Employment and Equal Opportunities Service

Chapter 3: Duty to make reasonable adjustments

This chapter will cover the following topics:

The Ordinance recognises that achieving equality for disabled people may mean changing the way that employment is structured in order to create a level playing field for all. This could be amending workplace policies, removing physical barriers or providing extra support for a disabled employee or job applicant.

The Ordinance introduces a duty on all employers to take steps to remove, reduce or prevent the obstacles that a disabled employee or job applicant may face in the workplace, where it is reasonable to do so. This is known as the duty to make reasonable adjustments and where an employer fails to do comply with this duty, this will be unlawful under the Ordinance.

A person (A) is under a duty to make reasonable adjustments:

- **where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage;**
- **where a physical feature puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, for A to take such steps as it is reasonable to have to take to avoid the disadvantage;**
- **where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

See section 32 of the Ordinance

For the purposes of the Ordinance the phrase “substantial disadvantage” simply requires there to be a disadvantage that is more than minor or trivial. This is not intended to be a high bar.

This chapter seeks to explain:

- What is an adjustment?
- What is considered reasonably?
- The duty to consult
- Who pays for adjustments?
- What are the consequences of a failure to make reasonable adjustments?

In addition, it should be remembered that when dealing with information relating to a disability this constitutes special category data, and particular care should be taken when using and storing this kind of information in order for employers to comply with their duties under the Data Protection (Bailiwick of Guernsey) Law, 2017. For further information please refer to the website of the Office of the Data Protection Authority at https://www.odpa.gg/

3.1 What is an adjustment?

Where it is identified that a disabled person is put at a substantial disadvantage when compared with someone who does not have that disability, then the Ordinance places a duty on an employer to make reasonable adjustments.

The employer may have to change the way things are done, make changes to a physical feature of a building, or provide aids such as special computer software to help that individual do their job. This is a two-stage process, in that the employer must:

- first, consider what adjustments could be made; and
- secondly, whether those adjustments are reasonable.

The purpose of an adjustment is that it must avoid the disadvantage. As such, the employer is not required to make an adjustment if it will have little or no impact on the disadvantage that they are seeking to resolve.

The need for an adjustment may arise where there is substantial disadvantage which is:

- caused by a provision, criterion or practice;
- caused by a physical feature; or
- able to be removed by an auxiliary aid.

Provision, criterion or practice

The term provision, criterion or practice is also used in indirect discrimination, and in broad terms means any form of policy or rule in the workplace that applies to everyone, such as a dress code, hours of work, or absence polices, but places a disabled person at a substantial disadvantage. It is irrelevant whether the employer intended the policy to discriminate against a person with a disability or not.

When considering reasonable adjustments in relation to a provision, criterion or practice, it is important to remember they are not always about the physical environment, they may also include providing information in an accessible format, for example providing manuals in bigger typeface or in braille, or may involving changing a process or procedure, or adjustments to hours of work, or how work is organised.

The issue is whether a disabled person has been placed at a substantial disadvantage by the policy, if they have, then the duty of reasonable adjustments arises. This may also amount to indirect discrimination. For further information on indirect discrimination please refer to Chapter 1: Discrimination and other prohibited conduct.

Example

A full-time employee has chronic fatigue syndrome (CFS). As a result, their productivity reduces in the afternoons, and they are making a large number of errors due to tiredness.

The full-time working hours are a provision, criterion or practice, and this places the employee with CFS at a disadvantage. Adjustments the employer may wish to consider include:

- Alteration to working hours
- Flexible working, such as working from home, part-time working, or job sharing
- Changing tasks or the pace of work to avoid exacerbating the condition
- Allowing for reasonable time off for appointments and treatment
- Changing layout of workspace, such as providing a quiet working station
- More frequent and longer breaks

Adjustment to physical features

The duty to make reasonable adjustments in relation to physical features will not come into force until 1 October 2028 at the earliest, nor will it be possible to bring a claim of indirect discrimination due to a physical feature until this date.

The purpose of this section of the guidance therefore is to allow employers to understand what adjustments they will need to make once this aspect of the Ordinance comes into force.

A physical feature means:

- **a feature arising from the design or construction of a building;**
- **a feature of an approach to, exit from or access to a building; or**
- **a fixture or fitting in or on premises.**

See section 32(8) of the Ordinance

It should be noted that the terms “fixture or fittings” are not defined under the Ordinance, but they would have their normal meanings so a fixture would include items such as light fittings or doors, whereas fittings would cover items such as office furniture.

Where it is identified that a physical feature causes a substantial disadvantage then an employer should consider what adjustments it can make to avoid that disadvantage. In the context of a physical feature this may mean:

- removing the physical feature in question,
- altering it, or
- providing a reasonable means of avoiding it.

