Equality for Disabled Education Staff: ATL Guidelines

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Introduction

ATL contributed to a 2015 TUC survey alongside other school and college unions, which reports a growing level of harassment and a decrease in the employment of disabled staff and willingness to accommodate them (see TUC, March 2015 *Disabled Workers and Students in Education*). This is despite comprehensive legislation in the form of the Equality Act (2010). The combination of stressful education reforms and austerity measures is also playing a part in increasing difficulties for disabled staff.

This guidance aims to provide an overview of the rights of disabled workers in schools and colleges and provide practical advice for union reps and members on how to achieve equality for disabled staff. One in five school and college students have some form of long term impairment or special educational need and they benefit enormously from having staff who are themselves disabled. Many disabled staff have experience of disabling barriers and how to challenge them effectively and develop strong self-esteem. However, if such staff are made to feel uncomfortable or harassed at work they are far less likely to act as positive role models to the school and college community.

This guidance will examine the Equality Act definition of disability, issues of disclosure and confidentiality and suggest areas of good practice. The Trade Union movement supports the 'social model' of disability approach developed by the UK Disabled Peoples' Movement. This views the main problems that people with long term impairments face as negative attitudes, physical and organisational barriers, rather than the 'medical model' approach, which views disability primarily in the person and their loss of function.

ATL is also committed to influencing greater awareness of mental health issues in education and to tackling the stigma and ignorance often shown by those who still do not understand about mental ill health. We believe that there is no health without mental health, and time and time again our members have raised the issue at ATL national conferences, at TUC Disabled Workers' Conferences, in the media and in the workplace.

Many people with mental ill health are facing stigma, a lack of compassion and knowledge and often aggressive behaviour from employers. It has been reported by MIND that, for example, perhaps at any one time 1 in 6 employees experience depression, anxiety or stress as a consequence of their working life. However, another survey showed that just 40% of employees would feel confident enough to discuss a

mental health problem with their employer[1]. In the same survey, only 25% of the respondents indicated that their employer encouraged employees to talk openly about mental health problems and 37% that their employer supported those with such problems effectively.

We know from a survey of our members in 2014 that:

- More than a third (38%) of school and college staff have noticed a rise in mental health problems among colleagues in the past two years.
- More than half (55%) of those working in education feel their job has had a negative impact on their mental health.
- Nearly seven in 10 (68%) school and college staff hide mental health issues from employers, while over six in 10 (63%) report physical problems.
- Almost half (45%) didn't disclose hidden health issues because of worry about managers' reactions.

The most common factors affecting the mental health of education staff were pressures to meet targets (63%) and inspections (59%), followed by pressure from leaders (55%).

More than half (55%) said their job has a negative impact on their mental health. Of those who said their job affects their health, 80% state stress is a factor. Almost 70% said their work results in them being exhausted and 66% believe it disturbs their sleep pattern.

The stigma attached to mental health issues means that many of those working in education were still afraid to tell their employer; two thirds (68%) of education staff with a mental health issue chose to hide it from their employer. Unfortunately, failure to disclose can leave you unprotected under the law.

What is mental health?

We all have mental health, which can be affected by a variety of factors, such as genetic inheritance, reaction to traumatic life events, workload, caring responsibilities, bereavement, domestic violence and abuse, personal circumstances and socio-

[1] Research by Chartered Institute of Personnel and Development, December 2011

economic factors. Certain groups have disproportionately high levels of mental ill health, such as Lesbian, Gay, Bisexual and Trans people and Black men for example[2]. A mental health problem can emanate from one aspect of a person's life and be heightened by circumstances in another. Some mental health conditions function along a spectrum, from feeling low, to being depressed to becoming diagnosed as clinically depressed. People deal with these issues in many different ways, but one of the most essential, yet difficult issues, is to recognise that there is a problem in the first place and then to seek help.

Mental health conditions can include, stress, depression, anxiety, phobias, memory problems, psychosis, bipolar disorder (formerly known as manic depression) and schizophrenia. Often there are physical manifestations of stress and anxiety occur, such as eczema, lethargy, disinterest, and sleeplessness and these are sometimes the first indication of a mental health issue.

Thinking about disability from a 'Medical Model' to a 'Social Model' approach

Despite some progress for disabled people's rights up until 2010, the predominant approach under the law is still a 'medical model' approach. To gain the protection of the law against discrimination on grounds of disability, someone must demonstrate what they cannot do, by comparison with a non-disabled person. If they meet the criteria, they are entitled to a "reasonable adjustment" from the employer. The focus of the current law is therefore on what the disabled person cannot do, rather than a challenge to the barriers that might cause the problem in the first place: in this 'medical model', the individual is the problem, not the barrier.

The 'medical model' underlying the DDA/Equality Act 2010 has a long history. For a long period, disability was thought by almost everyone to signify an inability to live a "normal life". Disabled people were seen as either the pathetic and helpless objects of charity, or else, if they managed despite everything to succeed in their careers and lives, as heroic figures overcoming their "defects" (not, note, the barriers) by superhuman effort. This was also the message promoted by the government during and following the Paralympics (2012).

[2] http://www.nhs.uk/Livewell/LGBhealth/Pages/Mentalhealth.aspx and http://www.maryseacolehouse.com/mental-health

Historically, well-meaning celebrities and philanthropists appointed themselves the spokespersons and experts on disability, despite being non-disabled themselves, and the focus was on street corner collections to fund the charities, none led by disabled people, and separate institutions to care for (lock away) the most impaired.

Although much has improved since disabled people began to challenge this picture and demanded the right to speak for themselves, and there have been changes in the policy of many of the large charitable organisations, the medical/charity model continues to dominate popular awareness and the media continues to promote this image relentlessly. Non-disabled people might assuage their consciences by making a donation to a good cause, but nothing changes for disabled people as a whole when this approach dominates thinking.

The 'social model' developed by Disabled Peoples' Movement turns the traditional approach on its head. It asks what can be done to remove the barriers to inclusion: in the workplace it is about fitting the job to the worker, rather than the worker to the job. It places the onus on the employer (and service provider) to make changes to workplace policies, practices and procedures to render them accessible to disabled people, rather than on the worker to demonstrate what it is they cannot achieve.

