overt and covert symptoms: the former consisted of silent blocks, initial sound repetitions at the beginning of words, increased rate of speech and an increased level of physical tension and loss of eye contact, and the latter consisted of avoidance of words and situations and negative emotions and attitudes connected with the stammering. The expert evidence showed that he was at a considerable communicative disadvantage at work, socially and within his home setting. While this case was decided under the Disability Discrimination Act 1995, which was the predecessor to the Equality Act, the definition of disability has remained substantially the same, and therefore this case remains relevant.

By contrast, in *Mails v Mitie Aviation Security Limited [2017]*, an Employment Tribunal did not accept that a person's lifelong speech disorder manifesting as fast speech, or possibly "cluttering or a stammer", constituted a disability. The Tribunal decided that the claimant did not have a disability for the purpose of the Equality Act because there was insufficient evidence to show that the speech disorder affected the claimant's normal day to day activities. In particular, the judge noted that the claimant had worked for the respondent for 15 years, receiving positive appraisals and acting as a mentor and that a colleague had given evidence that the claimant's speech disorder was not a problem prior to the dispute which was being heard in the Tribunal.

## **Additional Considerations**

### **Interiorised or covert stammering**

The statutory test set out above would be applied to all different permutations of stammering. Covert stammering can be more difficult to consider as a disability due to the reduced visibility of the condition.

Whilst we have not found any decided cases on the issue, our general research suggest that covert stammering could still fall within the definition of disability under the Equality Act. It is a physical or mental impairment and it can have an adverse effect on the person's day-to-day activities. The person may avoid conversations and ordering food or drinks due to their stammer. Where the effect is substantial and long term, it will fall within the definition.

The example from the Government's Guidance set out above shows that the fact that a person successfully uses avoidance strategies does not prevent their stammer being a disability for the purpose of the Equality Act.

The lack of visibility of covert stammering means that the person with a covert stammer may need to consider the awareness of the other party as this is relevant for certain types of discrimination, including direct discrimination and the duty to make reasonable adjustments.

### **Other Conditions**

Individuals who stammer sometimes also suffer from depression and/or anxiety. Where this depression/anxiety becomes in itself a mental impairment which causes substantial and long-term adverse effects on the person's day-to-day activities unrelated to the stammering, it may be that that condition is also a disability under the Equality Act.

# DISCRIMINATION

There are a number of different types of actions which fall under the general term "discrimination". These are explained below. Whilst some of the concepts are applied similarly across different areas (e.g. employment, goods and services and education), the duty to make reasonable adjustments differs significantly between contexts, and so it is discussed later in this document.

## 1. DIRECT DISCRIMINATION

The Equality Act defines direct discrimination as: "because of a protected characteristic, A treats B less favourably than A treats or would treat others".

Disability is a protected characteristic. An example of direct discrimination is an employee refusing to promote an employee or a shopkeeper refusing to serve a customer because they have a disability.

It is worth noting that B does not need to be the individual with the protected characteristic. A person can be directly discriminated against as a result of their association with a person with a protected characteristic e.g. a person may be treated less favourably because their child has a disability.

### (i) Less Favourable Treatment

The test of less favourable treatment is not just objective. A tribunal will consider whether the treatment was less favourable to the claimant, taking into account what is reasonably seen as unfavourable by the claimant.

Different treatment is not enough to demonstrate less favourable treatment. For example, having different dress codes for different genders is not less favourable treatment provided the standards are equivalent. Less favourable treatment cannot be 'offset' by another more favourable treatment e.g. demoting someone but increasing their salary to offset the loss of job status.

A person does not need to have experienced actual disadvantage (e.g. financial disadvantage) for the treatment to be less favourable. If the reason for the different treatment was a protected characteristic, that is direct discrimination, even though the person suffered no disadvantage.

### (ii) Real or Hypothetical Comparisons

To show direct discrimination, a claimant must show that they have been treated less favourably than a real or hypothetical comparator whose circumstances are similar to theirs, other than the protected characteristic. In practice, there may not be someone who is a perfect comparator, in which case the claimant may use a hypothetical comparator.

### (iii) Reason for Treatment

The less favourable treatment has to be **because of** the protected characteristic. If the treatment was for another reason which had nothing to do with the protected characteristic, the claim will fail.

#### (iv) Respondent's Knowledge

A respondent cannot commit direct discrimination unless they knew or ought reasonably to have known (i.e. 'should have known') that the claimant was disabled. This is relevant where an employer, education provider or provider of services is not aware of a stammer as the claimant would need to show that they ought to have known about the stammer.

