

Capsticks briefing

Understanding the Equality Act 2010: supporting disabled health learners from education to work

The starting point when considering what steps an employer can take in respect of health learners is to look to the provisions of the Equality Act. Positive discrimination, that is treating someone more favourably because of a protected characteristic, is generally unlawful but there are some important exceptions which will be relevant to those employing health learners and which we provide further detail on below. Employers are encouraged to explore these exceptions as a lawful way in which they can take steps to level the playing field and encourage greater diversity amongst their workforce.

Disability is one of nine protected characteristics under the Equality Act and is defined as a physical or mental impairment that has a 'substantial' and 'long-term' negative effect on the ability to carry out normal daily activities.

This guidance is going to focus on the following steps Public Sector NHS employers, the Higher Education sector, professional regulatory bodies and others working across health can take to help us tackle disability discrimination:

- 1 Section 13(3) of the Equality Act sets out that a person who is not disabled (B) will not be directly discriminated against where another person (A) treats or would treat a disabled person more favourably than he treats B.
- 2 Section 20 of the Equality Act is about making reasonable adjustments for disabled people.
- 3 Section 158 and 159 of the Equality Act is not limited to disabled people but enables an NHS employer to use positive action measures.

SECTION 13(3)

The Equality Act states that if the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

Following the introduction of the NHS Workforce Disability Equality Standard (WDES) and the mandated requirements that NHS organisations are now subject to, it is more important than ever that the NHS is inclusive and welcomes disabled people. A positive and proactive approach by employers towards supporting the transition of disabled health learners, trainees and apprentices into the workforce and working flexibly is key to creating an inclusive and open culture.

The WDES is a set of ten specific measures (metrics) which enables NHS organisations to compare the workplace and career experiences of disabled and non-disabled staff. NHS organisations use the metrics data to develop and publish an action plan. Year on year comparison enables NHS organisations to demonstrate progress against the indicators of disability equality.

The evidence clearly highlights that many disabled staff continue to experience inequalities in the workplace when compared to their non-disabled colleagues. The WDES demonstrates the continued need for the NHS, with system partners, to take robust action to make sure that progress takes place and that ongoing work programmes support proactive action for change.

Reasonable adjustments

Section 20 of the Equality Act sets out that there is a duty to make reasonable adjustments for disabled persons. The duty comprises of three requirements:

- 1 where a provision, criterion or practice places a disabled person at a substantial disadvantage, reasonable steps must be taken to avoid the disadvantage.
- 2 where a physical feature puts a disabled person at a substantial disadvantage reasonable steps must be taken to avoid the disadvantage
- 3 take reasonable steps to provide an auxiliary aid where not to provide the aid would put the disabled person at a substantial disadvantage.

Example: A is a trainee pharmacy technician and is autistic. The trainee is very sensitive to the intensity and placement of lights in the workplace and sensitive to sounds. The employer should initiate a meeting with A to discuss what reasonable adjustments can be made to A's working environment. Whilst the employer should seek A's views and consider previous adjustments A may have had as a student, it is not A's responsibility to suggest reasonable adjustments. The employer should consult occupational health about possible reasonable adjustments for example, noise cancelling headphones, changes to the lighting in the workspace and having regular meetings to assess progress. The trainee should also be signposted to Access to Work, who can also provide an assessment and non-repayable grants of up to £65,000.

The duty to make reasonable adjustments is a duty of the employer and of a qualifications body in providing education. The setting of a competence standard will not amount to disability discrimination except where this might lead to indirect discrimination. The provision of education and the methods of assessment regarding whether someone has met a competence standard are subject to the duty to make reasonable adjustments.

The NHS is encouraging all employers to consider adopting a well-designed disability leave policy to help some disabled staff who may feel more pressured, compared to non-disabled colleagues, to be at work even though they feel unable to be in the workplace. Disability leave is not sickness absence but a period off work, which has been approved by an employer, for a reason related to an employee's disability. Disability leave may be a reasonable adjustment and NHS Employers has produced guidance on Disability Leave: [An inclusive approach to disability leave | NHS Employers](#).