Adopting this approach is also a win for the employer and service provider, who will benefit because they become accessible to a wider group of potential workers and potential customers, instead of having to rush to fix a problem to provide access to each individual employee who requires an adjustment. It is the approach supported by the Trade Union movement and ATL.

The UN Convention on the Rights of Persons with Disabilities, developed by disabled people at the United Nations and ratified in July 2009 by the UK government, is based on a 'social model' approach and now being referred to in UK courts. Trade unions are also covered by the Equality Act, which makes it illegal for a union to discriminate against a member or applicant, on the grounds of disability, in the provision of access to training or events, publications, level of representation, benefits, meetings and election procedures [S53&57].

The TUC is committed to a 'social model' approach. The Public Sector Duty (s. 149 of the Equality Act), although recently weakened by the Government, does require schools and colleges to identify barriers and remove them[3].

[3] TUC (2015) Trade Unions and Disabled Members: Why the Social Model Matters https://www.tuc.org.uk/sites/default/files/socialmodel.pdf

The Equality Act 2010: promoting disability equality through the General Public Duty to Promote Equality[4]

The Equality Act protects people from being treated less favourably because they have a protected characteristic. The relevant protected characteristics in employment are:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race (including ethnic or national origins, colour and nationality)
- religion or belief (including lack of belief)
- sex
- sexual orientation.

The Equality Act introduces a new Public Sector Equality Duty (PSED) that replaces the previous three equality duties for race, disability and gender. The new duty applies to the 'relevant protected characteristics' of age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex and sexual orientation.

Section 149 of the Act (the PSED) imposes a duty on 'public authorities' and other bodies when exercising public functions to have due regard to the need to:

a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act
b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

All educational establishments funded from the public purse are covered and the responsible bodies are as follows:

- the governing body of an educational establishment maintained by an English local authority (not independent or private schools to which all other aspects of the Equality Act apply)

[4] EHRC (2013) Technical Guidance on the Public Sector Equality Duty England http://www.equalityhumanrights.com/legal-and-policy/legislation/equality-act-2010/equality-act-guidance-codes-practice-and-technical-guidance

- a local authority with respect to the pupil referral units it establishes and maintains
- the proprietor of a City Technology College, City College for Technology or the Arts, or an Academy including free schools.

In addition, schools and colleges, including academies and publicly-funded free schools, are under a further duty to produce a plan with one or more objectives every four years (the specific duty) and to have due regard to the general duty in all their functions.

The Court of Appeal has made it clear that the general equality duty not only applies to general formulation of policy, but also applies to decisions made in applying policy in individual cases and that it applies to the carrying out of any function of a public authority.

The broad aim of the general equality duty is to integrate consideration of the advancement of equality into the day-to-day business of all bodies subject to the duty. The general equality duty is intended to accelerate progress towards equality for all, by placing a responsibility on bodies subject to the duty to consider how they can work to tackle systemic discrimination and disadvantage, affecting people with particular protected characteristics.

To 'have due regard' means that in making decisions and in its other day-today activities a body subject to the duty must consciously consider the need to do the things set out in the general equality duty: eliminate discrimination, advance equality of opportunity and foster good relations.

How will the responsible body (governors or proprietor) demonstrate compliance?

1. How will it assess the relevance of the duty to the functions it exercises?
2. How will it gather the information it needs to enable it to comply with the duty?
3. How will it ensure that those exercising those functions understand their obligations under the duty?
4. How will it ensure that the duty is complied with both before and during any decision-making process?
5. How will it integrate rigorous and substantive consideration of the duty into the operation of its functions and its decision-making processes?

6. How will it show it has complied with the duty?
7. How will it build compliance with the duty into its commissioning or procurement/dealing with third parties?
8. What review mechanisms will it put in place to ensure that compliance with the duty is continuing?

The Brown Principles[5] (Brown v Secretary of State for Work and Pensions (2008)) demonstrate what the courts will accept as having due regard to these questions.

- Compliance with the PSED involves a conscious approach and state of mind-all staff know and understand what the law requires.
- Timeliness – the PSED must be complied with before and at the time that a particular policy is under consideration or decision is taken – that is, in the development of policy options, and in making a final decision. A public body cannot satisfy the PSED by justifying a decision after it has been taken.
- Rigour and real consideration – consideration of the three aims of the PSED must form an integral part of the decision-making process. The PSED is not a matter of box-ticking; it must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision. The decision maker must consider what information he or she has and what further information may be needed in order to give proper consideration to the PSED e.g. info, pupils, parents, staff and data analysis.
- No delegation – public bodies are responsible for ensuring that any third parties which exercise functions on their behalf are capable of complying with the PSED, are required to comply with it, and that they do so in practice. It is a duty that cannot be delegated.
- Continuous Review - public bodies must have regard to the aims of the PSED, not only when a policy is developed and decided upon, but also when it is implemented and reviewed. The PSED is a continuing duty.
- Record-keeping - it is good practice to keep a documentary record.

Education unions can challenge the responsible body to ensure they are complying with the PSED, both with regard to disabled staff and pupils.

The governing body of an academy decides that it is going to implement a new behaviour policy that will mean once any member of staff is absent for three times in a term they will have salary deducted for the time they are absent. They justify this

[5] http://www.thompsons.law.co.uk/ltext/127-case-law-public-sector-equality-duty.htm

acting as an incentive to come to work and so benefit the learning of students. They did not consult staff and it will impact adversely on those disabled members of staff who have reasonable adjustments to extra time off for treatment. As such, it is discriminatory and does not promote equality. In addition there was no engagement prior to the decision being taken. The union could seek a judicial review and get the decision set aside using the Public Sector Equality Duty (PSED). Often the threat may be sufficient to change the situation.

Who is disabled?

In order to be protected by the Equality Act, a person must have an impairment that meets the Act's definition of disability, or be able to establish that any less favourable treatment or harassment is because of another person's disability or because of a perceived disability. There has not been any registration as a disabled person since 1995.

> "A person has a disability if they have a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities." [6]

This means that, in general:

- the person must have an impairment that is either physical or mental. This includes sensory impairments, such as those affecting sight or hearing, though if correctable by contact lenses or glasses this does not count. Mental impairments include learning difficulties.
- The impairment must have adverse effects which are substantial i.e. more than minor or trivial.
- The substantial adverse effects must be long-term i.e. last for 12 months or more; or where the total period for which it lasts is likely to be at least 12 months; or which is likely to last for the rest of the life of the person affected.
- The long-term substantial adverse effects must be effects on normal day-to-day activities.