This may be more difficult to show in the case of a covert stammer if the person's speech does not give any clues that they would stammer if they put less effort into concealing it. If they have not otherwise disclosed the stammer, it may be difficult to show that the respondent knew or should have known about the stammer.

#### (v) No Defence

There is no justification or defence once a respondent has been found to have treated a claimant less favourably due to their disability.

## 2. INDIRECT DISCRIMINATION

The Equality Act defines indirect discrimination as: "A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's".

The test for indirect discrimination can be split into six elements:

1. B has a protected characteristic.
2. A applies a provision, criterion or practice (**PCP**) equally to a group of people, some of whom do not share B's protected characteristic.
3. B is in the group of people to whom the PCP is applied.
4. The PCP puts or would put persons with whom B shares the protected characteristic at a particular disadvantage compared to others who do not have the protected characteristic.
5. The PCP puts or would put B to that disadvantage.
6. A cannot show the PCP to be a proportionate means of achieving a legitimate aim (see 'objective justification' below).

An example of indirect discrimination might be a requirement for all employees to pass a physical fitness test where this is not necessary for the role, because having to pass a physical fitness test would be particularly disadvantageous when applied to persons with physical disabilities (e.g. mobility impairments).

#### (i) Provision, Criterion or Practice (PCP)

A PCP is defined widely; it is broader than just a "requirement or condition". It does not need to be recorded in a formal policy and can include one-off decisions, expectations, provisions in contracts or a prerequisite to service.

PCPs relevant to stammering could include, for example, the practice of requiring individuals to present ideas in a meeting or the practice of not providing speaker notes in advance (so that the person with the stammer is unable to practice).

**(ii) Disadvantage**

The Equality Act does not define disadvantage but the Supreme Court has held that 'disadvantage', 'detriment' and 'less favourable' mean similar things. Please see 'less favourable treatment' above.

There is no need for the claimant to prove why the PCP puts or would put a particular group at a disadvantage, it is enough to show that it does.

**(iii) Requirement for a Pool for Comparison**

For the purposes of disability discrimination, the claimant must show that the PCP puts people with their particular disability at a disadvantage, not that it disadvantages people with disability general.

When establishing whether a PCP puts people with a stammer at a disadvantage, the starting point is to look at the impact on people in a particular defined 'pool for comparison', who have no material difference from the group with the claimant's disability except the disability. The size and nature of the pool will depend on the PCP. Usually only those who are 'interested in' or affected by the particular PCP will be in the pool. In employment, if the PCP applies to the whole organisation, the pool may be the entire workforce. In goods and services, the pool may be the customers that use those goods and services. In education, the pool may be the year group or class of the individual or the entire school.

**(iv) Respondent's Knowledge**

Unlike direct discrimination, there is no need for the respondent to have been aware of B's protected characteristic or to have intended the discrimination in order to have indirectly discriminated.

However, a respondent who unintentionally indirectly discriminates may not be ordered to pay any compensation. The Equality Act states that if a tribunal finds that a respondent has indirectly discriminated against a claimant, *but is satisfied that the respondent did not intend to discriminate*, the tribunal must not make an award of damages unless it first considers whether another sanction would be more appropriate. For example, the court may grant an injunction or may make a declaration (see 'Remedies' below).

**(v) Objective Justification**

Unlike direct discrimination, indirect discrimination has a defence. Even if a respondent is found to have indirectly discriminated, they will not be liable if they can show that the PCP was a proportionate means of achieving a legitimate aim. The court or tribunal will consider the practices and considerations involved and reach its own conclusion as to whether the PCP was justified.

The more serious the disadvantage caused by the PCP, the more convincing the objective justification must be.

The objective justification is split into two elements:

1. Was the PCP pursuing a legitimate aim?
2. Were the measures taken by the PCP to achieve that aim appropriate and proportionate?

It is important to note that cost saving alone will not constitute a legitimate aim. The respondent must show that there is another aim being met, even if costs are a substantial part of the aim.

For providers of goods and services, guidance sets out specific examples of legitimate aims, such as preventing fraud or inappropriate use of services provided by the service provider and ensuring the health and safety of those using the service provider's service.

Then, the respondent must show that the measures taken were 'reasonably necessary' in order to achieve the legitimate aim. If they could have achieved the same objective using alternative, less discriminatory measures, it will not be 'reasonably necessary'.

The court or tribunal will undertake a balancing act between the business needs of the respondent and the impact of the measures on the protected group and the claimant in particular.

If a respondent has not first complied with its duty to make reasonable adjustments, it will be very difficult for them to show that the PCP was proportionate.

