

*VRA Webinar 22 Nov. 2022*

**The Equality Act (EqA) in VR:  
Comprehensive in theory but, as yet, restricted in practice**

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# Outline

- Equality Act (EqA) definitions / forms of discrimination
- Employers' obligations (selection & employment)
- Examples: acquired (ABI) + developmental (ASD/dyslexia)
- Float some draft conclusions / implications
- Key sources, other reading, references & abbreviations. Rely on EqA 2010 Employment Statutory Code of Practice (EHRC, 2011).

**Personal views: no legal training, not legal advice.**

Primary concerns: unfulfilled work potential + psychological impact

# Equality Act (EqA) (2010) – Core definitions

- ‘Disability’: “a physical or mental impairment which has a long-term and substantial adverse effect on the ability to carry out normal day-to-day activities”. (para 2.12).

‘Mental impairment’ is intended to cover a wide range of impairments relating to mental functioning (App. 1 para 6) .

- No need to establish a medically diagnosed cause for impairment, it is the effects that matters (App. 1, para 7)

Guidance on disability definition (Office for Disability Issues, 2011).

## Long-term / Substantial

- ‘Long-term’ - impairment has lasted or is likely to last for at least 12 mons. or for rest of life (para 2.14). Even when no longer adversely affected ... still protected if effects lasted for over 12 mons. (para 2.9).
- ‘Substantial’ means more than minor or trivial (para 2.15). A substantial adverse effect reflects general understanding of disability as a limitation beyond normal differences in ability
- When taking measures to treat/correct effect ..... still to be treated as though it has that effect and covered by EqA, except glasses/contact lenses (para 2.16)

## ‘Normal day-to-day activities’...

- Activities carried out by most people on a fairly regular or frequent basis .....
- This includes but is not limited to walking, driving, using public transport, cooking, eating, lifting & carrying everyday objects, typing, writing (& taking exams), going to toilet, talking, listening to conversations or music, reading, normal social interaction or forming social relationships, self-nourishing / caring and activities relevant to working life.

(App 1, paras 15).

## ....cont. Normal day-to-day activities

- Impairment may not prevent day-to-day activities but still have substantial adverse effect on how carry out those activities:

May suffer pain; or more than usual fatigue so not be able to continue over sustained period of time. (App.1, para 10)

**Good practice:** for employers & OH to focus on any reasonable adjustments (RA) needed even if there is doubt about whether person falls within definition of disabled person.

(para 10.43).

# Six forms of Disability Discrimination

- Direct discrimination
- Indirect discrimination
- Discrimination arising from disability
- Duty to make reasonable adjustments
- Harassment
- Victimisation

(Equality & Human Rights Commission [EHRC], 2011).

# Direct discrimination - disability .....

- Treat less favourably than treat (or would treat) others because of...:
  - a disability (para 3.2),
  - a stereotype relating to a disability (para 3.15) or
  - association with person with disability, campaigned to help or refused to act in a way that would disadvantage (paras 3.18-3.20).
  - mistakenly think a worker has a disability (para 3.21).

Unlawful, regardless of motive, intent, whether done consciously or unconsciously or whether the employer is aware of treating the worker differently (para 3.14) .

## Indirect discrimination....

- Apply an apparently neutral provision, criterion or practice which puts workers with a disability at a particular disadvantage (para 4.3)

This includes any policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions (para 4.5).

- ‘Disadvantage’ includes denial of opportunity or choice, deterrence, rejection or exclusion (not just financial actual loss) (para 4.9)  
does not have to be intentional (para 4.24).
- Unless show can proportionate means of achieving a legitimate aim.  
(para 4.4)

# Discrimination arising from disability...

- Treat person unfavourably because of something connected with disability (e.g. dismissal as a result of disability-related sick leave) (para 5.3).
- Discrimination where:
  - an employer treats the disabled person unfavourably ....because
  - of something arising in consequence of a person's disability; &
  - cannot show a proportionate means of achieving a legitimate aim.
- Unless the employer does not know, and could not reasonably be expected to know, that the person has the disability.