People who have had a disability within the definition are protected from discrimination on the grounds of that disability even if they have since recovered.

[6] Appendix 1, section 2 of EHRC Employment Statutory Code of Practice (2010) http://www.equalityhumanrights.com/sites/default/files/publication_pdf/employercode.pdf

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)).

A disability can arise from a wide range of impairments, which can include:

- 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, such as motor neurone disease, muscular dystrophy, and forms of dementia;
- auto-immune conditions such as systemic lupus erythematosis (SLE);
- organ specific, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease;
- developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia;
- learning disabilities;
- mental health conditions with symptoms such as severe anxiety, panic attacks, phobias, or unshared perceptions; 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;
- produced by injury to the body, including to the brain[7].

A woman teaching assistant has had rheumatoid arthritis for the last three years. The effect on her ability to carry out normal day-to-day activities fluctuates according to the weather conditions. The effects are particularly bad during autumn and winter months when the weather is cold and damp. Symptoms are mild during the summer

[7] Office of Disability Issues (2010) 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85010/disability-definition.pdf

months. It is necessary to consider the overall impact of the arthritis, and the extent to which it has a substantial adverse effect on her ability to carry out day-to-day activities such as walking, undertaking routine tasks, and doing playground supervision during inclement weather. As she would be likely to count as disabled, reasonable adjustments could be made by providing alternative indoor duties.

Progressive conditions count from diagnosis even if the impact is not yet substantial. These specifically include HIV-AIDs, Cancer and Multiple Sclerosis. Long-term facial disfigurement counts even if it does not have a substantial effect on normal day-to-day activities. It is the impact on carrying out normal everyday activities that is important - not the cause.

Day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

A nursery assistant has a mild learning disability. This means that her assimilation of information is slightly slower than that of somebody without the impairment. She also has a mild speech impairment that slightly affects her ability to form certain words. Neither impairment on its own has a substantial adverse effect, but the effects of the impairments taken together have a substantial adverse effect on her ability to converse. Although children, parents and colleagues understand her she would be likely to count as disabled.

Who is protected?

The Act protects anyone who has, or has had, a disability. For example, if a person has had a mental health condition in the past that met the Act's definition of disability and because of this is harassed, that would be unlawful. The Act also protects people from being discriminated against and harassed because of a disability they do not personally have. For example, it protects people who are mistakenly perceived to be disabled. It

also protects a person from being treated less favourably because they are linked to or associated with a disabled person. For example, if the mother of a disabled child was refused service because of this association, that would be unlawful discrimination[8].

Confidentiality and disclosure to the employer

There is no legal requirement to disclose your disability. However, you should be aware that an employer only has a duty to make reasonable adjustments for disabled employees if they know, or could reasonably be expected to know, that an employee has a disability. Of course, this is a difficult and complex issue, as not everyone feels able to disclose mental ill health to their employer or line manager. With the support of ATL reps, we would encourage people to make that disclosure, in confidentiality to the relevant person, if they feel it is safe to do so.

ATL recognises how difficult it can be for members experiencing mental ill-health. Often this can be difficult to accept and individuals may feel overwhelmed, particularly if proper support is not forthcoming, especially in the first weeks of a diagnosis. Acceptance is a big step in itself, but it must be sustained. Talking the issue over with a trusted colleague, family members, and/or outside medical professionals at an early opportunity is also necessary.

ATL reps, branch caseworkers and professional staff can help with advice, guidance and representation as necessary. Please get in touch. With support from your local rep, or branch representative, ATL can assist you with talking to your line manager or employer about your mental health support needs.

If an employer has not been informed that the employee considers themselves to be disabled under the Equality Act, then it is difficult to ensure that they make reasonable adjustments and prevent discrimination and harassment. Such information can be given in confidence and the employer has a responsibility to keep it confidential, particularly as there are social stigmas attached to some diagnoses, such as mental impairment or being HIV positive.

However, as many as half of the 11.5 million (20%) UK residents who count as disabled under the Equality Act, do not consider themselves to be disabled. The

[8] Government Equalities Office (2010) Equality Act 2010: What Do I Need To Know? Disability Quick Start Guide https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85011/disability.pdf

employer must do all they can reasonably be expected to do to find out if a worker has a disability. However, the Act imposes restrictions on the type of health or disability-related enquiries that can be made prior to making someone a job offer (S.60).

Despite the difficulties, schools and colleges should create an environment where staff feel supported in declaring they are disabled. This is part of the organisation's Public Duty to promote disability equality[9].

If an agent of the school or college, such as HR or a recruitment agency, know the staff member or recruit is disabled it is deemed that the organisation knows. It is important for the school to hold a confidential list of all staff members who are likely to be counted as disabled under the Equality Act.

A teacher has been at a primary school for 25 years and apart from a few bouts of flu has missed very few days over the years for sickness. She starts to regularly take Fridays off and then a longer period. Her behaviour has changed and is quite often upset and tearful. The head teacher disciplines her for excessive absence without finding out the underlying cause. The teacher asks to go to occupational health and it emerges she has a diagnosis of ovarian cancer. The head should have interviewed the teacher, as it now transpires that the extra absences arise from her newly diagnosed disability. The disciplinary must be withdrawn and a complaint could be made against the head for not doing all they reasonably could to ascertain the situation.

A secondary science teacher tells his deputy head, in confidence, that the depression he had 15 year ago at university has recently returned, following the break-up of his marriage. He is receiving treatment and will need to take some additional time off. A few days later he overhears some colleagues joking about mental health and a couple look at him pointedly. With the support of his union rep., he makes a formal complaint to the head teacher, both about the breach of confidence and the harassment he was subjected to. The deputy receives a formal warning and all staff receive training on disability harassment.

