

WALKERS

Equality Awareness SERIES



Disability: What does it mean in practice for Employers

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Introduction

- What does “disability” look like (factually and legally)?
- Why is this important for Employers?
- What is the “Social Model”? How does it work in Ireland?
- How can Employers become disability confident?
- How can Employers prepare for new legislation?



Background

- Disability and Inclusion Strategy (Billet XXII of 2013) – the States of Guernsey agreed to develop policy proposals for disability discrimination legislation
- The Social Model - the most suitable to meet Guernsey's needs
- The Committee *for* Employment and Social Security initiated work on the project in 2017
 - Complex review and comparative study of different legislation in other countries conducted by independent experts against criteria set by the Committee
 - Irish & Australian legislation suggested as the best “model” to suit Guernsey's needs



Background

- In June 2018 the States unanimously agreed an amendment to the Policy & Resources Plan and has directed the Committee to bring proposals for multi ground discrimination to the States by April 2020
- A full public consultation on the Committee's draft policy proposals will take place later this year
- The proposals will then be reviewed by the Committee in light of the consultation feedback.
- Final policy proposals will go to the States for consideration before the end of this term of government
- If these proposals are approved, an Ordinance will then be drafted and put to the States for approval

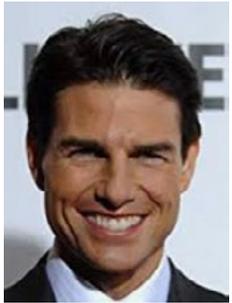


Background

- Equality Awareness - a key priority for the States and vital for Islanders to change how they think about disability.
- Key charities working on this include:
 - Guernsey Disability Alliance
 - Guernsey Employment Trust
 - Access for All Guernsey



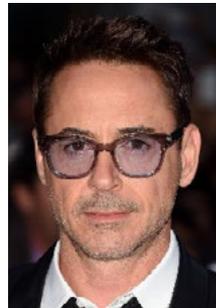
What does "disability" look like?



Tom Cruise & Keira Knightley



Halle Berry & Tom Hanks



Robert Downey Jr & Al Pacino



What does "disability" look like?



Dan Ackroyd & Susan Boyle



Justin Bieber & Ryan Gosling



Liz Taylor & John F Kennedy



What does “disability” look like? The Irish position

The Irish Employment Equality Acts 1998-2015 (the “Irish Equality Acts”) define disability broadly to mean:

- a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body
- b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness
- c) the malfunction, malformation or disfigurement of a part of a person's body
- d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction
- e) a condition, illness, or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour

and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person



What does "disability" look like? It may not be obvious

- Use of wheelchairs
- Depression / Anxiety
- ADHD
- Dyslexia
- Autism spectrum disorder
- Acquired brain injury
- Chronic fatigue
- Fibromyalgia
- Irritable bowel syndrome
- Temporary injury (eg car accident)
- Post-operative recovery
- Epilepsy
- Migraine
- Alcoholism / substance addiction
- Narcolepsy
- Anorexia / bulimia
- Low BMI / Obesity
- Hypertension
- Diabetes
- Visual /hearing impairment
- Kidney infection
- Work-related stress (panic attacks)



What is unlikely to constitute a disability under Irish law?

- Definition is a combination of medical and social models but is interpreted to be consistent with the UN Convention on the Rights of Persons with Disabilities
- Disability must be determined on a case-by-case basis
- Importance of medical evidence
- No minimum level of illness prescribed in Irish Equality Acts to constitute a disability but the Irish courts have indicated that a *de minimis* rule must be applied so that the 'effects or symptoms, which are present to an insignificant extent, would have to be disregarded'



Why is this important for Employers?





Why is this important for Employers?

- Legislation will be coming to protect individuals against disability discrimination (and protected grounds)
- Not finalised but likely to include protection against:
 - Direct discrimination
 - Discrimination by association
 - Indirect discrimination
 - Denial of an appropriate adjustment
 - Victimisation
 - Harassment



Why is this important to Employers?

- Legal responsibility on employers to recognise, reduce and remove any barriers that discriminate against disabled people to find or maintain employment
- 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



Why is this important for Employers?

- Direct Discrimination
 - Treating someone less favourably than another person is, has been or would be treated in a similar situation on the grounds of their disability
- Harry has recently taken some time off work as he has been suffering depression which is linked to his recent marriage breakdown. His colleague Martin, who does not have depression is offered a promotion, even though he has less experience and fewer qualifications than Harry



Why is this important for Employers?

- Discrimination by Association
 - Where a person (P) who is associated with another person (AP) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and
 - Similar treatment of AP on any of the protected grounds would constitute direct discrimination
- Jane has been offered a job as a receptionist in Big Bucks Bank. However, the job is suddenly withdrawn after she reveals she has a severely disabled child with complicated care arrangements



Why is this important for Employers?