Individual healthcare learners are encouraged to work through the issue of reasonable adjustments with their employers and education providers and to discuss in advance what will happen to customised equipment which is provided to the healthcare learner at the end of a rotation or the individual's employment. Ideally, a healthcare learner will be permitted to take the equipment with them, but this will be case specific. Access to Work can be contacted for further information.

Positive Action Measures

The Equality Act contains further exceptions to the rule that positive discrimination is unlawful under the two strands of positive action. In the context of disability, section 158 allows for positive action generally where it is reasonable for an employer to think that:

- those with a disability suffer a disadvantage connected to their disability.
- those with a disability have needs which are different to those who do not share that disability; or
- that participation in an activity by persons with a disability is disproportionately low.

Section 158 enables an employer to take action to enable the disabled person to overcome or minimise the disadvantage, meet the needs of the disabled person or enable or encourage participation in the activity provided the action taken is proportionate.

Example - Trust B, a Disability Confident Employer, is recruiting and wishes to positively encourage applications from disabled people, who are under-represented. It takes the following steps under section 158:

- *provides opportunities exclusively for disabled people before the recruitment process has commenced to encourage them to apply (i.e., work shadowing, internships, training courses)*
- *reviews advertisement wording to ensure it is accessible (i.e., easy read formats) and encourages disabled people to apply (i.e., by stating how highly the organisation values disabled staff and that it will support applicants / employees by making reasonable adjustments)*
- *reviews all person specification criteria to be applied and guarantees all disabled applicants who meet the minimum qualification criteria an interview.*
- *makes interviews/assessments accessible and considers an alternative to the traditional panel format, makes the structure of the day/process clear in advance, provides questions in advance, asks the candidate if they have any specific needs / require any adjustments in advance.*

Section 159 permits the selection of a disabled candidate for recruitment or promotion over someone who is not disabled if candidates are equally qualified, there is no policy of treating those who are disabled more favourably than non-disabled candidates and provided the action taken is proportionate.

There is no legal definition of what “equally qualified” means and it is not limited to academic qualifications so skills and experiences can certainly be used to assess overall qualification for a role. Section 159 can be used in a tie breaker scenario and where an employer has several candidates which are as qualified as each other, the disabled candidate could be selected.

It is important to remember that sections 158 and 159 do not automatically justify the setting of diversity targets and all actions by employers to attain those targets. A recent RAF inquiry found that a recruitment policy, which was put in place to improve diversity, but which resulted in several white male employees being held back in training (as compared to female employees and/or those from ethnic minority groups) was unlawful. The concept of proportionality (i.e., balancing the rights of those who benefit from a policy and those who may be treated less favourably as a result and trying to minimise any disadvantage) is crucial for employers.

Public sector equality duty

Section 149 of the Equality Act sets out the public sector equality duty (PSED). This requires a public body to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation.
- advance equality of opportunity between people who share a protected characteristic and those who do not.
- foster good relations between people who share a protected characteristic and those who do not in the exercise of its functions.

“Having due regard” means consciously considering the requirements of the PSED when exercising functions or making decisions. How much regard is 'due' will depend on the circumstances and the relevance of the PSED objectives to the decision or function in question.

The duty is a tool to improve the quality of decision-making by public authorities in relation to the impact their decisions have on people with protected characteristics.

Example: when deciding on what action to take under the PSED, an education provider analyses its data on examination performance and identifies several issues amongst different groups of students. Of particular concern is data showing that disabled students are underachieving compared to other students. Further data analysis shows that this is impacting negatively on the number of disabled students progressing to NHS careers. As the provider has relatively high numbers of disabled students this is identified as a priority issue. The organisation therefore sets an objective under the PSED to tackle the underachievement of disabled students. Its action plan to achieve this objective includes study skills support, mentoring and additional classes.

ROUNDUP OF CASE STUDIES AND LEGAL CASES WITH READ ACROSS TO HEALTH LEARNERS.

The Government Legal Service v Brookes: Assessment & adjustments

Ms Brookes is autistic and applied to join the Government Legal Service (GLS) as a trainee lawyer. The recruitment process involved a multiple-choice test based on situational judgment. Ms Brookes asked for an adjustment and to provide short narrative answers instead of undertaking the multiple-choice test due to her disability. The GLS refused the request but permitted her extra time. Ms Brookes failed to reach the pass mark and brought claims for discrimination and failure to make reasonable adjustments against the GLS.