### **3. DISCRIMINATION ARISING FROM A DISABILITY**

The Equality Act defines discrimination arising from a disability as: "A person (A) discriminates against a disabled person (B) if

*A treats B unfavourably because of something arising in consequence of B's disability, and*

*A cannot show that the treatment is a proportionate means of achieving a legitimate aim"*

The test is split into three elements:

1. B's disability caused, has the consequence of, or resulted in 'something'.
2. A treated B unfavourably because of that 'something'.
3. A cannot show that the treatment was a proportionate means of achieving a legitimate aim.

An example of discrimination arising from a disability in employment is dismissing an employee for capability because they consistently forget to organise meetings when the short term memory loss is a symptom of their depression.

An example from goods and services and education would be refusing for a child to attend nursery or school because they are not toilet trained when the reason for the lack of toilet training is because the child has learning difficulties.

#### **(i) Arising from a Disability**

The 'something' which caused the unfavourable treatment does not need to have been **caused by** the disability but there needs to be a connection between the disability and the 'something', even if it is just part of the reason for the 'something'.

An example of 'something' arising from stammering could be if an individual takes longer than other people to prepare for presentations because they need to rehearse over and over in order to reduce the likelihood of stammering.

**(ii) Treated Unfavourably**

This will be analysed similarly to "less favourably" – see above.

**(iii) Objective Justification**

Discrimination arising from a disability can be justified if the treatment was a proportionate means of achieving a legitimate aim - see above.

**(iv) Respondent's Knowledge**

The Equality Act specifically states that discrimination arising from a disability cannot apply if the respondent shows that they did not know, and could not reasonably have been expected to know, that the claimant had the disability. This will be particularly relevant where the person's stammer is covert and so the employer could reasonably be said to not have been expected to know that the person had the stammer.

If an individual is concerned that the other person is unaware of their stammer, they may wish to disclose it (for example, in the context of seeking reasonable adjustments) so that the other person has actual knowledge.

However, while the respondent needs to know about the disability, they do not need to be aware that the 'something' arises in consequence of the disability. For example, if an individual with a stammer avoids all social situations due to their stammer and their employer treats them unfavourably as a result of avoiding social situations, this could be discrimination arising from a disability even where the employer is unaware that the reason for the avoidance of social situations is the fear of stammering.

## **4. HARASSMENT**

The Equality Act defines harassment as: "*A person (A) harasses another (B) if— A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B*"

An example of harassment can be a team of colleagues who constantly make comments and 'banter' with their colleague concerning the fact that the colleague has a stammer, including mimicking the stammer. If the colleague finds that the conduct violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment, they may have a claim for harassment.

**(i) Unwanted Conduct**

'Unwanted' does not mean that the claimant has to expressly state that they do not want the conduct. Conduct amounting to harassment can be a one-off incident or a series of incidents, although creating an environment which is intimidating, hostile, degrading, humiliating or offensive usually requires more than one incident.

If the claimant has put up with the conduct for years or joins in on the conduct occasionally, it may still be seen that the conduct is 'unwanted'. However, this is fact sensitive. If the individual is an active participant in similar conduct, it is unlikely that they felt the conduct resulted in violating their dignity or created an intimidating, hostile, degrading, humiliating or offensive environment.

**(ii) Related to a Protected Characteristic**

The conduct does not need to be directed to the claimant and their particular protected characteristic. Therefore, conduct which is not directed to the claimant but occurs near them would be sufficient, as well as conduct which relates to the claimant's association with a person with the protected characteristic.

For example, an employee with a disability may see that other members of their team are downloading offensive images about people with disabilities onto their work computers. Even if the employee with the disability is never asked to view the images and the other employees do not do it for the purpose of upsetting that person, it would be harassment if the person felt violated as a result or felt that they had created an intimidating, hostile, degrading, humiliating or offensive environment.

A person can even be harassed in respect of a protected characteristic that the other person knows they do not have. For example, an employee who is subjected to homophobic banter and name calling can still be subject to harassment even though his colleagues know that he is not gay because the form of abuse relates to sexual orientation.

**(iii) Purpose or Effect**

When considering whether conduct had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, the tribunal will consider the claimant's perception, other circumstances of the case and whether it is reasonable for the conduct to have that effect.

## **5. VICTIMISATION**

The Equality Act defines victimisation as:

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

- (a) B does a protected act, or*
- (b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*

- (c) bringing proceedings under this Act;*
- (d) giving evidence or information in connection with proceedings under this Act;*
- (e) doing any other thing for the purposes of or in connection with this Act;*
- (f) making an allegation (whether or not express) that A or another person has contravened this Act"*

An example of victimisation in employment would be an employer refusing to employ someone because they gave evidence against their previous employer in a discrimination case.

