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Reasonable Adjustments in the Workplace Guidance for EIS Members & Representatives

Reasonable Adjustments in the Workplace: EIS guidance

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The purpose of this guidance

This guidance aims to set out some of the issues that people with disabilities can face in the workplace, and to offer advice on supporting those people to access the adjustments they need to enable them to enjoy fulfilling, healthy working lives, free from discrimination, in which their contribution and experience are recognised and valued.

The EIS recognises and values the contribution of people with disabilities in the workplace, and the insight and experience they can bring to their establishments, particularly at a time when a growing number of learners are being identified as having additional support needs. It can be valuable for learners to see that teachers may also have disabilities, that the education system can accommodate these, and that educational establishments can be inclusive environments for all.

Sadly, that is not always the case. In the education sector, as in wider society, people with disabilities can encounter discrimination. The concept of 'reasonable adjustments', which are the alterations to work arrangements which may be required to enable a person with disabilities to perform effectively at work, is based on the importance of employers seeking to ameliorate the disadvantage that people with disabilities might otherwise experience due to their disability and to disability discrimination.

Who is this guidance for?

This guidance is primarily for EIS Union Reps, including Local Association and Branch Secretaries. It may however be of use to members and to other Reps including School Reps, Health and Safety Reps, Equality Reps and Learning Reps, as a reference document. It aims to support greater understanding of the legal basis for 'reasonable adjustments', and to encourage good practice in delivering these across the education sector.

This is not intended to constitute comprehensive guidance and advice should always be sought from your LA Secretary/Branch Secretary/Area Officer in specific circumstances. The EIS case-handling protocol gives helpful guidance on how individual member concerns are addressed. ¹

What are reasonable adjustments?

'Reasonable Adjustments' are the alterations to work arrangements which may be required to enable a person with disabilities to perform effectively at work, and which, if not provided, may put a person with disabilities at a **substantial disadvantage** compared to others in the workplace. It is important that people with disabilities have the opportunity to fulfil their potential in all areas of learning and work. The teaching profession should be no different from any other profession in this respect.

Reasonable adjustments are provided for in law, by the **Equality Act 2010**. Disability is a 'protected characteristic' under Section 4 of the Act, meaning that people who have a disability must be protected from discrimination, harassment and victimisation. (See page 5 for the legal definition of having a disability). Where there is a failure to make a reasonable adjustment for a disabled person, without good reason, disability discrimination, which is illegal under the Equality Act, may have occurred.

Reasonable adjustments may have a technical, legal underpinning, but they are often about common sense and providing an inclusive working environment which takes into account an employee's needs. An employer need not be a legal or a disability expert in order to provide the appropriate adjustments. Often, an employer and employee can straightforwardly negotiate common-sense based arrangements which work for all concerned. However, it is important for medical advice to guide the employer/employee in discussions concerning adjustments. Employees must be asked for their consent if the employer wishes to seek medical advice from a GP or other relevant professional.

Put simply, making reasonable adjustments involves taking steps to enable the employee to stay in employment. The concept of reasonable adjustments is predicated on the assumption that people with disabilities have many valuable skills and assets to bring to the workplace, and are not defined by their impairments. This is in keeping with the social model of disability, which says

¹ <https://www.eis.org.uk/images/Employ%20Relations/Protocol%20on%20Case%20Handling%202016.pdf>

that disability is caused by the way society is organised, rather than by a person's impairment or difference. It looks at ways of removing barriers that restrict life choices for disabled people. When barriers are removed, disabled people can be independent and equal in society, with choice and control over their own lives. For example, a person with a mobility impairment, perhaps a wheelchair user, is not disabled by their impairment so much as by the construction of a society which assumes that all people can walk. Where buildings and infrastructure have disability access built in, the wheelchair user is able to participate fully, as she/he is not disabled by the environment.

Reasonable adjustments are an important part of creating more inclusive workplaces, and ultimately, a more equal society in which disability discrimination is widely understood and recognised, and is not tolerated, helping to create a society to which people of all abilities can contribute.

Legal context: Equality Act 2010

The Equality Act 2010² prohibits discrimination arising from disability.

The Equality Act replaced previous anti-discrimination laws, combining them under one piece of legislation. This includes the Disability Discrimination Act (DDA), which people sometimes still refer to, as it was the main piece of disability equality legislation in force for many years.

Section 4 of the Equality Act names disability as a 'protected characteristic', meaning that people with a disability have added protections from:

- direct discrimination
- indirect discrimination
- harassment
- victimisation
- discrimination arising from disability
- failure to make reasonable adjustments.

