



# Factsheet seven

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## When things don't work out well

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## Discrimination

Discrimination against people with disabilities remains one of the greatest human rights issues of our time.

A recent review of international and European Union legal sources on the prohibition of disability discrimination has revealed that an overwhelming advancement in the field has been made through the adoption or amendments of relevant international and European legal instruments on human rights and non-discrimination, as well as through a developing case law and academic scholarship related to these instruments<sup>1</sup>.

Finding out the exact number of physicians who identify as “disabled” might be an essential first step for proactively confronting disability-related barriers affecting patients, but might lead to substantial challenges<sup>2</sup>.

As we know, the reluctance to disclose disability as a doctor means that accurate data on the prevalence of disability amongst doctors is difficult, if not impossible to obtain.

**Direct discrimination** (section 13 **Equality Act** [2010]<sup>3</sup>) is when you are treated worse than another person or other people because:

- you have a protected characteristic
- someone thinks you have that “protected characteristic” (known as *discrimination by perception*)
- you are connected to someone with that “protected characteristic” (known as *discrimination by association*).

Your circumstances must be similar enough to the circumstances of the person being treated better for a valid comparison to be made.

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<sup>1</sup> <https://journals.sagepub.com/doi/abs/10.1177/1358229113482072>

<sup>2</sup> <https://journalofethics.ama-assn.org/article/why-increasing-numbers-physicians-disability-could-improve-care-patients-disability/2016-10>

<sup>3</sup> <https://www.legislation.gov.uk/ukpga/2010/15/section/13/2010-10-01>

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**Indirect discrimination** (section 19, **Equality Act** [2010]<sup>4</sup>) happens when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a protected characteristic, and you are disadvantaged as part of this group. If this happens, the person or organisation applying the policy must show that there is a good reason for it.

[A 'policy' can include a practice, a rule or an arrangement.]

It makes no difference whether anyone *intended* the policy to disadvantage you or not.

Discrimination against any person on the grounds of disability is 'a violation of the inherent dignity and worth of the human person', as it is stated in the Preamble to the *UN Convention on the Rights of Persons with Disabilities*<sup>5</sup>.

On 13 December 2006, the UN General Assembly adopted a specialised international convention dealing with the rights of persons with disabilities, the **Convention of Rights for Persons with Disabilities**<sup>6</sup>. Non-discrimination, actual participation and inclusion in society, respect for difference, equality of opportunity and equality are the fundamental principles followed by this convention.

Discrimination can include, for example:

- not hiring someone because of their disability
- selecting a particular person for redundancy because of their disability
- paying someone less than another worker without good reason

(Department for Work and Pensions, 2020<sup>7</sup>)

One must make sure that doctors with a disability are not particularly disadvantaged by the way an organisation does things, unless this is a 'proportionate way' to achieve a 'legitimate aim' of the organisation, e.g. maintaining education standards or health and safety.

The **Equality and Human Rights Commission** is the body responsible for implementing the Equality Act 2010 and which provides much useful advice in this

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<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2010/15/section/19>

<sup>5</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/preamble.html>

<sup>6</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

<sup>7</sup> "Employing disabled people and people with health conditions", Department of Work and Pensions guidance, updated March 2020, <https://www.gov.uk/government/publications/employing-disabled-people-and-people-with-health-conditions/employing-disabled-people-and-people-with-health-conditions>

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area<sup>8</sup>. It organises information on its homepage for individuals, organisations and the public sector in general.

We strongly commend this page to you.

### Useful organisations

There are a number of useful other organisations.

#### **START Ability Services**<sup>9</sup>

This organisation was established to provide efficient, expert solutions to businesses and individuals. Its consultants are experts in disability equality issues and psychological interventions.

#### **The Association of Disabled Professionals (ADP)**<sup>10</sup>

The ADP was set up for disabled people who wanted to enter or remain working in the professions or who considered work in management. It provides a forum for disabled people to share both their problems and their experiences of successful personal development and valued work

#### **Disabled Entrepreneurs Network (DEN)**<sup>11</sup>

DEN provides networking opportunities for disabled entrepreneurs in the UK, including providing opportunities to support disabled individuals achieve self-employment, a gateway to making a living and independent living.

#### **Access to Work**<sup>12</sup>

The "Access to Work" government scheme offers people who are disabled or have a physical or mental health condition practical support based on needs, which may include a grant to help cover the costs of practical support in the workplace.

An Access to Work grant can pay for special equipment, adaptations or support worker services to help you do things like answer the phone or go to meetings, or help getting to and from work.