- Indirect Discrimination
 - Where an apparently neutral provision would put people at a disadvantage compared with other people because of any protected ground(s), unless the provision can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary
- Hot Shot Accountants runs mandatory training courses for its audit staff. All staff are expected to attend and participate in “all staff” group training sessions to encourage “group think”
- Amy suffers from work-related stress panic attacks and Andy has hearing impairments. Both find it hard to participate



Why is this important for Employers?

- Indirect Discrimination Example (cont)
- Question for Hot Shot: Is there another way to deliver the required training which would make it less problematic for Amy and Andy?
- A solution could be to run smaller team training sessions and to then share knowledge firm wide.



Why is this important for Employers?

- 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
 - 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 is this important for Employers?

- What could an appropriate adjustment include?
 - Making facilities accessible
 - Rescheduling work
 - Reorganising activities
 - Adjusting learning strategies
 - Enabling access to support personnel
 - Obtaining different computer software
 - Obtaining a loop system
 - Offering flexible work times and/or the ability to work from home
 - Re-positioning an individual's desk/office
 - Offering car parking close to the office



Why is this important for Employers?

- Victimisation
 - When a person is put at a disadvantage (this may include dismissal, being penalised, subjected to or threatened with any detriment) because they have made an allegation about discrimination or they have supported someone else who has made an allegation of discrimination
 - It could include someone speaking up or appearing as a witness in support of someone else



Why is this important for Employers?

- Victimisation Example
 - Sally and Peter are team members. Peter suffers from OCD and likes to ensure that his desk is left in a particular way. Sally has observed another team member, Brian, deliberately messing up Peter’s desk for “a bit of a laugh”
 - Sally has become very concerned about Peter, who is becoming distressed by Brian’s actions and has helped him to raise a complaint against Brian to Dan, the team manager
 - Dan is unimpressed with Sally and thinks she is a busybody and should just “get back in her box”
 - At her next appraisal, despite no change in her performance, Sally receives lower scores from Dan for her performance than in the previous year, which has a negative impact on her bonus



Why is this important for Employers?

- Harassment
 - Any form of unwanted conduct related to any of the protected grounds and can be acts, requests, spoken words, gestures or the display, publication or circulation of written words, pictures or other material
- Megan suffers from bulimia. Her manager knows that she has an eating disorder and makes offensive remarks in the open plan office. For Megan's "Secret Santa" present her manager buys her a "Drop a Dress Size" diet book



What is the Social Model?

- Two types of Disability Model – Medical and Social
- Medical Model of disability links a disability diagnosis to an individual's physical body. The model supposes that the disability may reduce the individual's quality of life and the aim is, with medical intervention, to diminish or correct the disability.
- The Medical Model looks at what is 'wrong' with the person and not what the person needs.
- It has been criticised as creating low expectations and leading to people losing independence, choice and control in their own lives.



What is the Social Model?

- The definition of “disability” in the UK Equality Act 2010 and the Discrimination (Jersey) Law, 2013 are considered to be more in line with the Medical Model than the Irish definition
- This is because complainants qualify or disqualify for protection under the legislation by reason of the severity and longevity of their impairment or condition and, sometimes also, the degree of the effect of the impairment
- Both UK and Jersey legislation provide for a duty to make reasonable adjustments which is a concept firmly rooted in the Social Model
- Pan-Island Employers or Employers with UK operations will need to be aware of the differences in what constitutes a “disability”



What is 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



What is the Social Model?

- Some of the key ways that people are disabled by society are:
 - Prejudice
 - Labelling
 - Ignorance
 - Lack of financial independence
 - Families being over protective
 - Not having information in formats which are accessible to them
 - Accessibility to transport / premises



What is the Social Model? How does it work in Ireland?

- Rights based approach
- Definition of discrimination – occurs where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the nine grounds, including disability
- Broad scope – covers all aspects of the working relationship, from hiring and access to employment, through to dismissal – both direct and indirect discrimination are prohibited
- Discrimination by association (ie being associated with or connected to a person with a disability) and discrimination by imputation (ie labelling an individual as having a disability) is sufficient to attract protection from discrimination - disability need not impact of person's functionality
- Positive action is permitted, but not preferential treatment © 2019 WALKERS



What is the Social Model? How does it work in Ireland? (cont)

- Comparator
 - Must be a comparator to prove direct discrimination. Often difficult to find a comparator, so most Irish disability cases are litigated as a failure to provide reasonable accommodation
- Causal Link
 - Must be a causal link between disability and the alleged discriminatory act
- Vicarious Liability
 - Employer is vicariously liable for actions of its employees but it is a defence for an employer to show it took reasonably practicable steps that might have prevented the breach of law



What is the Social Model? How does it work in Ireland? (cont)

- Knowledge of disability
 - Employees are not obliged to disclose their disability to employers
 - Employers must be able to establish they had no actual, constructive or implied knowledge of the employee's disability to avoid liability
 - If there are clear signs of disability or the employer ought to have been aware of disability – employee is entitled to protection from discrimination
 - Employees should generally be encouraged to disclose disability to allow employer to comply with its legal obligations
 - Failure by employee to disclose disability when encouraged to do so may deprive them of protection under Irish Equality Acts