(Para 5.2)

# Duty to make reasonable adjustments 1.

- Employers required to take positive steps to ensure that people with disability can access and progress in employment. ... (para 6.2)
- Not only avoiding treating people with disability unfavourably, but also taking additional steps to ensure they can access jobs, education and services as easily as people without disability (para 6.2):
- The aim of making adjustments is, as far as possible, to remove any disadvantage faced by disabled people.

(EHRC, 2020).

## Reasonable adjustments (RA) 2.

Employers are required to take reasonable steps to:

- Avoid substantial disadvantage arising from a provision, criterion or practice applied by or on behalf of employer.
- Remove or alter a physical feature or provide a reasonable means of avoiding such a feature.....
- Provide auxiliary aid (including auxiliary service). (para 6.5)

No onus on employee to suggest what RA should be made (para 6.24)

If H&S concern, risk assessment should be undertaken (para 6.27).

## RA 3. – Factors

- Factors which might be taken into account when deciding what is a reasonable step include the following (para 6.28):
  - likely effectiveness in preventing disadvantage
  - the practicability of the step
  - financial & other costs of adjustment & extent of any disruption
  - the extent of employer's financial or other resources
  - financial or other assistance to help employer make adjustment
  - the type and size of the employer

## RA 4. – Implementation

- Effective RAs often involve little or no cost or disruption and are therefore very likely to be reasonable to have to make unless another factor (eg. impractical / ineffective) make it unreasonable (para 6.5)
- Even if significant cost may be cost-effective (e.g. relative to recruiting & training new staff member) (para 6.25) and also more likely to be reasonable if organisation has substantial financial resources. NB resources as a whole, not specific service.
- Easier to implement, more likely to be reasonable; however just because difficult does not mean it cannot also be reasonable.

## RA 5 'Reasonable' - legal judgment

- When duty applies, 'reasonableness' alone determines whether has to be made – this depends on individual circumstances (paras 6.30)
- [Not personal opinion - legal judgment about what is reasonable to implement... but why would you not make the RA anyway ? ]
- Having taken all relevant issues into account, if decide adjustment is reasonable, then must make RA, otherwise committing an act of unlawful discrimination > right to claim to Employment Tribunal (para 6.31-32). (NB Time limits for legal claims; paras 15.20-31).

# Disability–related Harassment

- Occurs when ‘unwanted conduct’ related to disability has purpose or effect of violating dignity of a person or of making them feel humiliated, offended or degraded (para 7.6). This could be .....
- spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour (para 7.7).
- Discrimination requires consideration of :
  - circumstances of person with disability,
  - environment in which it occurred, and
  - whether it is reasonable to have that effect (para 7.18).

# Disability–related Victimisation

Subjected to a ‘detriment’ because of making (or supporting) a complaint of discrimination (para 9.2). This includes ‘Protected acts’:

- bringing proceedings under the EqA
- giving evidence or information in connection with EqA
- doing anything related to provisions of the EqA
- making allegation person has acted in breach of EqA
- making/seeking ‘relevant pay disclosure’ (para 9.5)

Also unlawful to instruct ...or to help, cause or induce (or attempt to cause or induce) a person to discriminate against, harass or victimise third person because of disability or a protected act (para 9.16-17)

## Light relief:

Job role: Kayaking Instructor



Job retention – 4 issues identified: .....



# Obligations of employers in selection 1

- Assess objectively / not discriminate against applicant with disability
  - in arrangements for deciding who offered employment;
  - in the terms on which they offer employment; or
  - by not offering employment to the applicant. (para 10.7)

‘Arrangements’ - all policies, criteria & practices incl. adverts, application & interview, not just decision-making. (para 10.8)

- Might mean providing/accepting information in accessible formats or amending policies / procedures to reduce disadvantage. (para 10.18).