An example in goods and services would be a manager at a bank refusing a loan to a customer who oversaw an incident of sexual harassment between the manager and an employee and made a complaint about it to the head office alleging that the manager had sexually harassed the employee.

An example in education would be removing a Rastafarian child from all extra- curricular activities because they made an allegation of religious discrimination against a teacher for requesting that they cut their hair in order to comply with the dress code.

**(i) Detriment**

Detriment is interpreted similarly to 'less favourable treatment', 'unfavourable treatment' and 'disadvantage' - see above. The detriment must be connected to the protected act, not a protected characteristic. Therefore, a claimant does not need to have a protected characteristic to be subjected to victimisation. However, there has to be a link between the protected act and the detriment. There is no need to show a comparator but it may be useful to demonstrate why the claimant was treated differently to other people.

**(ii) Protected Act**

To do a protected act, the claimant does not need to have specifically stated that it was done under the Equality Act. For example, when making an allegation, the claimant does not need to have said that they are making an allegation that the person has contravened the Equality Act. However, the allegation needs to refer to a protected characteristic in some way.

The protected act does not need to have actually occurred, it is enough that the respondent believed that the claimant may do a protected act; for example, if the respondent believes that the claimant is the type of person who is likely to make a complaint and so believes they will make an allegation of discrimination, this may be covered.

## **6. REASONABLE ADJUSTMENTS**

The duty to make reasonable adjustments differs significantly between the goods and services context and the employment context so the duties are set out under the accompanying documents around employment, goods and services and education.

## RIGHTS & PROTECTION : AT WORK

All of the types of discrimination in the Discrimination section, page 8, apply in the context of employment, as well as certain specific rights outlined below.

The Equality Act applies to a broad range of situations at work, including recruitment, dismissal and disciplinary action. The Equality Act also covers actions undertaken by other employees where the actions are done 'in the course of employment', regardless of whether the employer knew or approved the acts. Therefore, even if the person discriminating is not the disabled person's supervisor, their actions may still fall within the scope of the Equality Act.

### Who is Protected?

The Equality Act applies to a wide definition of employees, which includes employees, workers (including agency workers) and individuals who are self-employed but whose contract obliges them to perform the work personally (e.g. self-employed people with no right to substitute another person in their place), as well as people in vocational training (including work experience placements). It also includes partners, LLP members and office holders (e.g. directors).

The Equality Act also applies to applicants to jobs – even if the applicant was unsuccessful in obtaining the role. It can also apply after the employment relationship, particularly in relation to reasonable adjustments (see below).

### Bringing a Claim

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Employees and applicants can bring a disability discrimination claim in the Employment Tribunal. The **claim should be brought within three months of the act of discrimination** (or if there has been a series of acts, **within three months of the last act in the series**). Before a claim can be made in the Employment Tribunal, it will usually be necessary for the claimant to contact the Advisory, Conciliation and Arbitration Service ("**Acas**"), who will try to conciliate the matter. If conciliation does not occur, or the dispute is not resolved via conciliation, Acas will issue a certificate. Holding a certificate from Acas is a prerequisite for lodging an Employment Tribunal claim.

The Employment Tribunal itself is not subject to a duty under the Equality Act to make reasonable adjustments for claimants or witnesses who have a disability, however it has discretion to take a person's disability, and the effects of their disability, into account when determining how proceedings are run. There have been cases in which a tribunal has given a witness who stammers extra time to give evidence and extra breaks, or has allowed the witness to submit a written statement instead of giving oral evidence.

### Exceptions

There are certain specified exceptions to discrimination in employment, including occupational requirements (e.g. actors who need to be a particular race or age) and positive action. In addition, the armed forces are exempt from the disability discrimination provisions of the Equality Act in their entirety.

## Specific Employment Rights

### Reasonable adjustments

Where a:-

1. Practice, criterion or practice;
2. Physical feature; or
3. Need for an auxiliary aid

puts a disabled person at a substantial disadvantage in comparison to those who are not disabled, the employer has a duty to take reasonable steps to avoid that disadvantage.

#### A. Requesting adjustments

There is no requirement for an employee to request or suggest adjustments as the duty to consider reasonable adjustments falls solely on the employer. However, it is good practice for employers to ask disabled employees about potential adjustments. If the employer suggests an adjustment that the employee does not consider to be helpful, the employee should explain why the adjustments are not useful and offer alternatives.