What is the Social Model? How does it work in Ireland? (cont)

- What is meant by "fully competent"?
 - Fully competent to undertake and fully capable of undertaking any duties if the person could do so if they are given reasonable accommodation by the employer
 - Reasonable accommodation means taking "appropriate measures" to enable an employee to:
 - Have access to employment
 - Participate or advance in employment, or
 - Undergo training
- unless the measures would impose a disproportionate burden on the employer



What is the Social Model? How does it work in Ireland? (cont)

- "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



What is the Social Model? How does it work in Ireland? (cont)

- Appropriate measures include:
 - Rearranging office furniture
 - Adapting standard equipment or providing something specially designed
 - Adjusting or modifying tests and training materials
 - Considering alternative ways of accomplishing a given task
 - Providing information in appropriate formats



What is the Social Model? How does it work in Ireland? (cont)

- Remaining on the books
- Alternative attendance patterns
- Phased return to work
- Working from home
- Reduction in working hours
- 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 is the Social Model? How does it work in Ireland? (cont)

- Forms of redress available in Ireland
 - Discriminatory dismissal – up to two years' gross remuneration, reinstatement or re-engagement
 - Victimization – up to two years' gross remuneration
 - Access to employment – up to €13,000
 - Employers ordered to take a specific course of action e.g. providing reasonable accommodation
 - No costs orders
 - Hearings in private but equality decisions can be published



How can Employers become disability confident?

- Carry out an equality audit of recruitment process, pre-employment questionnaires, staff handbook, including policies, procedures and contracts
- Encourage disclosure of disabilities – employee helplines, equal opportunities and inclusion and diversity policies
- Offer access to employee assistance programmes
- Consider positive action in recruitment to facilitate integration
 - In Ireland, public sector jobs target of 3% of employees with disabilities (rising to 6% by 2023)
- Manage all absences due to illnesses carefully



How can Employers become disability confident?

- Recognise the benefit of bringing further diversity to your workplace
- Consider Employee Wellness Programmes
- Consider signing up to the Guernsey Employment Trust – Employers' Disability Charter
 - Voluntary & Free
 - Demonstrates that your company is taking positive action and developing initiatives to enable more disabled people to access employment opportunities in Guernsey
 - Help change attitudes and work towards a fairer more inclusive society



How can Employers become disability confident?

- GETs Employers' Disability Charter - clear structure and action plan with nine commitments for employers that aim to assist disabled people into the workplace
- <https://www.youtube.com/watch?v=OJU6d7SLCE0>
- Companies do not have to achieve all nine commitments at the time of signing up – show a spirit of intent to work towards each commitment
- GET is presenting a workshop on 14 May to give practical advice to Employers and repeating on 6 August. 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>



How can Employers become disability confident?

GETs Employers' Disability Charter – 9 Commitments

1. We will encourage job applications from disabled people
2. We will guarantee a job interview for applicants who meet the minimum criteria for our job vacancies
3. We will implement good practice in all aspects of recruitment and retention of disabled people
4. We will consider “reasonable adjustments” in the recruitment process and in the workplace
5. We will provide work experience placements and job tasters for disabled people where practicable



How can Employers become disability confident?

6. Staff may be available to conduct mock or practice interviews for job seekers with a disability
7. We will encourage managers and supervisors to undertake online Disability Awareness training
8. We will act as a Disability Ambassador and encourage staff to motivate other employers
9. We will develop our own commitments to enhance the employment opportunities for disabled islanders



How can Employers prepare for new legislation?

- Be aware / raise awareness
- Ensure that any bad practices are being dealt with appropriately
- Offer training – equal opportunities, unconscious bias and disability awareness
- Engage with employees and stakeholders before legislation is implemented
- Contribute to the States public consultation prior to policy proposals being put forward so your views can be considered



How can Employers prepare for new legislation?

- Be proactive and plan ahead so cultural shift is progressive
- Set the standard early to maximise the potential benefits – beat your competitors by actively promoting diversity and inclusion
- Aim to be an “Employer of Choice”
- Focus on the benefits (eg recruitment, retention, increased staff morale and motivation, client appreciation)



How can Employers prepare for new legislation?

- Review current employment practices and procedures – legal advice may be required, particularly if they apply to multiple jurisdictions
- Pan-Island employers (and those with UK offices) will need to ensure their staff are aware of the effect of the different definitions of “disability” in the equality/discrimination legislation that applies in different jurisdictions
- Managers who have responsibility for team members working in different locations will need support to understand what practices to follow



Questions

Answers

The word 'Questions' is written in white on a pink speech bubble. The word 'Answers' is written in white on a green speech bubble. There are four smaller speech bubbles containing question marks: one blue, one orange, one red, and one white.



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Disclaimer:

The information contained in these slides is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter.



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