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<sup>8</sup> <https://www.equalityhumanrights.com/en>

<sup>9</sup> <http://www.startability.org.uk>

<sup>10</sup> <https://www.adp.org.uk/about.php>

<sup>11</sup> <https://www.disabledentrepreneurs.co.uk>

<sup>12</sup> <https://www.gov.uk/access-to-work>

# When things don't work out well

## Dealing with unpleasant behaviour

There is increasingly robust evidence that a diverse workforce in which all staff members' contributions are valued is linked to good patient care, and yet harassment and victimisation, or other unwanted abuse, from colleagues have been reported as being experienced in high proportion in NHS staff feedback<sup>13</sup>.

Unpleasant behaviour may be experienced in different contexts, and how you deal with it depends on the specifics of the situation, personal circumstances and the outcome you wish to achieve. Unpleasant behaviour towards disabled employees may be persistent or an isolated event, but, in all cases, the actions or comments are viewed as demeaning and unacceptable to the victim. Some argue that the established culture of the medical profession is one that potentially perpetuates an environment of bullying and harassment, especially during training, where there is a cultural hierarchy with unconscious biases<sup>14</sup>.

Challenging organisations or individuals on their "wrong doing" can leave you feeling even more isolated and vulnerable. Those experiences can easily destabilise an existing physical condition or mental condition.

The **Equality Act** [2010] covers the same groups that were protected by existing equality legislation, "protected characteristics" defined in section 4<sup>15</sup> – viz, age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity.

**Harassment** defined in section 26<sup>16</sup> is unwanted conduct related to a protected characteristic under the Equality Act 2010 that has the purpose of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

Harassment in the workplace can also occur where a person reasonably considers conduct to have that effect, even if the effect is unintended.

"Bullying" is not actually defined in UK employment law.

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<sup>13</sup> The "snowy white peaks" of the NHS: a survey of discrimination in governance and leadership and the potential impact on patient care in London and England. <https://www.england.nhs.uk/wp-content/uploads/2014/08/edc7-0514.pdf>

<sup>14</sup> <https://www.bradfordvts.co.uk/wp-content/onlineresources/teaching-learning/trainee-in-difficulty/bullying%20-%20BMA%20guidance%202006.pdf>

<sup>15</sup> <http://www.legislation.gov.uk/ukpga/2010/15/section/4>

<sup>16</sup> <http://www.legislation.gov.uk/ukpga/2010/15/section/26>

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ACAS defines workplace bullying as “*offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the person being bullied*”<sup>17</sup>.

The Health and Safety Executive stresses that bullying is a pattern of behaviour rather than isolated instances, and states that it “involves negative behaviour being targeted at an individual, or individuals, repeatedly and persistently over time”.

Section 27 **Equality Act** [2010]<sup>18</sup> legislates on **victimisation**. This makes it unlawful to subject an employee to detriment because they have raised (or are threatening to raise) a complaint about discrimination.

From the judgment in **Jessemey v Rowstock Ltd & Anr** [2014] EWCA Civ 185 confirmed that ex-employees are protected from victimisation by their former employer<sup>19</sup>.

### Overview of approaches

It is of utmost importance that you take care of yourself through such difficult situations for your own sake and your patients' sake. Get the emotional support you need, be it via friends and family, close colleagues or confidential helplines.

Talk to your GP or specialist teams and see if more formal medical support can/needs to be offered. Talk also to key people in your Trust, including supervisors and occupational health.

#### Essential steps

- Step 1: Identify the unpleasant behaviour: discrimination, bullying, harassment, or victimisation.
- Step 2: Document the evidence, and assess the situation.
- Step 3: Decide upon an appropriate course of action.

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<sup>17</sup> <https://archive.acas.org.uk/media/304/Advice-leaflet--Bullying-and-harassment-at-work-a-guide-for-managers-and-employers/pdf/Bullying-and-harassment-in-the-workplace-a-guide-for-managers-and-employers.pdf>

<sup>18</sup> <http://www.legislation.gov.uk/ukpga/2010/15/section/27>

<sup>19</sup> <https://www.employmentcasesupdate.co.uk/site.aspx?i=ed21790>

## When things don't work out well

### ✔ **Step 1: Identify the unpleasant behaviour: discrimination, bullying, harassment, or victimisation.**

The unpleasant behaviour can really undermine your confidence and you may not even realise that this is happening or has happened until you talk it through with an independent adviser. Talk to a trusted friend, colleague or mentor to reflect on the situation

### ✔ **Step 2: Document the evidence, and assess the situation.**

If you feel there might have been discrimination, *e.g.* in a job recruitment process or interview, get copies of all paperwork that was used as part of the selection process including copies of score sheets and references.

Unfortunately, you may have to be prepared for unpleasant surprises, and make sure you have support to deal with it.

If you feel harassed or bullied by a colleague, keep a record or diary of any incidences including how these have made you feel and how it has affected you.

### ✔ **Step 3: Decide on an appropriate course of action.**

There are organisations which can advise and help you with this process.