The GLS argued that the multiple-choice format was inextricably linked to the core competency being tested and assessing a short-written answer would require a subjective assessment of a test which was designed to be marked by a computer. Both the Employment Tribunal and the Employment Appeal Tribunal disagreed and found for Ms Brookes.

This case demonstrates the need for organisations employing healthcare learners to consider the method of assessment during training and whether an adjustment to such a process is possible without undermining the assessment of a competency standard.

Walsh v London Borough of Islington: Reduced hours

Mr Walsh had Crohn's disease and made a flexible working request to work two and a half or three days a week, with altered hours which was supported by occupational health. The request was refused, and his suggestion of arranging a job share was dismissed as impractical. The Employment Tribunal found that it would have been a reasonable adjustment to offer Mr Walsh a three-day working week in these circumstances. If three consecutive days had been impractical (because of the long gap between one week and the next), Islington could have considered any configuration of days.

For healthcare learners, the issue of whether they can meet the relevant competence standards on reduced hours will need to be considered but see further information below from the GMC in respect of less than full time training.

Less than full time training position statement Nov 17 (gmc-uk.org)

Mr J Patel v Lucy A Raymond & Sons Limited: Thinking about & agreeing the right support.

Mr Patel has dyslexia and was in the process of training to be an accountant when he applied for a role with Lucy A Raymond and Sons Limited. Mr Patel stated at interview he had dyslexia, this was of personal interest to the Chairwoman/Managing Director of the respondent, as she had personal experience of dyslexia. Mr Patel's dyslexia was the decisive factor in being offered the role, overshadowing the fact that he was not qualified to carry out the role. Within one month of commencing

employment, Mr Patel was dismissed. The respondent argued that Mr Patel's dismissal was due to a restructuring and because of Mr Patel's unreasonable conduct (in respect of requesting payment of training expenses). Mr Patel's case was that he was dismissed because of something arising in consequence of his disability i.e., his inability to work as quickly as other employees or to process information during his training at the pace of other employees because of his dyslexia. The Employment Tribunal found for Mr Patel in respect of this claim as the respondent had not been able to prove there was a reason, other than Mr Patel's dyslexia, for his dismissal.

This case demonstrates the need for employers to fully understand, during the recruitment or promotion process, the impact of a disability on an individual's ability to carry out day to day activities and how this may affect their work. In this case, the Managing Director's desire to employ Mr Patel because he had dyslexia overshadowed consideration of his qualifications, his ability to carry out the role or the support and training he would need. It appears that in their desire to assist Mr Patel, they ignored best practice in seeking specific advice about the individual's disability. The case also demonstrates why it is important for employees and employers to have access to support and information and to put in place the right help and support.

Mr S Johnstone v The Royal Mail Group: Following through with support.

Mr Johnstone's disabilities comprised Asperger's syndrome, dyslexia, depression and anxiety. Mr Johnstone started work as an apprentice with Royal Mail, which undertook an occupational health assessment at the start of his employment to understand what adjustments needed to be made to Mr Johnstone's role.

Mr Johnstone was a blue badge holder but found that the staff disabled car park spaces were taken by non-disabled staff when he arrived at work and so was forced to park elsewhere which involved a more hazardous walk. This, along with other issues, led to him resigning. The Employment Tribunal found that as Mr Johnstone's disability meant that he required structure in his day, reserving a disabled car park space for him was a reasonable adjustment. Royal Mail had therefore failed in this duty.

R. (on the application of Bapio Action Ltd) v Royal College of General Practitioners [2014] EWHC 1416 (Admin): What is due regard?

Bapio applied for a declaration that the clinical skills assessment of doctors was unlawful.

The clinical skills assessment was one tranche of a three-part assessment which took place towards the end of the required training for GPs. If successful in all three parts, the doctor was awarded a Certificate of Completion of Training by the RCGP. There was a marked difference in the pass rate at first attempt of the clinical skills assessment of doctors who had a first degree from a United Kingdom medical school and those with a first degree from a foreign medical school, and between different groups of doctors, categorised by race in each category. Bapio argued that the RCGP and the GMC as regulator had failed to fulfil the public sector equality duty.