## Obligations in Selection 2. – Health Enquiries

- With exception of enquiries to determine RAs, employers should not make enquiries about disability/health before job offer (para 10.10).
- Information obtained for purpose of adjustments should.....be held separately & not form any part of decision-making. (para 10.29).
- If disability voluntarily disclosed, must only ask further Qs about RAs required to carry out an intrinsic function of job. (para 10.37)
- Job offers can be conditional on satisfactory responses to disability or health enquiries / checks but must not discriminate on that basis.  
(para 10.39)

# Obligations of employers to employees 1

Must not discriminate against employee with disability in:

- Terms of employment: pay, hours, bonuses, pensions, sickness, leave
- Access to opportunities (i.e. promotion, transfer, training etc.)
- Dismissal; or any other detriment (para 10.11-10.17).

Policies & procedures may need to be amended to prevent disadvantage

Duty to make RAs applies to all stages of employment and should be implemented in a timely fashion (para 6.32).

Some RA require cooperation of co-workers. If staff obstructive or unhelpful employer expected to deal with this appropriately (para 6.35).

## Obligations to employees 2: Reasonable Steps e.g:

- Making adjustments to premises
- Providing information in accessible formats
- Allocating some duties to another worker
- Altering hours of work or training
- Transferring worker to fill an existing vacancy
- Assignment to different place of work and/or home-working
- Allowing absence from work to attend for rehabilitation, assessment or treatment
- Training or mentoring (for person or others)

..... cont.

## ...cont. Reasonable Steps 2b

- Acquiring or modifying equipment
- Modifying procedures for testing or assessment
- Providing a reader or interpreter
- Providing supervision or other support
- Allowing a disabled worker to take period of disability leave
- Participating in supported employment schemes
- Employing a support worker to assist a disabled worker
- Modifying disciplinary or grievance procedures
- Adjusting redundancy selection criteria
- Modifying performance-related pay arrangements

(para 6.33)

## A few ABI examples 1.

- Told by senior executive would not employ anyone with ABI !
  - Voluntary work enquiry - told 'we've already got one of those'!
  - Clients offered a salary below minimum wage
  - Ignoring advice on permitted earnings rules > risking benefits
  - Former Two Tick employer - meet minimum criteria - no interview.
  - Follow-up enquiries often ignored or dismissed.
  - Very slow response to concerns, exacerbating anxiety/distress
- + NHS job specs still require car driving just to travel between sites
- + Adjustment requests ignored (e.g. for a year by 3 managers)

.... Cont.

## ABI examples 2.

- pressure to work overtime in spite of fatigue, risking health/job
- refusing requests to meet VR staff to explain difficulties
- refusing support for a person with communication difficulties at a disciplinary hearing
- refusing VR support at work even when job at risk.

Even if rebuffed contact with employer may be beneficial as aware of involvement of people with knowledge of employee rights and may lead to change in attitude and more positive relationship.

- Without access to VR support, people very commonly struggle and often unable to secure the reasonable adjustments that they need.

## Developmental conditions - a few examples

- Delayed response / refusal to provide RA at interview – multiple examples incl. request to prepare presentation day before interview
- Multiple examples of long delays in implementation of RA, e.g.
  - RA not in place by 6 mons – employee left post
  - psychological impact > sickness > grievance / legal claim
- Failure to report sickness absence as being disability-related
- Decline to continue dyslexia RA from last role as passed own test
- + Other multiple other examples, subject of active legal claims

# Public Sector Equality Duty (PSED)

Consider needs of all individuals in policy, delivering services & for own employees so that appropriate & accessible to all.

Public bodies required to have due regard to the need to:

- eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by EqA
- advance equality of opportunity between people with a disability and those without
- foster good relations between people with a disability and people without.

(EHRC, 2014/2021)

## PSED 2: 'Advancing equality of opportunity' ....

- ....involves consideration of the need to:
  - remove or minimise disadvantages of people with a disability;
  - meet the needs of people with a disability; and
  - encourage participation in public life or other activities if low.
- Recognise the needs of people with a disability and take these into account in policies/services including making RA  
(EHRC, 2014/2021)

**In my view NHS action could include:**

Better training, status of OH advice, advocacy & central budget

# HCPC & VRA Practitioner Standards

- **HCPC:** not discriminate against service users, carers or colleagues by allowing your personal views to affect your professional relationships or the care, treatment or other services you provide;
  - > challenge colleagues if you think they have discriminated against, or are discriminating against, service users, carers and colleagues
- **VRA:** Accommodate differences due to age, disability, gender reassignment, marriage & civil partnership, pregnancy & maternity, race (incl. colour, nationality, and ethnic or national origin), religion or belief, sex (gender) & sexual orientation.