Example

An employee had a stroke a number of years ago and as a result, has a number of different impairments, including being partially sighted and reduced mobility. In order to gain access to the building, the employee has to walk up a flight of stairs and through a corridor which is dimly lit, both of which place the employee at a disadvantage to their colleagues, and they struggle to gain access to the building.

Both the stairs and lighting within the building are physical features, and so the employer should consider whether it is possible to remove, alter or provide means to avoid it. For example, is there another way the employee can gain access to the building, such as a rear entrance to avoid both the stairs and corridor. Alternatively, the employer could install a handrail on the stairs and improve the lighting in the corridor*.

* The duty to make reasonable adjustments to physical features does not come into force until 1 October 2028 at the earliest

Auxiliary aids

The Ordinance also places a positive obligation on employers to provide auxiliary aids, which will avoid a disabled person being put at a substantial disadvantage.

For these purposes an auxiliary aid means equipment or a service that:

- **is used by a disabled person, and**
- **provides assistance which compensates for or removes any disadvantage or inequality connected with their disability.**

but does not include any item of personal equipment which the person would reasonably be expected to own.

Auxiliary aids could include the provision of a specialist piece of equipment such as an adapted keyboard, specific chair or text to speech software. An auxiliary services could include the provision of a sign language interpreter or a support worker for a disabled employee. Whether these adjustments are reasonable is a separate question and needs to be assessed. See next part of Chapter 3.

Example

An employer might have to provide special equipment such as an adapted keyboard for an employee who has carpal tunnel syndrome, a large screen for a visually impaired employee, or an adapted telephone for someone with a hearing impairment.

Though the obligation to make adjustments to physical features does not come into force until 1 October 2028 at the earliest the duties in relation to any provision, criterion or practice, or auxiliary aids are in force from 1 October 2023. The three types of reasonable adjustments are not intended to be mutually exclusive, so if an adjustment relates both to a physical feature and the provision of an auxiliary aid, then the employer would be under a duty from the initial commencement of the legislation on 1 October 2023 to supply the auxiliary aid.

Example

An employee has seasonal affective disorder (SAD) and is recruited to join a team who currently work at a fixed desk in a dark corner of the office with no natural daylight. Their desk itself is a fixture and so constitutes a physical feature. Accordingly, moving their actual desk (i.e. the physical feature) would strictly not be a requirement until 1 October 2028. However, the employer still needs to consider whether the duty to make reasonable adjustments arises from 1 October 2023 in respect of either a provision, criterion or practice or the provision of an auxiliary aid.

Accordingly, the requirement for the employee to sit with their team would likely be considered a provision, criterion or practice, so allowing the employee to sit a different desk with natural daylight may be considered a reasonable adjustment, if the location of the desk puts the employee at a substantial disadvantage.

Alternatively, the provision of a light box, which replicates natural daylight could be considered an auxiliary aid, and so could also be considered a reasonable adjustment.

The duty to make reasonable adjustments can often overlap to some extent with the concept of indirect discrimination, although it is important it is still considered separately.

Example

A company has a policy that no headphones are allowed in the office but a person with impaired sight, who uses text to speech software, or someone on the autistic spectrum may need headphones to enable them to do their job properly.

The policy of no headphones in the office could be considered to be indirect discrimination because of the provision, criterion or practice or the denial of a reasonable adjustment (auxiliary aid) if requested.

Adjustments to rented property

In practice many employers do not own the premises in which they operate, rather they rent the building or office as tenants from a commercial landlord. In most instances, the employer will have restrictions under the terms of their lease in relation to making adjustments to the property they occupy. The Ordinance creates specific duties for landlords. Landlords are required to make and pay for minor improvements in response to reasonable adjustment requests to replace or provide signage, to replace taps or door handles, to replace, provide or adapt door entry systems, to change the colour of a wall, door or surface. With respect to other changes to physical features, commercial landlords are required to allow reasonable adjustments for the benefit of employees of an employer who occupies a building as tenant.

In granting permission for reasonable adjustments to a physical feature (other than the minor improvements already listed), a landlord may require a tenant to:

- to pay any or all of the costs of any works undertaken under this section;
- to engage an appropriately qualified tradesperson to undertake the work; and
- to restore the property to its original condition at the end of the tenancy.

Where a landlord unreasonably refuses permission to carry out works, then the landlord is considered to have failed to comply with its duty to make reasonable

adjustments, and so would be deemed to have discriminated against the disabled person.

The employer is the tenant and would therefore be expected to carry out and pay for the alteration unless it was a disproportionate burden for them to do so.