The focus of this guidance note is on reasonable adjustments (the failure to make these being prohibited by the Equality Act) but there are many types of discrimination, and legal advice should be sought where needed.

There may be occasions when other types of discrimination occur at the same time as a failure to make reasonable adjustments, and so consideration should be given to this in particular circumstances. For example, an employee might be refused a reasonable adjustment but might also experience harassment, if the way in which they are treated violates their dignity, or creates an intimidating,

² <http://www.legislation.gov.uk/ukpga/2010/15/contents>

hostile, degrading, humiliating or offensive environment. In one such case³, a claimant with spondylosis and osteoarthritis was required to work at least one Saturday in every four, which prevented her from taking four consecutive days of rest and having time to recover from her pain medication. She claimed that there was a failure to make reasonable adjustments. She was disciplined for refusing to attend on a Saturday on which she was scheduled to work. An employment tribunal upheld her claims of failure to make reasonable adjustments, and held that the way in which disciplinary proceedings were brought against her amounted to harassment.

Discrimination arising from disability

Section 15 of the Equality Act, 'Discrimination arising from disability', clarifies what is understood by discrimination arising from disability. It says:

- (1) *A person (A) discriminates against a disabled person (B):*
 - (a) *If A treats B unfavourably because of something arising in consequence of B's disability, and*
 - (b) *If A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

The ban on disability discrimination applies to all employers. All workers are protected, including employees and job applicants. No qualification period is necessary to bring a disability discrimination claim. There is no lower/upper age limit.

Employees and potential employees (job applicants) with disabilities are protected from discrimination in relation to:

- recruitment and selection
- terms of employment
- promotion, transfer, training or other benefit
- dismissal/being subjected to other detriment.

For more information about the legal context see links and further reading on page 15.

³ Grace V Royal Bank of Scotland Insurance Services Ltd. (2010)

The definition of disability

Under the Equality Act 2010, a person is disabled if she/he has:

- a physical or mental **impairment**
- which has a **substantial** (which has been held to mean 'more than minor or trivial') and **long-term adverse effect**
- on her/his ability to carry out **normal day-to-day activities**.

Points to note about the definition of disability

- This definition can include physical disabilities and also mental health conditions. A disability can arise from a wide range of impairments including:
 - sensory impairments, such as those affecting sight or hearing;
 - impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;
 - progressive impairments, such as motor neurone disease, muscular dystrophy, and forms of dementia;
 - auto-immune conditions such as systemic lupus erythematosus (SLE);
 - organ specific impairments, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease.
 - Developmental impairments such as autistic spectrum disorders (ASD), dyslexia and dyspraxia;
 - learning disabilities;
 - mental health conditions with symptoms such as anxiety, low mood, or panic attacks; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; Post Traumatic Stress Disorder, and some self-harming behaviour;
 - mental illnesses, such as depression and schizophrenia;
 - impairments produced by injury to the body, including to the brain.
- It can also include intermittent/fluctuating conditions, such as menopause, provided that they have a substantial and long-term adverse effect on the person's life, and their ability to carry out day-to-day activities.
- The definition includes people with cancer, HIV, and multiple sclerosis, from the first day of diagnosis

- 'Substantial' is more than minor or trivial, e.g. it takes much longer than it usually would to complete a daily task like getting dressed
- A 'long-term' adverse effect means 12 months or more (although some conditions are included from the day of diagnosis)
- 'Normal day-to-day activities' are defined as activities that people do on a regular basis in their everyday life as opposed to work, e.g. climbing stairs, getting in and out of a car, or reaching and bending.

It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions. You should never assume that someone has, or doesn't have, a disability.

What if the employer doesn't agree that an employee is disabled?

One interesting aspect of disability, compared to some of the other characteristics protected by the Equality Act 2010, is that there is often disagreement between the employer and employee about whether the employee is in fact disabled and whether the employer was aware, or should have been aware, that the employee was disabled. (This is because, for an employer to be answerable for alleged disability discrimination, they must have known, or be in a position where they should have known, that the employee is disabled.)

Recent caselaw on this matter⁴ points to an obligation on the employer to be mindful of the possibility that an employee who is on sick leave or who is having difficulty participating at work *may* be disabled, and therefore the duty not to discriminate and to make reasonable adjustments may apply. The Equality and Human Rights Commission (EHRC) explains that "if challenged, employers will be required to show that they considered all the information before them and made reasonable enquiries about whether the employee was disabled." This chimes with the EHRC Code of Practice on Employment (2011) which states that:

"The employer must do all they can reasonably be expected to do to find out whether this is the case [if an employee is disabled]. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

⁴ <https://www.equalityhumanrights.com/en/legal-work-scotland/disabled-or-not-disabled-not-only-question>

The EHRC Code of Practice, to which employers must have regard, also makes the point at paragraph 6.9 that focussing too closely on the legal definition may not be the best approach:

“In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each worker and job applicant.”