[9] EHRC (2010) Employment Statutory Code of Practice, sections 5.13 - 5.16
http://www.equalityhumanrights.com/sites/default/files/publication_pdf/employercode.pdf

Protection for disabled education staff under the Equality Act 2010

The TUC's excellent guide[10] on sickness absence and disability leave summarises the forms of discrimination that are outlawed:

- **Direct discrimination**: that is, less favourable treatment because of disability, compared to someone whose circumstances excluding the disability are otherwise comparable. Such discrimination cannot be justified by the employer.
- **Discrimination arising from disability**: that is, treating someone less favourably because of something arising in consequence of a person's disability. Such discrimination is capable of legal justification by the employer if the treatment is a proportionate means of achieving a legitimate aim. In addition, there will be no discrimination if the employer shows that it did not know, and could not reasonably have been expected to know, that the person had the disability. This is a very broad type of discrimination.
- **Indirect discrimination**: this type of discrimination happens when an employer applies a provision criterion or practice which puts or would put people with a different disability at a particular disadvantage compared to people who share the disabled person's disability; it is applied to the disabled person; and the employer cannot show that it is a proportionate means of achieving a legitimate aim. This type of discrimination has never previously applied to disability. It is aimed at tackling group disadvantage, and can be used to tackle policies and practices that are inadvertently detrimental – which may include sickness absence policies. There is no knowledge requirement for indirect discrimination.
- **Failure to make a Reasonable Adjustment**. This is one of the key components of the disability provisions of the Equality Act. An employer is under a legal obligation to make reasonable adjustments to enable a disabled person to work or continue to work. There can be no justification for a failure to make a reasonable adjustment, but an employer is allowed to argue that an adjustment is not "reasonable". There is a wide range of possible adjustments, including changes to physical aspects of premises and changes in someone's work duties.

The TUC advice explains that the Equality Act does not contain a list of adjustments that an employer might have to make, but the Employment Code of Practice which the

[10] Sickness Absence and Disability Leave, TUC (2013). New guidance is forthcoming.

Equality and Human Rights Commission has published to provide guidance for employers, employees and tribunals in how the provisions work does provide a list of possible adjustments. These include disability leave. The relevant example given in the code is as follows:

A worker who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period.

Direct discrimination

This occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic. Direct discrimination is generally unlawful. However, it may be lawful in the following circumstances: in relation to the protected characteristic of disability, where a disabled person is treated more favourably than a non-disabled person.

To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.

During an interview for the head of year, a job applicant informs the employer that he has multiple sclerosis. The applicant is unsuccessful and the employer offers the job to someone who does not have a disability. In this case, it will be necessary to look at why the employer did not offer the job to the unsuccessful applicant with multiple sclerosis, to determine whether the less favourable treatment was because of his disability.

There is also direct associative discrimination, when a person is treated less favourably because of their association with a disabled person and direct discrimination through

perception, when someone who is not disabled is discriminated against because someone perceives that they are disabled.

At a job interview, an applicant mentions she has a disabled child. Although she is the most qualified candidate, the employer decides not to offer her the job. This decision treats her less favourably than the successful candidate who has not mentioned having a disabled child. If the less favourable treatment of the unsuccessful applicant is because of her having a disabled child, which the responsible body may think will interfere with her ability to carry out the job, this would amount to direct discrimination by association with her disabled child.

Taking a case to an Employment Tribunal will require providing a comparator whose circumstances are materially the same apart from the protected characteristics. However, this cannot always be found and a hypothetical comparator may suffice, especially if it draws on the material circumstances of several people. In disability cases, an appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself)[Employment CoP Ch 3].

Indirect Discrimination

Indirect discrimination may occur when an employer applies an apparently neutral provision, criterion or practice (PCP) that puts workers sharing a protected characteristic at a particular disadvantage. For indirect discrimination to take place, four requirements must be met:

- the employer applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group including a particular worker;
- the provision, criterion or practice puts, or would put, people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic;
- the provision, criterion or practice puts, or would put, the worker at that disadvantage
- the employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

A school uses the intranet as the main method of communicating with staff. News and school policies, curricula documents, pupil data and reports are all on the staff area of the website. However, the website has all of its text embedded within graphics. Although it did not intend to discriminate indirectly against those staff with a visual impairment, the practice by the school places those with a visual impairment at a particular disadvantage, because they cannot change the font size or apply text-to-speech recognition software. They therefore cannot fully access the website/school intranet and puts them at a particular disadvantage. It is unlikely to be a proportionate means of achieving a legitimate aim, as blind and visually impaired staff cannot function and communicate effectively, so their ability to carry out their role is compromised.

A higher level Teaching Assistant with dyslexia, who is responsible for timetabling the 35 teaching assistants at the school, has been used to receiving information from the SENCO and Assistant Head- Inclusion in the form of emails, which are compatible with her text to speech software and she can efficiently allocate the TAs their timetables. A new head teacher decides to introduce a different timetabling programme across the whole school, which is contained in a series of matrices. The software the higher level TA uses is incompatible. After some weeks she is disciplined for not carrying out her job satisfactorily. With advice from her union rep she takes out a grievance for disability discrimination against the head teacher for indirect disability discrimination. The chair of governors who investigates finds in her favour and the school goes back to the old timetabling system, whilst a new system which is compatible with speech to text software is found.

Indirect disability discrimination can be difficult to establish, as one has to demonstrate the impact on a whole group of employees and the particular employee and demonstrate why it is not a proportionate means of achieving a legitimate aim. In practice, this usually means management decisions can be justified in terms of efficiency or the success of the school or college. It may be better to claim a failure of the anticipatory duty to make reasonable adjustments [Employment Code of Practice (CoP) Chapter 4]. Please take advice from ATL.

Discrimination arising from disability

The Act says that treatment of a disabled person amounts to discrimination where:

- an employer treats the disabled person unfavourably;
- this treatment is because of something arising in consequence of the disabled person's disability; and
- the employer cannot show that this treatment is 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.

Direct discrimination occurs when the employer treats someone **less** favourably because of disability itself, as outlined above. By contrast, in discrimination arising from disability, the question is whether the disabled person has been treated **unfavourably** because of something arising as a consequence of their disability.

A college dismisses a lecturer because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The college's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated unfavourably because of something arising as a consequence of her disability (namely, the need to take a period of disability-related sick leave). The college ought to have established this prior to dismissal and offered additional disability leave as a reasonable adjustment.

In considering whether the example of the disabled lecturer dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled lecturer with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability, if the employer cannot objectively justify it.