#### B. Employer knowledge

The duty to make reasonable adjustments only arises if the employer knows or ought reasonably to be expected to know that the individual has a disability and is likely to be at a substantial disadvantage compared to people who are not disabled.

If an employee is unsure whether their employer is aware of their stammer, they could inform them and make them aware of the substantial disadvantage they have to contend with.

#### C. Reasonable steps

Employers only need to make such adjustments as are 'reasonable'. This is an objective, fact-sensitive test to be determined by the tribunal, taking into account the fact that there is no duty to take measures which would impose a disproportionate burden on the employer. The most important factor is whether the adjustment could be successful. Another consideration would be the effect on other employees, though it will not be the deciding factor.

The tribunal will also consider the cost effectiveness of the adjustment. However, large employers may be expected to make adjustments that are not strictly cost effective, though they would not usually be expected to make very expensive adjustments. The tribunal will consider the employer's other costs relative to the costs of the adjustment, including the employee's salary, the highest paid cost of reasonable adjustments for other employees, total staffing costs etc.

#### D. Auxiliary aid

Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled,

the employer must take such steps as it is reasonable to have to take to provide the auxiliary aid.

An auxiliary aid is something which provides support or assistance to a disabled person. It can include provision of a specialist piece of equipment or auxiliary services; for example, provision of a sign language interpreter.

## **Pre-employment Health Disclosure**

The default position under the Equality Act is that an employer cannot ask potential recruits questions concerning their health.

However, there are specific prescribed or permitted reasons for employers to ask pre-employment health questions where they need to establish whether:

1. the applicant will be able to undergo the required assessment;
2. their duty to make reasonable adjustments will be engaged for the applicant to undergo the required assessment (not in relation to doing the job itself, only for their ability to undertake the assessment); and
3. the applicant will be able to carry out a function that is intrinsic to the work concerned.

If the employer asks questions about an potential employee's health which do not fall within the permitted reasons, the burden of proof in cases of direct discrimination will be reversed; that is, instead of the employee having to prove discrimination occurred, the employer will need to show that it did not.

While an employer cannot request the information, an employee can choose to freely disclose their disability and the substantial disadvantage it gives them in order to engage the employer's reasonable adjustments duty. This may be relevant for an applicant with a covert stutter – they may wish to consider disclosing this so that the employer can make any necessary adjustments.

## **Remedies**

Where a claimant succeeds in a discrimination claim, an employment tribunal may, do any (or some, or all) of the following:

### **Order the respondent to pay compensation**

The amount is calculated on the basis of how much loss the claimant has suffered so as to put the claimant in the position they would have been had the discrimination not taken place. There is no cap on the level of compensation which can be awarded so the award can be substantial.

The compensation can be made up of financial loss (e.g. loss of earnings, pension etc.) and also injury to feeling, calculated by applying "bands" of compensation to the type and severity of discrimination which occurred (i.e. whether it was less serious and one-off or whether it was a lengthy campaign of discrimination).

In order to be recoverable, the claimant will need to show that their losses are directly caused by the act of discrimination. The claimant will be expected to have mitigated their loss, for example by applying for another job and by limiting their expenses.

### **Make an "appropriate recommendation"**

This is a recommendation that the respondent take specified steps within a specified time period in order to obviate or reduce the adverse effect on the claimant. Previous recommendations have included that the claimant be reinstated at their role or some other suitable role and that the interviewer be informed of the discrimination which occurred. Tribunals will not usually recommend that a person receives a pay-rise or that employees involved apologise.

If the employer fails to comply with a recommendation, the tribunal can increase the compensation payable to the claimant.

### **Make a declaration**

This is a declaration as to the rights of the claimant and the respondent in relation to the case. This may be awarded where the claimant has suffered no loss but simply wanted to prove their point as a matter of principle. The declaration would usually state that the discrimination occurred.

### **Order an injunction**

If the discriminatory act is still continuing, for example the PCP is still in practice, the tribunal may make an injunction stopping the employer from continuing to perform the discriminatory act. Injunctions are rare because employers usually terminate the practice when they know they are being taken to the tribunal.

# RIGHTS & PROTECTION: GOODS & SERVICES

All of the types of discrimination set out under the heading Discrimination on page 8 apply in the context of goods and services, as well as certain specific rights outlined below.

## Who falls within the scope of the Act?

Anyone providing goods, services or facilities to the public, whether or not for profit, is subject to the Equality Act and, therefore, prohibited from discriminating against people with a disability. This includes individuals, businesses and public bodies.