Before a case will be heard at an employment tribunal, there is a requirement to first go through a reconciliation process via the Advisory, Conciliation and Arbitration Service (ACAS). ACAS provides excellent advice on this. You may not need legal representation to go through their process. It is worth asking if and how you can represent yourself in this, if you wish to do so or have no other option financially

Only when reconciliation fails can a case be taken to employment tribunal. The decision of taking something to employment tribunal again depends on individual circumstances, how much is at stake, the likelihood of success, reputational considerations and resources.

You may wish to obtain good quality legal advice and representation before deciding to take your case to tribunal.

If you feel that taking action would make matters worse for you, either in terms of your physical or mental health, your professional progression or financial security then this may not be the best decision for you personally.

## When things don't work out well

### **Discriminatory pre-employment behaviour**

If there has been a breach of pre-employment Health Questions Section 60, the Equality Act 2010, e.g. discriminatory advert, questions about your health asked before or during interview, you can report this to the Equality Human Rights Commission (EHRC) *via* the Equality Advisory Support Service (EASS).

The EHRC will follow this up initially in an advisory role and feedback to you. This is an elegant way of raising concerns and ensuring organisations pay attention to their duties and can be done independently of taking legal action. The service keeps a record of such reports and can take further action if an organisation breaches the act repeatedly.

### **Sources of help and support**

There are some key documents.

### **Key employment documents**

These might include:

 The actual employment contract itself.

Two important 'sources of law':

 The Equality Act and associated guidance.

 The Equality and Human Rights Commission (EHRC) Employment Code.

The Code covers discrimination in employment in relation to all the protected characteristics under the Equality Act, not just disability. Its official name is Employment: Statutory Code of Practice. Chapters 5 and 6 focus particularly on disability and give useful guidelines and illustrations of the law, including the kind of adjustments which employers should make to their workplace and when discrimination may be justified.

These documents do not set out the law in themselves, but employment tribunals ("tribunals") must take into account any relevant provisions when deciding cases. Both documents can be downloaded from the EHRC website at

[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## When things don't work out well

There are also some key organisations who can give support.

### Further support

 **Advisory, Conciliation and Arbitration Service (ACAS)** is an independent public body of the Government of the United Kingdom working to improve workplace relationships<sup>20</sup>. You can call the ACAS helpline for free and impartial advice and clear and confidential guidance about any kind of dispute or query that you have about relationship issues within the workplace.

 **British Medical Association (BMA)** is the trade union and professional body for doctors in the UK<sup>21</sup>. BMA counselling services are available to all doctors. BMA members can also get free employment advice and possibly legal representation. However, the threshold to take action here may be higher than that of private law firms.

 **Citizens Advice Bureau (CAB)** can give information about what to do before taking legal action, how to gather information about your case, taking legal action including time limits and what you will need to produce.

 **Disability Law service (DLS)** provides free advice via information, factsheets, training courses and telephone and written advice on employment and discrimination law

 **Disability Rights UK (DRUK)** are able to provide you with advice over the phone but their website also has a number of fact-sheets that may be of help.

 **Equality and Advisory Support Service (EASS)** is an advice service aimed at individuals who need expert information, advice and support on discrimination and human rights issues and the applicable law in England, Scotland and Wales<sup>22</sup>. It is possible to speak to an adviser and discuss your situation for advice.

 **Equality and Human Rights Commission (EHRC)** advise on disability discrimination and discrimination at work in England, Scotland Wales<sup>23</sup>. They also advise about collecting evidence. They provide a wealth of written resources. They have a useful section on identifying disability discrimination and one on dealing with discrimination in work and how to challenges it in a step by step advice section.

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<sup>20</sup> <https://www.acas.org.uk/about-us>

<sup>21</sup> <https://www.bma.org.uk>

<sup>22</sup> <https://www.equalityadvisoryservice.com>

<sup>23</sup> <https://www.equalityhumanrights.com/en>

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 **General Medical Council (GMC)**<sup>24</sup>, especially GMC 'confidential helpline' and GMC guidance, specifically "Welcomed and valued"<sup>25</sup>.

 **Other useful wellbeing resources:**

 **"Headspace meditation app"** – teaches how to breathe, sleep, meditate and live mindfully.

 **"Insight Timer" – from the Maudsley** – provides courses on anger and stress management, meditation and living with pain and chronic health conditions plus many more topics. *May require a subscription for full access.*

 **"Calm app"** – Meditation app teaches mindful practice, sleep meditation and provides calming soundscapes. You get a year free as an NHS doctor when registering with your NHS email address <https://www.calm.com/blog/take-a-deep-breath>.

**This factsheet is part of a series of nine factsheets on disability and practitioner health, produced jointly by NHS Practitioner Health and the Disabled Doctors Network. They have been co-authored by Dr Shibley Rahman and Dr Kelly Lockwood.**

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<sup>24</sup> <https://www.gmc-uk.org>

<sup>25</sup> <https://www.gmc-uk.org/education/standards-guidance-and-curricula/guidance/welcomed-and-valued>