A midday supervisor is disciplined for losing her temper with a difficult child. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which the school was aware. The disciplinary action is unfavourable treatment. This treatment is because of something that arises as a consequence of the midday supervisor's disability, namely her loss of temper. There is a connection

between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.

Schools and colleges can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments.

If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. If a disabled colleague thinks they are being treated unfavourably, it is good to hold an initial meeting to determine the grounds, and if they appear to indicate discrimination then:

- arrange a meeting with the school or college leader,
- point out what is happening and that it amounts to disability discrimination, point out that the colleague in question is disabled under the Equality Act, and,
- request reasonable adjustments from the organisation [Employment CoP Chapter 5].

Positive action

Positive action applies to all the protected characteristics. Positive action provisions mean that it is not unlawful discrimination to take special measures aimed at alleviating disadvantage or under-representation experienced by those with any of these characteristics, by providing additional training. This now includes employing a member of an under-represented group, where two candidates are of equal worth. Positive action is entirely voluntary – there is no requirement for an employer to use either the general provisions or those relating to recruitment and promotion.

A secondary school has a vacancy for one of its senior management posts. All the other senior posts at that level are filled by non-disabled men. The school conducts a recruitment exercise and at the end of a stringent and objective process finds that two applicants – a man and a disabled woman – could do the job equally well. The school could decide to take positive action and give the job to the woman. But the school couldn't give the job to the woman if the man would be able to do the job

better than her with her reasonable adjustments – that would be unlawful direct discrimination against the man.

The duty to make reasonable adjustments

The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled. Discrimination against a disabled person occurs where an employer fails to comply with a duty to make reasonable adjustments, imposed on them in relation to that disabled person.

The duty of reasonable adjustment (S.21) owed by all school/college employers to disabled staff and students is an important requirement on school/college employers. They are also under a duty not to discriminate directly (S.15) or indirectly (S.19) against disabled staff, not to discriminate for reasons arising from their disability (S.15) and not to harass (S.26) by virtue of disability. In addition those who complain or support complainants are protected from victimisation (S.27).

The duty to make reasonable adjustments comprises three requirements. Employers are required to take reasonable steps to:

- Avoid the substantial disadvantage where a provision, criterion or practice applied by or on behalf of the school/college puts a disabled person at a substantial disadvantage compared to those who are not disabled.
- Remove or alter a physical feature or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage compared to those who are not disabled.
- Provide an auxiliary aid where a disabled person would, but for the provision of that auxiliary aid, be put at a substantial disadvantage compared to those who are not disabled.

There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable. Effective and practicable adjustments for disabled workers often involve little or no cost or

disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

The following are some of the factors that might be taken into account when deciding what is a reasonable step for a school/college to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the school's or college's financial or other resources;
- impact on health and safety for the employee and other staff and building users;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the school/college (whether an academy chain or a stand-alone academy, whether a community school with support from the Local Authority or the size of the budget).

The sole criterion is the reasonableness of the proposed measures. If a school/college does not comply with the duty to make reasonable adjustments they will be committing an act of unlawful discrimination. A disabled worker will have the right to take a claim to the Employment Tribunal based on this.

Reasonable adjustments in practice

It is a good starting point for a school/college to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required.

Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for the school/college to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker and their representative before they are made.

The following reasonable adjustments are illustrated with examples:

a. **Making adjustments to premises**

A school/college makes structural or other physical changes such as widening a doorway, providing a ramp, making an accessible toilet and changing area or moving furniture for a wheelchair user.

b. **Providing information in accessible formats**

The format of instructions and school/college policy documents might need to be modified for some disabled workers (for example, produced in Braille or on audio tape). Instructions for people with learning disabilities might need to be conveyed orally with individual demonstration or in Easy Read. Schools/colleges may need to arrange for recruitment materials to be provided in alternative formats.

c. **Allocating some of the disabled person's duties to another worker**

A school reallocates break duties to another teacher, as a disabled teacher with ME cannot be outside in the winter without it exacerbating her condition.

The job of the school service manager involves occasionally going onto the open roof of a building, but the employer transfers this work away from her as her disability involves severe vertigo.

d. **Transferring the disabled worker to fill an existing vacancy**

A school/college should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments, such as equipment for the new post or transfer to a position on a higher grade i.e. moving from a class-based job to work in the school office.

e. **Altering the disabled worker's hours of work or training**

A school allows a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability. It could also permit part-time working or different working hours to avoid the need to travel in the rush hour if this creates a problem related to an impairment.

A phased return to work with a gradual build-up of hours might be appropriate in some circumstances, eg allowing a lecturer with a recent spinal injury to have no tutor group and timetable them to start teaching at 9.30 am rather than 8.30 am.

f. **Assigning the disabled worker to a different place of work or training or arranging home working**

A school relocates the workstation of a newly disabled junior teacher (who now uses a wheelchair) from an inaccessible third floor classroom to an accessible one on the ground floor. It may be reasonable to move her place of work to other premises of the same employer if the first building is inaccessible. Allowing the worker to work from home some of the time might be a reasonable adjustment for the school to make where possible.

g. **Allowing the disabled worker to be absent during working or training hours for rehabilitation, assessment or treatment**

An employer allows a person who has become disabled more time off work than would be allowed to non-disabled workers, to enable her to have rehabilitation training. A similar adjustment may be appropriate if a disability worsens or if a disabled person needs occasional treatment. This dispensation needs to be built into sickness monitoring and triggers for capability.

h. **Giving or arranging for training or mentoring (whether for the disabled person or any other worker)**

This could be training in particular pieces of equipment which the disabled person uses, or an alteration to the standard workplace training to reflect the worker's particular disability.