Where the service provider does not provide services directly to the public (e.g. a manufacturer of consumer goods who sells to a shop, who then sells to the public), they will not be within the scope of the Equality Act.

A service provider is prohibited from discriminating against a service user by not providing services, goods or facilities which are usually provided to the public or not providing them in the manner that they are usually provided. They are also prohibited from subjecting the service user to detriment as to the terms on which the services, goods or facilities are provided, by terminating the services or subjecting them to any other detriment.

## Who is Protected?

A person is protected under the Equality Act when they seek to obtain or use the services of a service provider, throughout the duration of the provision of the services and after the service has ended.

## Bringing a Claim?

Individuals wishing to bring claims against a service provider for discrimination can bring the claim in the County Court in England and Wales or Sheriff Court in Scotland. The claim must be brought within **six months** of the act of discrimination.

## Exceptions

Certain services are outside the scope of the Equality Act in relation to disability discrimination, such as certain types of transport.

The Equality Act contains an exception to the prohibition against disability discrimination for service providers which transport people by air or provide services on aircrafts, however discrimination in this context is prohibited by EC Regulation 1107/2006. This Regulation, which concerns the rights of disabled persons with reduced mobility when travelling by air, sets out the basic principle that a carrier or its agent must not refuse, on the grounds of disability or reduced mobility, to accept flight reservations or prevent a person from boarding. It only permits airlines to discriminate in very limited circumstances. For example, under article 4(1)(a) of the Regulation, an airline may refuse to accept a reservation from a person with a disability in order to meet required safety standards. If an airline makes a refusal on the basis of the above point, the airline must make reasonable efforts to propose an acceptable alternative to the person in question.

A similar exception applies in the context of rail travel, in that Regulation (EC) 1371/2007 applies instead of the Equality Act for rail passenger rights and obligations. This regulation provides that disabled persons and persons with reduced mobility should have the same right as all other citizens in the areas of information, ticketing provision, compensation and assistance. It also contains provision for enforcement of these rights. Limited exceptions also apply in the context of land transport and taxis.

## Rights

### (i) Reasonable adjustments

Service providers are required to take all reasonable steps to ensure that people with a disability can access their services. Unlike under employment, the duty is an anticipatory duty. This means, even if a service provider has no disabled service users, they are under a duty to make reasonable adjustments rather than waiting for a disabled service user to encounter issues before making adjustments.

The duty is also a continuing and evolving duty; the service provider should regularly review the ways they are meeting the needs of service users.

The duty arises whether or not the service provider knows that a particular person is disabled or that they are likely to be at a disadvantage. However, the lack of knowledge may be taken into account when considering the reasonableness of the steps taken.

#### (A) Reasonableness of the adjustment

A service provider is not under a duty to take any steps which would fundamentally alter the nature of the services they provide or the nature of their trade or profession. For example, a restaurant which provides 'dining in the dark' will not be required to provide light so that a deaf customer can lip read.

When considering whether a step is reasonable, the Court will undertake an objective assessment based on the following relevant considerations: type of service provider; the nature of the service provider, its size and resources; and the impact of the disability on the person concerned.

#### (B) Advertising

Similar to the obligation on employers when advertising jobs, service providers cannot discriminate in advertisements of their goods, services or

## Remedies

The County Court can award damages for any financial loss as a result of the discriminatory act, personal injury and aggravated or exemplary damages. They can also award compensation for injured feelings.

The court can also make non-financial remedies, including a declaration or injunction. Unlike the employment tribunal, the County Court cannot make recommendations.

# RIGHTS & PROTECTION: EDUCATION

All of the types of discrimination set out under Discrimination on page 8 apply in the context of education, as well as certain specific rights outlined below. The Equality Act provisions concerning educational providers cover schools, further and higher education, and general qualification bodies. The Act applies to all schools, including nursery schools maintained by a local authority and nursery education provided within a school. Private training providers and private universities do not have duties under the educational provisions of Equality Act, but do have duties under the service provider provisions.

The responsible body has responsibility for ensuring the school adheres to its duties under the Equality Act. This will be the governing body for a local authority maintained school; the Academy Trust for an academy; the proprietor for an independent school; and the governing body for a university or other institutions in the higher and further education sectors.

A student who is on a work placement may also be able to bring a claim against the work placement provider.

## Who is Protected?

Pupils and prospective pupils are protected under the Equality Act. Additionally, former pupils will also be protected where the negative treatment arose from and is connected to a person having been a pupil and would have been prohibited if they were still a pupil.

The scope of protection goes beyond the classroom and includes all aspects of school life; for example, it covers extra-curricular activities, lunchtime and school trips.