What is not classed as a disability?

Certain conditions **do not** amount to a disability for the purposes of the Equality Act, these being:

- addiction to, or dependency on, alcohol, nicotine, or any other substance (other than in consequence of the substance being medically prescribed);
- the condition known as seasonal allergic rhinitis (e.g. hayfever), except where it aggravates the effect of another condition;
- a tendency to set fires;
- a tendency to steal;
- a tendency to physical or sexual abuse of other persons;
- exhibitionism;
- voyeurism.

However, it is important to note that these conditions may give rise to separate disabilities (e.g. depression caused by alcohol abuse).

Sometimes a person can have a range of health conditions which can make it harder to identify whether there is a disability present. It is important to focus on the adverse effect of any condition on the carrying out of day to day activities. E.g. if a person is obese, their obesity in itself is not an impairment, but if it causes breathing and mobility difficulties which substantially adversely affect their ability to walk, that would be included in the definition.

Employee obligations: dos and don'ts

There is no obligation on an employee with a disability to ask for adjustments. The duty to consider what steps it might be appropriate to take in the circumstances is the employer's alone. However, it is sensible for employees to be proactive by asking for the adjustments that they need. If an employee or employer is unsure of the types of adjustments that may pertain for any particular disability, they can seek advice from a GP, an occupational health physician or various specialist agencies.

If you are an employee with a disability, and you require reasonable adjustments:

- **DO** ensure that the employer, or someone acting on their behalf, knows that you have a disability, in order that they cannot claim that they were unaware. Employees are entitled to keep their health condition(s) confidential, and some conditions with stigma attached (e.g. AIDS, HIV, some mental illnesses, difficulties arising from menopause, some bowel or bladder conditions) can make disclosure difficult. However, employers need sufficient information to carry out reasonable adjustments. Members may wish to make their condition(s) known to an occupational health adviser, or to a HR officer, where appropriate, in strictest confidence. Any colleague to whom members disclose health information should treat this with great sensitivity.
- **DO NOT** feel the need to disclose the cause of your impairment or prove a recognised illness. The question of disability is judged according to the effects of the impairment on everyday life and day to day activities. Disclosure of causes/medical details is not required.
- **DO NOT** feel obliged to disclose disability during the recruitment process. The Equality Act protects potential employees as well as existing employees. If offered a post, you should then discuss your disabilities and what reasonable adjustments may be needed.
- **DO NOT** assume that you need to be 'registered disabled' to qualify: this is not the case.
- **DO** remember that you are only asking for what you need to be able to part of the workforce and don't feel guilty or embarrassed. Many people with disabilities say they 'don't want to make a fuss', but you are entitled to be protected from substantial disadvantage and to enjoy full equality with your non-disabled peers.

Employer obligations: when should employers make reasonable adjustments?

The legal duty for employers to make reasonable adjustments arises in relation to three specific areas:

- 'Provision, criteria or practice' (PCP)
- Physical features of the workplace
- Provision of auxiliary aids.

Provision, criteria or practice - PCP

Where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage, in relation to a relevant matter, in comparison with persons who are not disabled, the employer is then obliged to take 'such steps

as it is reasonable to have to take' to avoid the disadvantage (see S.20 (3) of the Equality Act 2010).

PCPs are broadly defined and include any policies, practices or arrangements operating in your establishment, whether formal or informal. For example, an 'unwritten rule' that all medical appointments should take place before or after the school day would amount to a PCP. On the face of it, such a requirement is neutral in its effect as it is also disadvantageous to non-disabled teachers. However, a disabled teacher who requires essential medical treatment in the middle of the school day for a reason related to their disability (e.g. physiotherapy) will be at a disadvantage when compared to teachers who are not disabled and who do not require essential medical treatment in the middle of the school day.

This unwritten rule could trigger your employer's duty to make reasonable adjustments if it prevents you from attending a medical appointment during the day, and this places you at a substantial disadvantage.

Physical features of the workplace

Likewise, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer should take 'such steps as it is reasonable to have to take' to avoid the disadvantage. (s.20(4) of the Equality Act).

Physical features include, but are not limited to steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits, internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings and signs.