All staff are trained in the use of a particular IT System but a school provides slightly different or longer training for a teacher with restricted hand or arm movements. An employer might also provide training in additional software for a visually impaired worker, so that she can use a computer with speech output.

i. **Acquiring or modifying equipment**

An employer might have to provide special equipment such as an adapted keyboard for someone with arthritis, a large screen for a visually impaired worker, or an adapted telephone for someone with a hearing impairment, or other modified equipment for disabled workers (such as longer handles on a machine). There is no requirement to provide or modify equipment for personal purposes unconnected with a worker's job, such as providing a wheelchair if a person needs one in any event but does not have one. The disadvantages in such a case do not flow from the school's arrangements or premises.

j. **Modifying procedures for appraisal or marking**

A teaching assistant with restricted manual dexterity would be disadvantaged by a written test, so the employer gives that person an oral test instead.

k. **Providing a reader or interpreter**

A school arranges for a colleague to read a student's work to a lecturer with a visual impairment at particular times during the working day. Alternatively, the employer might hire a reader.

l. **Providing supervision or other support**

A school provides a support worker or arranges help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence in unfamiliar situations, such as on a training course or when they cannot access the whole classroom.

m. **Allowing a disabled member of staff to take a period of disability leave**

A teacher who has cancer needs to undergo treatment and rehabilitation. His school allows a period of disability leave and permits him to return to his job at the end of this period. This should not count as sick leave.

n. **Participating in supported employment schemes, such as Workstep**

A man applies for a job as an office assistant after several years of not working because of depression. He has been participating in a supported employment scheme where he saw the post advertised. He asks the school to let him make private phone calls during the working day to his support worker at the scheme and the employer allows him to do so as a reasonable adjustment.

o. **Employing a support worker to assist a disabled worker**

A careers teacher with a visual impairment is sometimes required to make home visits to work placements. The school or the teacher employs a support worker to assist her on these visits and is reimbursed by Access to Work.

p. **Modifying disciplinary or grievance procedures for a disabled worker**

An assistant cook with a learning disability is allowed to take a friend (who does not work with her) to act as an advocate at a meeting with her head about a grievance. The employer also ensures that the meeting is conducted in a way that does not disadvantage or patronise the disabled worker.

q. **Adjusting redundancy selection criteria for a disabled worker**

Because of his condition, a deputy head with an auto-immune disease has taken several short periods of absence during the year. When his school is taking the absences into account as a criterion for selecting people for redundancy, they discount these periods of disability-related absence.

r. **Modifying performance-related pay arrangements for a disabled worker**

A disabled teacher who is on performance-related pay needs a shortened working day and her school agrees to as a reasonable adjustment. It may be a reasonable adjustment for her employer to progress her pay even though her output in terms of performance is less than her colleagues.

Access to Work

The Government Access to Work scheme may assist a school/college to decide what steps to take. If financial assistance is available from the scheme, it may also make it reasonable for an employer to take certain steps which would otherwise be unreasonably expensive. The disabled employee has to contact them in the first instance through Job Centre Plus.

However, Access to Work does not diminish any of an employer's duties under the Act. In particular:

- the legal responsibility for making a reasonable adjustment remains with the school/college – even where Access to Work is involved in the provision of advice or funding in relation to the adjustment.
- it is likely to be a reasonable step for the school/college to help a disabled person in making an application for assistance from Access to Work and to provide on-going administrative support (by completing claim forms, for example).

Access to Work helps you to overcome disability issues in the workplace by providing support and helping pay for work-related costs. This support can include:

- special aids, equipment or adaptations you need at work
- a support worker to help you do your job
- help with travel if you have difficulties using public transport
- a communicator at job interviews, and/or
- mental health support.

It is currently (2016) capped at £40,800 per annum.

It may be unreasonable for an employer to decide not to make an adjustment based on its cost, before finding out whether financial assistance for the adjustment is available from Access to Work or another source[11] [Employment CoP Ch 6].

[11] More information about Access to Work is available from https://www.gov.uk/access-to-work/how-to-claim

Best practice on Disability Leave

The TUC recommends the following best practice. The two policies that will contribute most to protecting workers from losing their jobs through the misapplication of sickness absence measures are to separate the counting of disability-related absences from sickness absence, and the establishment of a Disability Leave (DL) provision. Neither are a legal obligation on an employer (though an employer may have to permit disability leave as a reasonable adjustment for individual employees), so neither will happen unless unions negotiate them into being.

The concept of disability leave has been around since the 1990s but it has been very little taken up by employers. This is despite being campaigned for by unions and advocated by disability organisations. With the advent of the Disability Equality Duty it became more common in the public sector, and this sector provides the majority of examples of actual policies. Many such policies have not been in existence for very long, so it is hard to judge their effectiveness, and in other cases their interpretation has depended on the interpretation of the words on the page.

The experience of individual unions in negotiating policies and then attempting to use them provides some important clues as to the main requirements of an effective policy. Some of these are identified below.

- The policy must identify who is eligible for DL. As explained above, in most cases this will have to be limited to those who qualify under the Equality Act definition. However, unions may need to consider that there can be grey areas, especially where the worker has a condition that is intermittent, and may recur in future but has not done so for a time; or where it may not yet have lasted 12 months. It would be best therefore to try to find a way of ensuring that people in these positions, who are often those who are most likely to need the protection of such a policy, are not excluded by the wording of the agreement.
- It is very likely that the agreement will specify that, since it is about disability, it is not about sickness absence. Unions will want to check carefully the wording of the agreement so that there is no doubt about what is and is not covered.
- Employers will normally insist on a time limit for periods or the total length of disability leave that can be granted. Where the employer insists on a time limit, the union will press for the maximum length possible, and that it is not constrained by calendar periods – it is after all possible that a period of DL will straddle calendar or financial years.

- Probably the best approach is to try to secure agreement to a flexible approach, writing in that this is related directly to the circumstances in any given case. It should be possible to argue that as every individual's circumstances are unique, it is best for all concerned if the policy permits a degree of flexibility especially in terms of time limits, to be negotiated in each case.
- Retrospective application should be permitted. It is possible that a member's absence will have started before it becomes known that this is disability-related, in which case it should be possible to redefine the absence as DL rather than sickness once this has been clarified.
- The policy needs to specify what sort of absence qualifies for DL. It will be important that it has a wide and, preferably, non-exclusive range of possibilities. The essential elements are that the DL period should be available for all relevant possibilities - appointments, treatment, therapy, recuperation, training or retraining, assessments, and when waiting for the employer to complete the making of adjustments – and also include an element of flexibility so that it can be extended to cover unforeseen but clearly appropriate circumstances. In addition, it might be applied as well when the worker requires a phased return to work, to cover part-time working during this period, in order to ensure that the worker remains on full pay during this time.
- It will be of the essence of the policy that DL is counted as continuous service from the point of view of all benefits that depend on service.