The claim was dismissed. The High Court held that the RCGP was under a continuing duty to have regard to the objectives of the PSED in the exercise of its public functions of granting Certificates of Completion of Training and in setting and administering assessments which led to the grant of such certificates. The evidence showed that the RCGP had applied its mind to the issue by commissioning various expert reports into the matter. Those reports had identified a need to make changes and the time had now come where action needed to be taken to comply with the PSED. However, the RCGP was not in breach of the PSED at the present time.

The Court also found that the GMC had taken formal steps to demonstrate fulfilment of its duties under the PSED and had also taken steps of potential practical value, including the commissioning of some of the relevant research, which it was acting on.

The judgment illustrates the need for public authorities to have “due regard” to the objectives of the PSED. Where they can show they have applied their mind to the issue, the Courts will not be quick to intervene in their decision-making. There is no longer a prescribed way of evidencing that due regard, although many public authorities use equality impact assessments to demonstrate how they have considered the PSED objectives.

USEFUL REFERENCE POINTS

The Office of the Independent Adjudicator (OIA) is an independent body set up to review student complaints about higher education providers in England and Wales.

The OIA website contains summaries of the decisions made by the OIA regarding complaints received from students. The decisions by the OIA are categorised as either justified, not justified or partly justified. The case summaries are recommended as a reference point for employers who are considering reasonable adjustments for disabled health learners.

Student Mental Health - CS031803 – OIAHE

(Don't take a blanket approach - treat people as individuals)

An education provider found that a medical student needed to repeat Year 4 because she had not satisfied the progression requirements. Soon after this decision, the student was diagnosed with generalised anxiety disorder and obsessive-compulsive disorder which was shown to be likely to have impaired her academic performance and engagement with the programme. The provider decided that it was not possible to retrospectively apply the psychiatric report to assessments that the student had already completed, and the student complained to the OIA.

The OIA concluded that it was reasonable for the provider to require students to satisfy the necessary conditions for progression before proceeding to the next stage of the programme. Repeating the year was the only way to demonstrate that the student could meet the requirements for progression to Year 5.

However, the provider had taken a blanket approach by rejecting the evidence as retrospective without properly considering all the relevant circumstances of the student's particular case. The provider could have asked itself whether the student's diagnosis amounted to a new and previously unsuspected condition that might have affected her performance. The OIA recommended that the provider consider the student's medical evidence and whether the circumstances might have impacted her performance. If it decided the circumstances might have affected her performance, the provider should consider the terms of the student's repeat year, including whether it should be treated as a first attempt and whether it should be subject to tuition fees.

Student Mental Health - CS031801 - OIAHE

(Be curious about tackling disadvantage)

In this case, a student had been diagnosed with depression, general anxiety disorder, social anxiety which prevented her from leaving her house. One of the adjustments recommended in her support plan was the use of a note-taker in workshops. The provider initially refused the student's request for a notetaker to attend workshops in her absence. It stated that attendance was key to the learning on the programme.

The OIA found that the evidence did not suggest that the provider properly considered its obligations under the Equality Act, whether the attendance requirement placed the student at a substantial disadvantage because of her disability and, if so, what could be done to prevent the disadvantage. The complaint was found to be justified.

Disability and ill-health: Responsibility on universities to document how they have supported students with disabilities - PI091409

(Being able to demonstrate proactive action)

In this case, the OIA found the complaint of a student to be justified where a university had removed the student from the course for poor attendance against the terms of his Learning Agreement. At that stage, the student presented medical evidence of depressive illness. The University could not demonstrate that, once it was made aware of the diagnosis, it looked at whether illness might have contributed to the student's poor attendance or whether its processes had put the student at a disadvantage.

The OIA recommended financial compensation to the student for distress and that the university rehear the student's grievance.

Disabled students and DSA

(Duty of care to signpost to right information at the right time?)

The student suffered an injury during their studies. Their education provider put in place some support for the student but did not give them any information about Disabled Students' Allowance (DSA). The

following year the student asked for some further support and the provider advised them to apply for DSA, which they did. A few months before the end of their studies, the student obtained funding through DSA for assistive technology and equipment, and study skills support.