## House of Lords Select Committee: EqA 2010 & Disability (2016)

- Problems with RA in '*almost every part of society*'. Highlight poor understanding of employers' duty to reduce disadvantage '*to achieve equality in practice*' (para 204-6), some still see as '*favouritism*'.
- House of Lords Liaison Committee (2021): Many concerns > 19 recommendations – govt., PSED, RA & access to justice.

## Women & Equalities Committee (2019a):

- 'What little enforcement is happening insufficient to tackle systemic or routine discrimination' that too many experience as a simple fact of life' > Need a fundamental shift in enforcement of the EqA.

## Misuse of Non-Disclosure Agreements (NDAs)

- WEqC (2019b) also raise serious concerns of employers covering up allegations of workplace discrimination through NDAs.

Employees often feel have to sign but may then be difficult to work in same sector and/or suffer psychologically or financially.

- “NDAs should not be used to silence victims of discrimination and harassment’ and ‘employers and their legal advisers should not be complicit in using NDAs to cover up allegations of unlawful acts”.
- FoI request English NHS Trusts by Health Service Journal: 2018-21 247 settlement NDAs (excl. non-responders) but number is falling.

# Ableism and the Labour Market

Why Are 48,000 Disabled Workers Managed out of Work every year ?

- Employment Tribunals: ‘far from ideal’ - legal representation needed to navigate system but prohibitively expensive for most .....  
Experience frequently traumatising - legal advice often to settle asap to reduce trauma > smaller settlement + no impact on case law.  
Disability-positive framework involves ‘changing hearts & minds’:
  - View all employees as talent to be nurtured and prioritise health & wellbeing incl. offering ‘workplace adjustments’ to all,
  - Act creatively to remove barriers and facilitate inclusive workplaces

(Association of Disabled Professionals, 2022)

# Light relief - kayaking adjustments 1



## Adjustments 2. Health & Safety



# Light relief: Still working !



# Some unhelpful responses to complaints / claims

- Delayed and/or inconsistent response (NB time limits for claim)
- Not agreeing with or implementing OH recommendations
- Disputing medical and/or psychological reports / demanding re-assessments to re-confirm diagnosis and/or disability.
- Even when appears clearcut, may not be resolved: denial of EqA jurisdiction, attempts to reframe or justify action / inaction !
- Further discrimination / harassment / victimisation > resignation
- Inaccurate/misleading evidence provided to investigations
- Spiralling & often prohibitive legal costs
- Lack of RA in legal proceedings > further discrimination

## Successful RA legal claims – some examples:

- Refusal to vary standard assessment test or format
- Refusal to provide a dedicated parking space
- Not making adjustments, as none recommended by GP !
- Failure to recognise disadvantage > inefficiency
- Training delayed > dismissal on capability grounds
- Insufficient adjustments > do job but not to best of ability
- Declining request to transfer to another role - RA required
- Disability leave adjustment removed > dismissal
- Failure to maintain rate of pay on disability redeployment

Please share any additional examples

## A more positive ABI example

- A person receiving couples therapy very late post ABI facing dismissal following alleged gross misconduct (reporting error).
- Explain to HR error likely to reflect current stress on top of effects of ABI when fatigued at end of day (not misconduct). Hearing postponed > on leave pending OH assessment / report.
- Vocational assessment > recommended RAs. Detailed report to Occupational Health and meeting with employer & HR.
- Redeployed in reduced role on protected pay. 'Micro-management': In adjusting to new role, ongoing support - monthly for 2 yrs > quarterly > 6 monthly > annually to secure & maintain new job role.