## Bringing a Claim?

The following steps are available to a person who has been discriminated against in the context of education:

- Meet with the head teacher to discuss the issue.
- Request to meet with the responsible body.
- Follow the education provider's complaints process.
- If they a person is unsuccessful in the provider's complaints process, or does not wish to complain to the provider first, they can make a claim to the Special Educational Needs and Disability (SEND) Tribunal. While other types of discrimination claims against schools, colleges or universities are heard in the county court, disability discrimination claims are heard in the SEND Tribunal instead of the country court. The claim must be made within six months of the discrimination taking place. It is important to note that the claim form differs depending on whether the personal lodging the claim is a parent or the young person.

## Specific Education Rights

### (i) Reasonable Adjustments

In addition to the duties highlighted above, educational providers, such as schools and higher educational institutions, have a duty to make reasonable adjustments

to ensure that disabled students are not at a substantial disadvantage to their peers who are not disabled. As it is an anticipatory duty, educational providers are required to anticipate issues and make adjustments to allow disabled students to participate in the whole life of their education.

What would be an appropriate reasonable adjustment will depend on the specific circumstances. For practical examples of appropriate adjustments, one should refer to the three DVDs in publication from the Department for Education, "Implementing the Disability Discrimination Act in Schools and Early Years Settings."

Educational providers are required to ensure that reasonable adjustments are in place; it is not an optional consideration. As such, there is no justification for failing to make a reasonable adjustment. Additionally, educational providers are not allowed to charge for putting any reasonable adjustments in place.

**(ii) Accessibility Plan**

Schools must also provide accessibility plans. Accessibility plans set out how over a period of time the school (a) intends to increase access to the curriculum for disabled pupils; (b) improve the physical environment to increase access for disabled students; and (c) make written information more accessible to disabled students by providing information in a number of different forms. Accessibility plans must be in writing, as well as reviewed and revised as necessary.

## **Remedies**

Under the Equality Act, the court has the power to award any remedy which could be granted by the High Court in tort proceedings or in a claim for judicial review, including:

- a declaration of the rights and responsibilities of the parties;
- an injunction to prevent the discriminatory treatment from ongoing;
- a quashing order;
- damages to compensate for any loss suffered (the Equality Act stipulates that this could include compensation for injured feelings); interest on damages; and
- costs.

# PERSONAL INDEPENDENCE PAYMENTS

## How it Works

Personal Independence Payment ("PIP") is a disability benefit paid to people who are aged 16 to 64 years old. The PIP system is not based on a list of conditions or disabilities but on the level of assistance an individual requires because of how a condition affects his or her life. This functional approach takes into account ten daily living activities and two mobility activities.

In respect of each activity, the individual is then allocated points, ranging from 0 to 12, according to the extent to which the condition affects the person's life. The Department for Work & Pensions ("DWP") will add together your points from all the activities. First, if a person gets between 8 and 11 points in total, they will get the daily living component of PIP at the standard rate. If they get at least 12 points in total, they will get the daily living component at the enhanced rate. Second, the DWP will consider the individual's eligibility for the mobility component of PIP. In doing so, it will adopt the same approach, but only taking into account the two mobility activities.

The system is not means-tested. As such, income, savings and occupation do not impact an individual's eligibility.

## Can I Qualify?

In light of the points-based approach, whether a person qualifies for a PIP allowance depends upon the individual's specific circumstances. For someone with a stammer, the particularly relevant activities are "Communicating verbally" (activity 7) and "Engaging with other people face to face" (activity 9). The eligibility of the individual will be determined by a functional assessment conducted by a health professional, with a significant majority of these assessments carried out face-to-face. The health professional will allocate a number of points on the basis of the individual's circumstances (see tables below with descriptors and corresponding point allocations).

Activity	Descriptors	Points
<b>7. Communicating verbally</b>	a. Can express and understand verbal information unaided.	0
	b. Needs to use an aid or appliance to be able to speak or hear.	2
	c. Needs communication support to be able to express or understand complex verbal information.	4
	d. Needs communication support to be able to express or understand basic verbal information.	8
	e. Cannot express or understand verbal information at all even with communication support.	12

Activity	Descriptors	Points
<b>9. Engaging with other people face to face</b>	a. Can engage with other people unaided	0
	b. Needs prompting to be able to engage with	2
	c. Needs social support to be able to engage with other people.	4
	d. Cannot engage with other people due to such engagement causing either –  (i) overwhelming psychological distress to the claimant;  or  (i) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	8

When considering a person's eligibility, there are a number of definitional points which are worth bearing in mind.