Provision of auxiliary aids

There is also a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to 'take such steps as it is reasonable to have to take' to provide the auxiliary aid. (s. 20(5) of the Equality Act).

Auxiliary aids are not defined in legislation, but they are covered in the Equality and Human Rights Commission's Code of Practice on Employment. Auxiliary aids can include specialist equipment such as an adapted keyboard; specialist software; or auxiliary services such as a sign language interpreter, a palantypist or a support worker.

Substantial disadvantage

The term 'substantial' simply means the disadvantage complained of must be more than minor or trivial. It does not therefore carry a particularly heavy burden of proof.

Information provision

The Equality Act states that employers should take steps to ensure that information is provided in an accessible format, where it relates to these aspects above.

Paying for adjustments

Reasonable adjustments should be paid for by the employer and you should not have to pay for such adjustments yourself. If at any time it is suggested that you pay for adjustments, please seek advice from your School Rep, Health and Safety Rep or Local Association/Branch Secretary as appropriate, before taking any further steps.

Types of Reasonable Adjustments

There is a very wide range of adjustments that may assist someone with a disability to remain in work. It is unlikely that any single adjustment will remove or ameliorate disadvantage experienced by employees with disabilities. This is because the nature of the barriers faced by disabled employees, and the impact of mental or physical health conditions on work, can and do change over time. It is sensible for employers to discuss the effectiveness of any adjustments made with the employee and remain open to trying different adjustments at different times, where it is reasonable to do so.

Below are some examples of reasonable adjustments that an employer could make. Some of these adjustments have been made for employees in educational establishments in Scotland in recent years.

- Transferring the employee to another job that involves lighter work, provided the employee consents
- Modifying instructions/reference manuals, e.g. providing them in Braille
- Providing a modified chair or workstation
- Providing a car parking space near to the place of work or with sufficient space for manoeuvring mobility equipment
- Adjusting lighting levels in the workspace
- Flexibility about start times to take account of the extra time a person with a disability may need to get ready for work
- Providing software for reading
- Sharing classes with another teacher to allow unsuitable tasks to be reallocated, e.g. a blind teacher shares a class so s/he can teach the theory aspects of a course whereas a colleague teaches the practical aspects
- Providing a tablet to make website and smartboard use easier

- Providing hearing assistance equipment for deaf teachers, e.g. a loop system
- Timetabling extra non-contact time to allow time for planning, marking and reporting
- Adjusting the timetable to allow for rest breaks; and providing facilities for rest
- Making physical changes e.g. installing a ramp for a wheelchair, installing a lift, or relocating the employee to a different classroom
- Providing a special keyboard for a teacher with arthritis
- Allowing a phased return to work after a period of disability related absence
- Offering flexible working arrangements including part-time working
- Facilitating the provision of Access to Work including transport or the provision of Personal Support Assistants
- Adjusting sickness absence management policies to be sensitive to conditions caused by or arising from disability, e.g. migraines exacerbated by visual impairment, which could be monitored separately but not included as a 'trigger' for an absence management meeting.

When is an adjustment 'reasonable'?

This is not straightforward, because what is reasonable in one set of circumstances may not be reasonable in another. A good starting point is to consider whether the adjustment sought is likely to remove or ameliorate the disadvantage complained of. An employer doesn't have to be certain that the adjustment will remove disadvantage; it is only necessary that they believe the adjustment is likely to remove or ameliorate disadvantage.

A key point to consider is whether the adjustment would enable the employee in question to remain in or return to work. The more likely that an adjustment is to keep someone in work or help them return to work after a period of absence, the more reasonable it is likely to be, once other relevant considerations such as cost, have been taken into account.

The reasonableness of an adjustment is determined by:

- Whether it is effective
- Whether it is practical
- What it costs
- The resources of the organisation
- The availability of financial support.

An employer must be prepared to justify its reliance on any of these factors if they refuse to make reasonable adjustments.

Legal rulings on this matter have historically been decided on a case by case basis, taking into account the facts of each case. There is no objective justification test.

Employers can refuse to make some adjustments, and caselaw has upheld some of those decisions, e.g. an employer is not legally required to continue paying a disabled employee whose entitlement to sick pay has been exhausted by disability-related absence, or offer ill-health retiral, although many employers will wish to go beyond legal minima.

The principle remains that an employer is entitled to expect employees to be able to attend work on a regular and reliable basis, and this will be taken into account in deciding what reasonable adjustments can be made.

What if the adjustment is refused?

