



TERMINAL CANCER

Brian Butler, Health & Safety and Employment Advisor for GCMA, answers a Helpline Question regarding a terminally ill employee and Disability Discrimination Law.

Secretary At Work: February 2007 (reviewed March 2012)

Helpline Question

Q: We have an employee who is suffering from terminal cancer. What is the up to date position on Disability Discrimination law?

A: The club's conduct towards a disabled person does not amount to disability-related discrimination if it is justified. However there are only limited circumstances in which justification can happen and these were further restricted on October 1st, 2004 by the Disability Discrimination Act 1995 (Amendment) Regulations 2003.

An example of justification given by the Disability Rights Commission Employment Code of Practice, October 2004 (para 6.3) is that of a man who has severe back pain and is unable to bend being rejected for a job as a carpet fitter as he cannot carry out the essential requirement of the job, which is to fit carpets. This would be lawful as the reason he is rejected is a substantial one and is clearly material to the circumstances (the two conditions required for justification by DDA 1995 s.3A(3)).

The overall position since October 1st, 2004 is that direct discrimination can never be justified if the disabled person is capable of doing the job in question.

For practical purposes the question of whether discrimination under the DDA 1995 is justified is generally likely to be less important than the question of whether an employer has fulfilled his duty to make reasonable adjustments to accommodate the needs of a disabled employee. The duty of an employer to make "adjustments" to accommodate a disabled employee or job applicant only requires him to make adjustments which are "reasonable". Justification is not a defence for a failure to comply with the duty to make a reasonable adjustment. In circumstances where an employer is under a "duty to make reasonable adjustments" but fails to do so, he cannot try to justify less favourable treatment unless he can say that the less favourable treatment would still have been justified even if he had complied with the duty to make reasonable adjustments. The various sections of the Disability Discrimination Act 1995 impose a potentially onerous duty on employers to make reasonable adjustments to ensure that in any particular case a disabled job applicant or employee is not disadvantaged by reason of working practices or the physical features of premises. The adjustments required could be, for example, adjustments to working

practices or to physical conditions or to provide alternative employment - the Act provides a lengthy list of examples (DDA 1995 s.18B(2)) and this is expanded on by the Disability Rights Commission employment Code of Practice

A club faced with a disabled employee should obtain the Disability Rights Commission employment Code of Practice and seek expert advice to ensure they do not inadvertently discriminate against a disabled employee.

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