- (a) Under activity 7 titled "Communicating verbally", the reference to "communication support" includes both a specialist and someone who knows the individual and is experienced in assisting him or her to communicate. "Complex verbal information" means information in one's native language which is communicated in either more than one sentence or one complicated sentence.
- (b) Under activity 9 titled "Engaging with other people face to face", two definitions which require consideration are "prompting" and "social support". The former is defined as "reminding, encouraging or explaining by another person" while the latter means "support from a person trained or experienced in assisting people to engage in social situations."

## Your Rights

The PIP allowance is made up of two components: the daily living component and the mobility component. Each can be paid at either a standard or enhanced rate. Whether the daily living rate is paid at the standard or enhanced rate will depend on the points allocated to the individual. For example, in respect of verbal communication (activity 7), if an individual is found to "need communication support to be able to express or understand basic verbal information", then that person will be allocated 8 points (see table above). This will entitle the person to the daily living component of PIP at the standard rate. If under activity 9, it is found that the individual needs "social support to be able to engage with other people" then he or she will be allocated an additional 4 points. Taken together, this would entitle the individual to the daily living component at the enhanced rate which is currently set at £87.65 per week.

This allowance is received in addition to any Employment and Support allowance or other benefits.

## Challenging a PIP Decision

It is possible to challenge a PIP decision. Individuals who wish to challenge a decision can request the DWP to reconsider the decision. This is called "Mandatory Reconsideration" and the purpose is to review the initial decision, not to consider the initial application in light of new factors. The mandatory reconsideration procedure is a prerequisite to making a formal appeal. It is important to note that a person only has one month from the date of the PIP decision to request a mandatory reconsideration.

If a person is unhappy with the mandatory reconsideration decision, they can then lodge an appeal. Importantly, the appeal must be made within one month of the date on the Mandatory Reconsideration Notice. Additionally, a person is permitted to appoint someone as his/her 'representative' to help with the appeal process. The representative could be anyone, such as a family member or friend. As a representative, this person can assist with the appeal submission, provide the person with advice and even act on the person's behalf.

The appeal process has a number of stages. First, a person must download and fill in a notice of appeal form (form SSCS1). This is accessed online. Following submission, the person will be able to provide the tribunal with evidence, such as a medical note, to support his/her case. The appeal will then be decided at a tribunal hearing. A decision will then be given either the day of the hearing or after the hearing by the post.

## SOURCES AND RESOURCES

Equality Human Rights Commission, '*Proving disability and reasonable adjustments*' (November 2014) [https://www.equalityhumanrights.com/sites/default/files/proving\\_disability\\_and\\_reasonable\\_adjustments.pdf](https://www.equalityhumanrights.com/sites/default/files/proving_disability_and_reasonable_adjustments.pdf)

Equality Human Rights Commission, '*Equality Act 2010: Summary Guidance on Employment*' (June 2014) <https://www.equalityhumanrights.com/en/publication-download/equality-act-2010-summary-guidance-employment>

Equality Human Rights Commission, '*Services, public functions and associations: Statutory Code of Practice*' (2011) [https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf)

Equality Human Rights Commission, '*Your rights to equality from businesses providing goods, facilities or services to the public*' (June 2015) <https://www.equalityhumanrights.com/sites/default/files/equalityguidance-businesses-2015-final.pdf>

Department for Education, '*The Equality Act 2010 and schools*' (May 2014) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/315587/Equality\\_Act\\_Advice\\_Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf)

*HM Land Registry v Wakefield* [2008] UKEAT 0530-08-1712  
[https://www.bailii.org/uk/cases/UKEAT/2008/0530\\_08\\_1712.html](https://www.bailii.org/uk/cases/UKEAT/2008/0530_08_1712.html)

HM Government, '*Personal Independence Payment (PIP)*' <https://www.gov.uk/pip/print>

*Mr S Mails v Mitie Aviation Security Limited* [2017] ET Case Number 2200158/2017  
[https://assets.publishing.service.gov.uk/media/596df6eee5274a0a690001c0/Mr\\_S\\_Mails\\_v\\_Mitie\\_Aviation\\_Security\\_Ltd\\_2200158-2017\\_-\\_Reasons.pdf](https://assets.publishing.service.gov.uk/media/596df6eee5274a0a690001c0/Mr_S_Mails_v_Mitie_Aviation_Security_Ltd_2200158-2017_-_Reasons.pdf)

Office for Disability Issues, HM Government, '*Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*' (May 2011) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/570382/Equality\\_Act\\_2010-disability\\_definition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf)

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