In conclusion, it should be clear that having a well-constructed DL policy, administered by a management that understands it, and with members supported by union representatives who are trained in dealing with disability discrimination, will reduce enormously the risk that members who have to take absences as the result of their impairment might fall foul of sickness absence procedures. However, as unions themselves have made clear, however well written an agreement, there will remain problems with interpretation, especially in the area of overlap between disability-related and sickness absences[12].

Fitness to teach and the Equality Act - Teachers

Under Section 141 of the 2002 Education Act and subsequent regulations[13] there is a duty on school employers and providers of initial teacher training to ensure candidates

[12] Sickness Absence and Disability Leave, TUC, 2013. New guidance is forthcoming later in 2016.
[13] The Education (Health Standards)(England) 2003 No.3139 Reg. 6 and 7

and teachers are physically and mentally fit to teach. The school can at any time challenge a teacher's physical or mental fitness to teach, but must take account of medical evidence from the teacher and any requests for reasonable adjustments (Section 20 Equality Act). If the employer is still not satisfied of their capacity the school can refer the member of staff to a qualified medical examiner-usually occupational health. The member of staff can be accompanied by their own qualified medical practitioner and submit evidence. If the member of staff refuses to attend then the school can make its own determination.

The Equality Act places a duty on an employer to consider making reasonable adjustments, whether technical, physical or advisory, to ensure an individual does not suffer a disadvantage because of employment practices or any physical feature of the workplace.

A medical advisor who is instructed by an employer or a training provider to determine whether an individual is fit to teach should do so having taken into account any reasonable adjustments that could be made to assist the employee in carrying out their duties. It is imperative that consideration is given to making such adjustments, as this could make all the difference in determining whether an individual is fit to work in the teaching profession.

A Teaching Assistant with epilepsy has had it under control for a number of years and not had a seizure. Her medication has been changed by her doctor and this has led to her having two seizures in school. The head teacher has suspended her and referred her to occupational health. The head has not given her a chance to submit evidence. After the intervention of her union the head agrees to a meeting, where the TA produces a letter from her specialist pointing out the circumstances and that her new drugs are now working. She is reinstated and it is agreed she can have extra time off to attend the monthly epilepsy clinic as a reasonable adjustment.

Health and disability questions

Since the Equality Act (Section 60) was introduced, it is generally unlawful for an employer to ask any job applicant about their disability or health until the applicant has been offered a job (conditional or unconditional). Employers face a further challenge in trying to balance their duties under differing sections of the legislation.

The purpose of this provision is to try and stop employers screening out disabled applicants at the early stages of the recruitment process. The legislation makes it clear that inferences of discrimination could be drawn if an employer chooses to ask questions regarding an employee's health prior to offering employment[14]. This includes the previously standard question which was, and often still is, included on application forms asking the number of days off an applicant has had in the past year.

There are some exceptions:

- to make reasonable adjustments to the recruiting process e.g. large print, Braille or a sign interpreter
- to undertake a particular practical test as part of the selection process
- for monitoring purposes;
- to implement positive action e.g. such as guaranteed interview for suitably qualified disabled candidate as under the Two Ticks system
- where it is an occupational requirement if a person with a particular impairment was required e.g. a deaf sign language tutor to support deaf students [Employment CoP 10.25- 10.34].

If an individual is confronted with breaches of these procedures during the process they should use their own discretion as whether to raise this at the time, but should report such breaches to ATL to take up with the employer.

Protection from harassment

The Act prohibits three types of harassment. These are:

- harassment related to a 'relevant protected characteristic' ie disability
- sexual harassment
- less favourable treatment of a worker because they submit to, or reject, sexual harassment or harassment related to sex or gender reassignment.

Only harassment related to disability is dealt with here, though there may be an overlap with sexual harassment. Disability harassment of a worker occurs when a person engages in unwanted conduct which is related to or their disability and which has the purpose or the effect of:

[14] https://www.atl.org.uk/publications-and-resources/report/2011/legal-fitness-to-teach.asp

- violating the worker's dignity
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, and acts affecting a person's surroundings or other physical behaviour. The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

A female primary teacher returns to work after a motor accident in which she sustained a leg injury and had to have the lower part of one leg amputated. She now has a prosthesis fitted and is able to resume her teaching duties. As a reasonable adjustment the head agrees she will not need to do break duties or put out the PE apparatus and other colleagues will cover. She is concerned to hear colleagues complaining that this is unfair on them and making fun of the way she now walks. This is raised with the head teacher by her ATL rep and it is agreed to have a staff training session on disability equality, followed by the head addressing the staff to make clear such harassment is unacceptable.

The Head of English at a secondary school has recently had to cope with the bereavement of her son and husband. The next term the school has an OFSTED inspection and they flag up some concerns with the English Department appraisal. The Head of English comes to see the head teacher and says she is very depressed and on medication. The following term the head teacher institutes capability procedures against the Head of English and keeps observing her lessons unannounced.

On the advice of ATL she files a grievance against the head teacher for harassment. The Chair of Governor's investigation reveals that previous to her bereavement the Head of English had been exemplary and the school had pressured her to come back from sick leave too soon in light of the OFSTED inspection. She is taken off capability, given a light timetable and allowed to attend counselling twice a week in school time. The Senior Management Team have to undertake Equality training.

In the current environment, with increasing workload and lack of work/life balance, the amount of workplace stress and bullying is increasing. This can increase levels of harassment and lead to an increase in mental health impairment amongst staff. In these situations the best way forward may be a collective approach from all the education staff and their respective unions in the workplace, based on well-documented information on an environment of stress and harassment for staff [Employment CoP Ch. 7].

