

WALKERS

Equality Awareness SERIES



Adjusting for Disability: Case studies for Employers

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Introduction

- What might an appropriate adjustment be?
- What steps should an Employer take when considering an adjustment?
- Why do Employers need to consider making adjustments?
- What are the benefits of making an adjustment?
- Case Studies



Background – Current position in Guernsey

- The Committee *for* Employment and Social Security is currently working on proposals for multi-ground discrimination legislation
- Public consultation to take place this summer with final policy proposals to go to the States by April 2020
- Disability Discrimination
 - Social Model identified as best for Guernsey’s needs
 - Legislation likely to be based on a combination of the Irish and Australian laws
 - Likely to include protection against “Denial of an appropriate adjustment”



Background – The Social Model

- Social Model of disability proposes that what makes someone disabled is not their medical condition , but the attitudes and structures of society
- It looks at ways of removing barriers that restrict life choices for disabled people
- When barriers are removed, disabled people can be independent and equal in society, with choice and control over their own lives
- The concept of “adjustment” is firmly rooted in the Social Model



Background – What could constitute a “disability”?

- It could be visible or hidden
- It could be physical or mental
- It could be long-term or short-term
- It could be linked to the employee’s work life or home life
- It could be linked to the employee or an employee’s family member - associative disability - although no current proposal for employers to have to make reasonable adjustments for carers



Background – What is the current position?

- Whilst Guernsey does not have the legislative framework in place yet the concept of making appropriate adjustments is not new
- Many Guernsey employers will already be making reasonable adjustments
- Pan-Island Employers or Employers with UK operations will be aware that both UK and Jersey legislation provide for a duty to make reasonable adjustments
- Pan-Island employers will need to be aware of the differences in what constitutes a “disability” under proposed Guernsey legislation and the Jersey law which follows the definition of disability seen in the UK



Background – The Irish position

- The Irish Employment Equality Acts 1998-2015 (the "**Irish Equality Acts**") include the concept of "reasonable accommodation" but no examples
- However there is a definition of "appropriate measures" in relation to a person with a disability:
 - a) means effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned;
 - b) without prejudice to the generality of paragraph (a), includes the adaption of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources; but



Background – The Irish position (cont.)

- c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.



What might an appropriate adjustment be?

IMPAIRMENT	DIFFICULTY	ADJUSTMENT
Anxiety	Travel in rush hour	Allow flexible working to avoid busy times
Back pain	Long periods seated	Full ergonomic assessment and regular rest breaks
Depression	Start time of 8am	Adjust to later start time
Repetitive strain injury	Long day working at PC	Ergonomic keyboard; regular rest breaks



What might an appropriate adjustment be? (cont.)

Impairment	Difficulty	Adjustment
Epilepsy	Long days, long meetings	Frequent breaks, cold drinks, fan available
Restricted mobility	Getting to work	Provide car parking space close to work
Lupus/ME	Full time work throughout the year	Flexible working (eg compressed hours, and/or unpaid time off at regular intervals)
Aphasia (often following a stroke)	Speech and language problems; can also affect reading and writing	Phased return, changes to duties, time off for medical appointments, written instructions; regular breaks



What steps should an Employer take when considering an adjustment?

- Employers should:
 - take a proactive approach and engage with the employee about any possible adjustments from the outset;
 - be aware of the employee’s medical condition and take into account any medical evidence the employee provides;
 - consider if additional expert medical evidence may be helpful or if an occupational or ergonomic assessment may be necessary;
 - once all the medical evidence has been reviewed, consider the appropriate measures, special treatment or facilities in order to allow the employee to be capable of performing the tasks of the position;



What steps should an Employer take when considering an adjustment (cont.)?

- engage in consultation with the employee and make adequate enquiries to ensure the employer has all material information and facts before taking any decision which is to the employee’s detriment;
- consider any proposals that an employee may make regarding appropriate measures/adjustments;
- keep records of conversations and meetings;
- record any decisions made/reached; and
- be prepared to revisit decisions and, if possible, try an alternative option, if adjustments are not working for the employee or the business.