(from Tyerman et al., 2017, example D).

## Draft conclusions on EqA in VR

- EqA: comprehensive requirements but not well understood.
- Discrimination common - lack of enforcement
- Raising concern / legal action often leads to more discrimination, harassment and/or victimisation > psychological impact
- Complex / protracted complaints & grievance procedures
- Regulatory bodies seem reluctant to regulate discrimination.
- Ongoing VR support if person decides to take action. **However ...**
- Few can afford cost of legal representation or taking legal action.
- Wasted potential, high cost & risk of psychological damage

# Discrimination Action > Psychological Impact

- Stress & frustration of taking action on top of discrimination
- + Response often challenging, sometimes aggressive
- + Questioning of diagnosis, impairment, disability or disadvantage
- Significant impact on psychological well-being, e.g. after ABI
  - ❖ undermining progress in insight and awareness into difficulties
  - ❖ reinforcing belief that no-one outside family & ABI understands
  - ❖ loss of confidence in ability to work, if no adjustments agreed
  - ❖ reduction in job search / applications / employment
- Increased social isolation, depression & suicidal thoughts / actions

**Need for collective action !**

## Reflections for VR practice: 1. Person

- Immediate advice / support in response to reported discrimination.
- Alert to potential impact on psychological well-being (? referral).
- Signposting to advice on EqA, as appropriate (e.g. CAB, EASS, EHRC, DRUK, solicitors, Union, TUC, voluntary groups, VRA).
- Support in weighing implications and pros & cons of taking action - VR input to find alternative job is often a safer option.
- Provision of reports to inform any grievance or legal action.
- Ongoing support for any such process & after-effects, as required.

## Reflections for VR practice: 2. Employers

- Signposting to sources of EqA advice for employers: (e.g. ACAS, Business Forum on Disability, CIPD, EHRC, HSE, OH)
- Offer of support in response to above information/advice
- + **Where concerns of D remain:** As discussed & agreed with person...
- Raise concern with employer: Avoid 'D' word (Discrimination) & 'E' word (Equality), focus on 'F' for Facilitation, facilitating for...  
person - **A** Adjustments, **B**elief, **C**onfidence > Psychological W/B  
employer - **P**erformance, **R**esolution & **S**tability > Productivity
- As reqd, statement of disability, concerns & options for resolution

## Reflections for VR practice: 3. Practitioners

- Need HCP/VR practitioners to be alert to & address EqA issues
  - Core EqA training - disability + information sources (incl. VRA)
  - Survey of VR practitioners EqA experiences / training needs
  - Pooling of +ve. and –ve. examples to guide VR practice
- + For those responding to EqA concerns:
- Development of in-depth training (incl. examples)
  - Specialist supervision / mentoring / peer support
  - Research on psychological impact of complaints / legal cases
  - Pan-disability, inter-disciplinary, multi-agency group to support EqA in VR to facilitate people in achieving their vocational goals.

## Key source material

EHRC (2011). Equality Act 2010 Employment Statutory Code of Practice. London: Equality and Human Rights Commission.

<https://www.equalityhumanrights.com/sites/default/files/employercod e.pdf>

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## Other recommended reading

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# Abbreviations 1

ABI	Acquired brain injury	ACAS	Arbitration & Conciliation Service
EHRC	Equality & Human Rights Com	BFD	Business Forum on Disability
ET	Employment Tribunal	CAB	Citizens Advice Bureau
EqA	Equality Act	CIPD	Chartered Institute Personnel Dev.
H&S	Health & Safety	DRUK	Disability Rights UK
HSJ	Health Services Journal	EASS	Equality Advisory & Support Serv.
OH	Occupational Health	HCPC	Health & Care Professionals Coun
NDA	Non-Disclosure Agreement	HSE	Health & Safety Executive
PSED	Public Sector Equality Duty	TUC	Trade Unions Council
RA	Reasonable Adjustments	VRA	Vocational Rehabilitation Assoc.
VR	Vocational Rehabilitation	W&EC	Women & Equalities Comm.