How to support disabled members in schools and colleges

1. Make it publicly clear to all colleagues that ATL supports disabled members.
2. Reps should contact ATL's Lead Equalities Officer if they are interested in undertaking equality reps or disability champion training. Unionlearn runs an online course and the course is available through Trade Union Education[15].
3. Disabled members/colleagues should be encouraged to disclose their disability to management or HR (in confidence).
4. Discuss with them what might help them to do their job effectively.
5. Discuss with the member whether reasonable adjustments are in place and/or whether additional adjustments are needed.
6. Make sure when discussing their work situation all disabled members have a work place colleague or union rep present.
7. Write an account of the meeting and give a copy to management.
8. Keep all relevant papers including copies of e-mails.
9. If the disabled colleague feels they have been harassed or discriminated against, take advice from ATL. You may want to consider whether the school/college grievance procedures could be used to resolve any issues.
10. If there is a failure to resolve the issue, take advice from your ATL branch secretary or the ATL Member Adviser Team. Please note there are strict deadlines for taking a case to Employment Tribunal. This must be within 3 months (less a day) of the incident occurring and now costs £1200. It is therefore important to raise concerns at an early stage in order that ATL can advise and, if necessary, take legal advice on the member's behalf.
11. If the issue is to do with the promotion of disability equality and has general implications, raise it with all colleagues of all the unions on site.
12. Take general breaches of the PSED to the school Joint Negotiating Committee.

[15] http://www.unionlearn.org.uk/courses/disability-champions-work-online and http://www.unionlearn.org.uk/courses/disability-champions-work

Suggestions for creating and maintaining mentally healthy workplaces

Research[16] shows that many employers and senior managers are simply unaware of mental health issues amongst their workforces. Studies[17] have also shown that in general, health and wellbeing programmes (including those for mental health) pay significant dividends if promoted by employers. Legally, employers have a duty of care towards their employees, which includes the requirement to assess and reduce as far as reasonably possible the risks arising from work-based hazards, such as mental health problems[18].

Employers (including school and college governors) and senior managers should develop effective policies to address wellbeing, including mental health, amongst their employees. Such initiatives and strategies should:

- positively and actively promote wellbeing for all employees
- recognise potential causes for mental health problems at work and take reasonable measures to avoid the cause or reduce the risks as far as possible
- recognise early any mental health problems and take steps to resolve the issue
- support any employees experiencing mental health problems.
- include periodic assessments of wellbeing amongst employees, collectively and individually, which can be completed in a variety of ways, including surveys and confidential interviews
- actively promote of wellbeing initiatives
- recognise potential causes of mental ill health amongst staff in the workplace, which ought to be part of any health and safety risk assessment
- introduce a programme of health risk assessment procedures.
- train SMT in recognition of mental health problems in employees and the use of suitable and sympathetic work-based early interventions
- define clearly roles and responsibilities for line managers and senior staff in respect of mental health issues
- implement statement of continuing programme of management of work-related stress (including mental health problems) in compliance with HSE standards[19]
- record reviews and updates of the policies and procedures.

[16] Sainsbury Centre for Mental Health 2007; Shaw Trust 2010
[17] Eg PricewaterhouseCoopers 2008
[18] Health and Safety at Work Act 1974; The Management of Health and Safety at Work Regulations 1999; Disability Discrimination Act.
[19] *Health and Safety Executive management standards* at www.hse.gov.uk/stress/standards

We suggest that the following actions may be helpful for employers supporting individual employees:

- prompt and effective reaction to issues highlighted by any risk assessment or Occupational Health referral
- effective and meaningful programmes of support for staff in mental distress or experiencing more serious mental illness, aimed at either supporting the employee in work or back into work over an appropriate timescale
- evaluation and monitoring of workload and responsibilities with reference to wellbeing
- short-term rehabilitation and return to work plans
- longer-term reasonable adjustments to working arrangements (subject to regular review)
- positive and employee-centred use of Occupational Health professionals and, where necessary and appropriate other external agencies
- clear statement on procedures to deal with adverse treatment of an employee with mental health problems eg bullying, failure to support properly.

Problem at work?

In the first instance, it's always a good idea to contact your workplace rep and contact your branch section. You can also contact an ATL member adviser between Monday and Friday, 9am–5pm on 020 7930 6441.

Get involved

ATL has a forum for disabled staff and holds an annual meeting at conference each year. We also encourage disabled members and allies to apply for places on ATL's delegation to the TUC Disabled Workers' Conference in May each year. Accommodation and subsistence are paid by ATL for successful applicants. We also run regular training on mental health and disability issues and training for members who wish to become Equality Reps. We can also organise a branch briefing or session for members. If you would like to get in touch about this guidance or any other equalities issue, please contact ATL's Lead Equalities Officer, Wanda Wyporska at wwyporska@atl.org.uk or on 07435 970065. For advice and guidance call the ATL London office on 020 7930 6441.

Further advice and resources

- *Finding Your Way: Mental Health Information*
  http://www.heron.nhs.uk/pidd/publicationdetails.aspx?m=1&formatid=12976 .
  Norfolk County Council and including Norfolk & Waveney Mental Health Partnership NHS Trust, Age Concern Norfolk, Norfolk PCT, Norfolk Mind, Great Yarmouth & Waveney PCT.
- *Mental health at work*
  www.mind.org.uk/employment
- *Mental Health First Aid*
  http://mhfaengland.org/
  Campaign to end mental health discrimination in the workplace, with information for both employers and employees.
- *Department for Work and Pensions*
  www.dwp.gov.uk
- *Mindful Employer*
  http://www.mindfulemployer.net/
  Increasing awareness of mental health at work and support
- *Forget the label – just listen!*
  http://www.time-to-change.org.uk/forgetthelabel
  BME mental health support (and www.time-to-change.org.uk).

Trade Union resources

- *Leading and Managing a Well Workplace*
  http://amie.atl.org.uk/wellworkplace
- TUC disability resource list
  https://www.tuc.org.uk/equality-issues/disability-issues/resources
- *Stress and mental health at work - a guide for union reps*, The Labour Research Department published (May 2011). This can be ordered from
  www.lrdpublications.org.uk
- Health and Safety Executive on stress
  http://www.hse.gov.uk/stress/ and particularly the management standards:
  http://www.hse.gov.uk/stress/standards/
- Expert training for employers is provided by ACAS, working with Mindful Employer. They run regular courses across the country, and also provide

tailored in-house training. Details can be found on their website, www.acas.org.uk , or by calling 08457 383736.

- The MIND information line is available on 0300 123 3393 or by email info@mind.org.uk.
- TUC Mental Health Conditions Guide http://www.tuc.org.uk/workplace-issues/health-and-safety/guides-workers/mental-health-conditions-guide
- LGBT mental health http://www.tuc.org.uk/equality-issues/lesbian-gay-bisexual-and-transgender-rights/lgbt-advice-information/lgb-t-workers

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