What steps should an Employer take when considering an adjustment (cont.)?

- The decision in *Humphries –v- Westwood Fitness Club [2004] ELR 296* sets out the obligations on employers:
 - Examine the factual position and seek clear medical guidance regarding the employee's capability including the degree of impairment arising from the disability and its likely duration; and
 - Consider what reasonable accommodation or appropriate measures (including any special treatment or facilities) can be made available by which the employee may become fully competent to perform his or her role;



What steps should an Employer take when considering an adjustment (cont.)?

- Consult with the employee along the way to ensure that the employee has a say in any decisions which could adversely impact their terms and conditions of employment or which could lead to the termination of employment; and
- Document the entire process so that it is clear what has been examined and considered by the employer and what the response of the employee is before any decision is made regarding the employee.



What steps should an Employer take when considering an adjustment (cont.)?

- Under the Irish legislation:
 - There is no obligation on employer to hire, promote, or retain an employee who cannot perform the essential functions of the job.
 - However, a person must be regarded as competent if they could be competent once reasonable accommodation is provided.
 - In the rare cases where an employer has exhausted all adjustment options and cannot find a solution to enable an employee to perform the essential functions of the job there is no additional requirement for an employer to then create a new role or need to find an alternative role within their organisation



What steps should an Employer take when considering an adjustment (cont.)?

- *Nano Nagle School v Daly [2018] IECA 11* (Supreme Court appeal pending)



Why do Employers need to consider making adjustments?

- Denial of an appropriate adjustment
 - Where a person fails or refuses to make/provide an appropriate adjustment without which an individual would find it difficult to access employment, continue to work and/or to progress within their work, or to undergo training
 - Unlawful unless such an adjustment would give rise to a disproportionate burden
- Pre-employment responsibilities ie when recruiting as well as for existing employees



Why do Employers need to consider making adjustments?

- "Disproportionate burden" is assessed taking into account:
 - Financial and other costs
 - The scale and financial resources of an employer's business
 - The possibility of obtaining public funding or assistance
- Employer is not obliged to provide anything that the person would normally provide for themselves eg hearing aids.
- Employer should be able to show evidence of the extent to which they considered and consulted with the employee about appropriate measures



What are the benefits of making an adjustment

- Improve diversity and inclusion within your workplace – proven benefits for employees and the business
- By recognising, reducing and removing any barriers that discriminate against disabled people to find or maintain employment, Employers are meeting their legal responsibilities
- More than 5,500 people of working age with a disability or long term health condition in Guernsey
- A source of qualified workers that can often be overlooked and who want to work
- Often simple no/low cost change can have a big impact towards reducing barriers and enabling these people to join the workforce



What are the benefits of making an adjustment?

- Could assist your recruitment efforts by attracting a wider pool of talent
- Might help you retain employees who would otherwise resign
- Allow employees to focus on the elements of their roles they are able to perform best
- Could help you manage your sickness/absence records
- Contribute to you being seen as an Employer of Choice
- Boost to staff morale



What are the benefits of making an adjustment

- Guernsey Employment Trust established in 2015
 - Supported over 300 people into employment
 - Currently working with 166 people with approximately 60 of these actively job searching
 - GET offers varying levels of support
 - Possible to get support from other sources eg Guernsey Blind Association



What are the benefits of making an adjustment

- Majority of adjustments are no or low cost
 - Adjusting working hours
 - Job carving
 - Adapting induction/training materials or procedures to make them more accessible



How can Employers prepare for the change in legislation

- Employers should review:
 - Recruitment policies and procedures
 - Employment contracts
 - Job descriptions
 - Employee Handbook/policies and procedures
- Work closely with Occupational Health / Company Doctor
- Consider signing up to the Guernsey Employment Trust – Employers' Disability Charter
- Employee training on Diversity & Inclusion, Disability Awareness and Equal Opportunities



CASE STUDY 1 - RECRUITMENT

- Magic Trust Company has a vacancy in its Private Client Accounts Team for a Senior Account Manager.
- Hayley, the HR Manager, has placed an advertisement for the role and has received four applications:-
 - Paul, currently works for a competitor
 - Brian, who is on a temporary contract for a competitor
 - Liz, an Account Manager, returning from a career break after having twins
 - Tom, an internal candidate.