The student was awarded a 2:2 classification but appealed saying that if the DSA support had been available sooner, they would have achieved a 2:1. The provider rejected the complaint and the student complained to the OIA.

The OIA found the complaint to be justified and that the provider ought to have given the student information and advice about DSA support when they first asked for help. The provider said that it had not done so because at that point the effects of the student's injury had not lasted for 12 months or more. The student first asked for support ten months after their injury and medical evidence indicated that the effects of the injury were ongoing. The delay in advising the student about DSA support, and delays in the application process itself, meant that the student couldn't access all the support they needed until near the end of their studies. When the provider reconsidered the student's profile, it decided to award the student a 2:1 classification.

The Equality and Human Rights Commission has produced guidance on the public sector equality duty. It has also published several education case studies, and case study 2 (linked below) sets out details of how The Open University has approached securing greater accessibility for disabled students:

[ECHR essential guide public sector equality duty](#)

[ECHR advice-and-guidance/education-case-studies#h2](#)

USEFUL RESOURCES

- Diversity and Ability CiC [Disability inclusion & accessibility in education and work](#)
- Empowerment Passport CiC [Disability inclusion & accessibility in education and work](#)
- The Centre for Accessible Environments [Home - CAE](#)
- The Disabled Student's Commission [Disabled Students' Commission](#)
- The Disabled Doctors Network [Disability Guidance | Disabled Doctors Network](#)
- Disability Rights UK [Disability Rights UK |](#)
- The Disabled Student Commission [Disabled students - Office for Students](#)
- NHS Employers [Making effective reasonable adjustments to support staff in their roles](#)
- NHS Workforce Disability Equality Standard [NHS England » Workforce Disability Equality Standard](#)

- Access to work [Access to Work: get support if you have a disability or health condition: What Access to Work is - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/access-to-work-get-support-if-you-have-a-disability-or-health-condition)

Video -Professor Elizabeth Hughes CBE on why the social model is very important.



Advocacy and support on health and disability including:

Arthritis – [Versus Arthritis](#)

Attention Deficit Hyperactivity Disorder (ADHD) – [The ADHD Foundation](#)

Autism - [Autism Alliance UK](#), [Autism Plus](#) and [The National Autistic Society](#).

Back-related pain – [BackCare](#)

Cancer & working - [Macmillan cancer information for employees and on employment rights](#)

Diabetes – [Diabetes UK](#)

Dyslexia - [Dyslexia Action and British Dyslexia Association](#)

Dyspraxia – [Dyspraxia Foundation](#)

Ehlers Danlos - [Ehlers Danlos Society](#)

Epilepsy - [Epilepsy Action](#)

Hearing impairment - [Action on Hearing Loss](#)

Mental health - [Mind](#)

Multiple Sclerosis - [Multiple Sclerosis Society](#)

Muscular Dystrophy - [Muscular Dystrophy UK](#)

Sickle Cell Anaemia - [The Sickle Cell Society](#)

Speech impairment - [The British Stammering Association](#)

Strokes - [Stroke Association](#)

Visual impairment - [RNIB](#)

For more information please contact:



NICOLA GREEN
PARTNER
 020 8780 6975
Nicola.green@capsticks.com

CAPSTICKS

capsticks.com

Twitter: @capstickslp

BIRMINGHAM

1 Temple Row
 Birmingham B2 5LG
 T +44(0)121 230 1500
 F +44(0)121 230 1515
 DX: 13003 - Birmingham

CHORLEY

Ordnance House,
 6 East Terrace Business Park
 Euxton Lane,
 Chorley PR7 6TB
 T +44(0)125 726 6008

LEEDS

Toronto Square, Toronto Street
 Leeds LS1 2HJ
 T +44(0)113 322 5560
 F +44(0)113 242 2722
 DX 713112 – Leeds Park Square

LONDON

1 St George's Road
 London SW19 4DR
 T +44(0)20 8780 2211
 F +44(0)20 8780 1141
 DX 300118 – Wimbledon
 Central

WINCHESTER

Staple House, Staple Gardens
 Winchester SO23 8SR
 T +44(0)1962 678 300
 F +44(0)1962 678 311
 DX 2532 - Winchester