If at any time an adjustment is refused, please seek advice from your School Rep, Health and Safety Rep or Local Association/Branch Secretary as appropriate, before taking any further steps. In any discrimination case, making a claim to an Employment Tribunal (an independent tribunal which makes decisions in legal disputes around employment law) is a possible recourse, although this should always be the last resort, after all other options have been exhausted. There are strict time limits applied to the Employment Tribunal process and so it is important to notify the appropriate union representative as early as possible.

Advice to EIS Members

All teachers and lecturers are advised to:

- Participate in Professional Learning on disability equality issues
- Make use of disability equality education resources to challenge all forms of disability discrimination
- Ensure that incidents of disability discrimination affecting staff or pupils/students are reported and recorded using appropriate formal procedures, and use the data to inform the development of anti-discrimination approaches.

Members with a disability are further advised to:

- Consult their Union Rep, or Local Association/Branch Secretary, in the first instance, for advice (the EIS Case Handling Protocol will determine who is able to assist with your query) in the event of needing reasonable adjustments or having been refused a request for adjustments, particularly if you wish to lodge a grievance
- Consult your local Equality Rep, who may be able to advise on good practice from elsewhere in the authority or from another establishment, and who may know of relevant policies and resources (note however that Equality Reps do not take on casework)

- Consider applying for Personal Independent Payment (PIP), as this may allow for purchasing equipment that can be used at home and at work. (We are aware that the process of applying for PIP can be stressful and difficult and would encourage members to seek support from a relevant agency or charity through the process).
- Contact the Access to Work service. An Access to Work grant can pay for practical support e.g. it can contribute to the cost of equipment, or assist with costs associated with transport, funding PSAs etc.

Advice to EIS Representatives

EIS representatives are advised to:

- Familiarise themselves with this guidance
- Take account of the specific needs of members with disabilities in any discussions of provision, criteria or practices, such as when discussing policies such as Absence Management, Flexible Working, Dignity at Work or Health and Safety; or when discussing building alterations; or timetabling issues.
- Advise members as to their legal rights to protection from disability discrimination
- Work with the Local Association/Branch to promote disability equality initiatives, that challenge negative attitudes, and promote a more inclusive and diverse workplace in which members with a disability are supported and included
- Monitor the kinds of decisions being made around reasonable adjustments for members, and share any emerging issues or concerns with members of your Local Association/Branch.

Advice to Local Association/Branch Secretaries

EIS Local Association/Branch Secretaries are advised to:

- Discuss this advice with the local Executive Committee/Committee of Management/Board of Management, and any appropriate action that it may wish to take
- Discuss within LNCTs/JNCTs or other negotiating fora the effectiveness of current disability equality strategy, policies and approaches in operation within the authority/college/university
- Ensure that the local authority/college/university has robust mechanisms in place for reporting, monitoring and responding effectively to disability discrimination
- Discuss how those at greatest risk of disability discrimination are being supported in the workplace, including the range of reasonable adjustments being put in place, to enable better sharing of approaches across establishments
- Encourage the provision of Professional Learning for staff, especially those in management roles, on disability equality matters
- Seek to influence the content of locally developed policies and practices, including through the use of Equality Impact Assessment, taking into

account the specific needs and experiences of disabled members, and consulting them where relevant

- Engage with EIS Equality Reps in developing work in this area
- Emphasise the importance for all staff and learners, including those who have a disability, of a respectful, trusting and collegiate learning environment across all establishments
- Seek further advice as required from Area Officers or EIS HQ.

Further reading

Teaching and Disability – EIS policy:

<http://www.eis.org.uk/images/EIS%20Policies/Teaching%20&%20Disability%20policy%202013.pdf>

Definition of Disability - UK Government guidance:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf

Equality and Human Rights Commission, disability advice:

<https://www.equalityhumanrights.com/en/disability-advice-and-guidance>

Equality Act 2010:

<http://www.legislation.gov.uk/ukpga/2010/15/contents>

Disability and cancer:

<http://www.cancerresearchuk.org/about-cancer/coping/practically/the-disability-discrimination-act-and-cancer>

Access to Work:

<https://www.gov.uk/access-to-work/overview>

ACSAS guide to disability discrimination:

<http://www.acas.org.uk/index.aspx?articleid=1859>

PIP: How to claim, and help with your claim form:

<https://www.gov.uk/pip/how-to-claim>

<https://www.citizensadvice.org.uk/benefits/sick-or-disabled-people-and-carers/pip/help-with-your-pip-claim/fill-in-form/>

Independent Living Fund Scotland:

<http://ilf.scot/>

Disability Information Scotland:

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

Inclusion Scotland:

<http://inclusionscotland.org/>