CASE STUDY 1 - RECRUITMENT

- Hayley has reviewed the CVs with Richard, Director Private Client, and all candidates look to have suitable experience. He agrees to meet them all.
- As part of Magic Trust's recruitment procedures candidates are asked to disclose if they require any adjustments to be made to enable them to attend and participate in an interview.
- Hayley notices that Paul has declared a "bad back".
- Hayley is aware that Tom has had a few recent periods of sickness absence and that the reason given has been work-related stress.
- What should she do next?



CASE STUDY 1 - RECRUITMENT

- Paul
 - Having contacted Paul, he confirms he has two prolapsed discs in his lower back which are causing him some grief but that so long as he can move around a little bit in the interview he should be fine.
- Tom
 - Hayley is due to have a return to work meeting with Tom after a recent period of absence at which he explains that he was dating his Senior Manager's sister but that this relationship has broken down and now the working relationship with his Senior Manager, Kate, has become strained and he feels very nervous about directly reporting to her.
- What should Hayley do now?



CASE STUDY 1 - RECRUITMENT

- Hayley confirms to Paul that the meeting will take place in their main meeting room and that there will be space should Paul need to stand up or move about.
- With Tom's agreement Hayley sets up a meeting which she attends with Tom and Kate to discuss their current reporting arrangements. This meeting is positive, Tom feels reassured and Kate separately confirms to Hayley that she has no interest in getting involved in her sister and Tom's relationship matters and insists she is treating him as she always has done.
- Hayley arranges to meet all the candidates for interviews with Richard



CASE STUDY 1 - RECRUITMENT

- Paul
 - Most experienced candidate and could clearly do the role required.
 - During the interview he needs to get up and walk around a bit and also confirms that he has a bit of difficulty going up and down stairs too much.
- Magic Trust Company is located in a town house office and does not have a lift. The Private Client Accounts Team sit on the third floor (which has a lovely outlook over the harbour and Castle Cornet). Their support/admin team are on the first floor.
- What adjustments could Hayley potentially consider for Paul?



CASE STUDY 1 - RECRUITMENT

- Brian
 - Brian’s interview starts well but then his phone rings. He apologises and excuses himself to take the call.
 - When he returns he explains that his son suffers from epilepsy and that he needs to cut short the interview as his son’s after-school carer needs to go home due to a family emergency.
 - Brian asks if the interview can be rescheduled for the following week, but says the first availability he has is Wednesday lunchtime as he has pre-existing doctor and school appointments for his son at the start of the week.
 - Richard is unimpressed.
- What should Hayley do now?



CASE STUDY 1 - RECRUITMENT

- Hayley explains to Richard that they should look to rearrange the interview with Brian to ensure he can be fairly considered alongside the other candidates for the role.
- As Brian's son is likely to have a disability there could be a risk of discrimination by association.
- In the event, Brian contacts Hayley to withdraw from the interview process as he has now been offered a permanent role at his existing employer.



CASE STUDY 1 - RECRUITMENT

- Liz
 - Liz interviews well although it is clear from the discussions that she has more experience in Pension teams than in working with Private Clients.
 - Liz has not performed a Senior Manager level role previously.
- Tom
 - Tom appears to be very anxious during his interview and when discussing his existing role and experiences to date gets visibly distressed.
 - He admits that he loves working for Magic Trust Company but that he needs to move away from his current team as he is still really finding it hard working with Kate.



CASE STUDY 1 - RECRUITMENT

- Subject to being able to agree the adjustments Paul requires, Richard and Hayley agree that he is their preferred candidate for the Senior Account Manager role.
- What should Hayley do next?



CASE STUDY 1 - RECRUITMENT

- Hayley has notified the Private Client Accounts Team that some of the team (those that will be working directly with Paul when he joins the team) will be relocating to the first floor and will be grouped near their admin/support colleagues whilst the remainder of the team will be remaining on the third floor
- Hayley receives a couple of complaints from team members unhappy at losing their offices and view.
- How should she approach this?



CASE STUDY 1 - RECRUITMENT

- Richard is concerned about Tom's well being. He is aware of a prospective vacancy in another team where a long standing team member, Beryl, is due to retire in a few months time.
- Richard confirms that he would like to offer Beryl's role to Tom as a lateral move and is happy for Beryl and Tom to work together for a period of time so she can hand over her clients effectively.
- Tom is delighted and accepts this offer
- What does Hayley need to do now?



CASE STUDY 1 - RECRUITMENT

- As Tom's lateral move now creates a vacancy in Kate's team at Account Manager level, Hayley contacts Kate to discuss further.
- They agree that Hayley should advertise the role.
- Liz gets in touch and is angry that she wasn't considered for the role based on her recent interview and relevant experience and claims that she has been discriminated against on the grounds of her post-natal depression.
- Is the Company at risk?



CASE STUDY 2 - MARK

- You get an email from HR telling you Mark has phoned in sick. He is going to the doctor but expects to be back soon. You don't hold your breath. This must be the fourth time in as many months.
- What should you do?



CASE STUDY 2 - MARK

- Mark returns to work after 3 days. In preparation for a return to work interview, HR has gathered the following information for you from medical certificates, self certification forms and the sickness absence calendar:
 - Torn ligament - 5 days (3-7 February)
 - Work related stress - 5 days (1-5 March)
 - Nausea/tiredness - 1 day (25 March)
 - Sore eyes/no energy - 4 days (2-5 April)
 - Fever/vomiting - 3 days (3-5 June)



CASE STUDY 2 - MARK

- Mark agrees to a medical report being prepared. What information will you provide the Doctor?
- What questions will you be asking the Doctor?
- What if Mark refuses to engage with the process?



CASE STUDY 2 - MARK

- The medical report includes the following:
 - *Mark's recent medical history includes reference to the following symptoms – fever, vomiting, painful red eyes, tiredness, stomach cramps and diarrhoea. In my opinion he is suffering from Crohn's disease, a form of inflammatory bowel disease (IBD).*
 - *The symptoms of IBD can come and go. There may be times when the symptoms are severe (flare ups), followed by long periods when there are no or few symptoms at all (remission). There is currently no cure for Crohn's disease.*
 - *Treatment aims to relieve the symptoms and prevent them returning and includes specific diets, lifestyle changes and medicines (including by injection). In cases where symptoms don't improve with medication, surgery may be necessary to remove part of the bowel.*
- What next?



CASE STUDY 2 - MARK

- How would you anticipate Mark's situation panning out if his attendance levels continue to deteriorate?



CASE STUDY 2 - MARK

- But...things take an unexpected turn.
- On the day you were due to discuss the medical report with Mark, he calls in sick and then sends in a medical certificate signing him off for a week. The reasons given for absence are "Workplace stress due to bullying and aggravated IBS"
- The next day HR tells you they've spoken to Mark. He's told them he's "been finding the whole occupational health thing really stressful" and that "it's clear that you just want to get rid of him".
- Mark's medical certificate is extended for 6 weeks and then for a further 8 weeks (15 weeks in total)
- What now?



Upcoming Events

- States' Public Consultation likely to be announced soon and will run over the summer months. Contribute and share your views
- GET is presenting a workshop on 6 August (repeat of the 14 May workshop) to give practical advice to Employers. Link to sign up:
 - <https://www.eventbrite.co.uk/e/employment-and-disability-a-practical-approach-for-employers-by-guernsey-employment-trust-tickets-60742772267?aff=ebdssbdestsearch>
- CAE (Centre for Accessible Environments) is running a "Access auditing and Best Practice" 2 day course on 15 & 16 October 2019
 - For further information or to reserve your place, email places@access.gg or call Karen on 07781 467 316



Questions

Answers



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