Example

An employer asks its landlord for permission to widen a doorway to enable an employee in a wheelchair to have access and to put in a disabled toilet. In these circumstances the landlord is not allowed to unreasonably refuse this request but can require the employer (who is also the tenant) to restore the property to its original condition at the end of the tenancy.

The employer would be required to consider this adjustment. The landlord could not refuse permission but would not need to do it or pay for it. It is the employer's responsibility to pay for the change and restore at the end of the tenancy (which the landlord could request) but the employer would not have to do this if to do so would be a disproportionate burden.

An example of where the adjustment may be identified as a disproportionate burden could be where the installation would:

- affect planning or building control;
- affect fire safety;
- stop the building from operating; or
- be disproportionately financially onerous i.e. if the tenancy was a short one or where the building related to a very small business and the costs are disproportionate.

However, what is a disproportionate burden will vary depending on the circumstances of the case.

See the next section of this chapter, What is considered reasonable?, which explains about disproportionate burden.

3.2 What is considered reasonable?

If a substantial disadvantage does exist, and the employer is aware or should be aware the person is disabled, then they must make “reasonable” adjustments.

A person (A) does not discriminate against a disabled person if:

- **A fails to make an adjustment to avoid a disadvantage to a disabled person if to do so would be a disproportionate burden on A; or**
- **A does not know and could not reasonably be expected to know that the person was a disabled person.**

See section 32(6) of the Ordinance

At a practical level there are various factors that determine whether a particular adjustment is considered reasonable. This is ultimately an objective test and not simply a matter of what the employer or the disabled person may personally think is reasonable. These factors can include:

- how effective the adjustment will be to reduce or remove the disadvantage that the disabled employee will otherwise experience. There is a requirement to consult the disabled person to see what would be most effective. If the most effective solution is a disproportionate burden there may still be an alternative adjustment that could be made to partially remove the disadvantage;
- its practicality and/or effect on the business;
- the cost;
- the length of a tenancy in the case of changes to physical features of a building;
- the organisation’s resources and size;
- the availability of financial support;
- other considerations such as planning, building control or fire safety, where applicable.

When considering how reasonable an adjustment may be, some people may think that disabled people are treated better or 'more favourably' than non-disabled people in certain respects. Sometimes, this may be what is needed to remove the

disadvantage and create equality of opportunity for the disabled person. Making an adjustment in this way is not discrimination against a person who does not have a disability.

The cost of many adjustments will either be nothing, or a minimal amount and so where this is the case, as long as the adjustment is workable and effective, then it would be considered reasonable.

The size and resources of the employer are also another factor. For a small business with limited resources, if the required adjustment costs a significant amount, then it is less likely to be reasonable to make the requested changes. However, costs should never be looked at in isolation, an employer should always consider the other factors too, including the availability of financial and other support.

Example

A newly disabled employee (who now uses a wheelchair) had historically worked at workstation in what would now be in an inaccessible office on the third floor, in an old office building without a lift. If the employer had office space on the ground floor either at that building or another office building with an accessible workstation, then it would likely be considered reasonable to move the employee's workstation or place of work to an accessible location.

If the employer did not have any suitable and accessible office space, and was only located on the third floor of the building, then it would be unlikely that the installation of a lift would be considered reasonable, although the employer should still consider other alternatives such as whether the employee could work from home.

Example

An employer has a written policy which covers all types of leave. The employer provides a reasonable adjustment for a disabled employee who has a visual impairment, by providing an audio file of this policy. As this adjustment would cost the employer nothing, it would be considered reasonable.

Example

An employee who has a learning disability has a contract to work from 9am to 5.30pm but wishes to change these hours to start at 9:15am. This is because the friend who accompanies them to work is no longer available before 9am. They propose to make up the time over their lunch break. Allowing the employee to start slightly later is likely to be a reasonable adjustment for that employer to make.

When can an employer be assumed to know about a disability?

Generally, where one member of staff (e.g. such as a HR officer) or an agent (e.g. such as a recruitment agent) knows of an employee's or applicant's disability or potential disability, then the employer will not be able to claim that they do not know of the disability. They will therefore be under a duty to make reasonable adjustments. Employers should ensure that where information about a disabled person may come through different channels, there is a route for the sharing of that information in order to comply with their duties. This should be done with the consent of the disabled person and respecting confidentiality.

Example

A recruitment agent is engaged by an employer to identify suitable candidates for a number of new roles. The recruiter becomes aware of a candidate's disability which might be relevant to their ability to undertake an aptitude test. The candidate consents to this information being disclosed to the employer. However, the recruiter does not draw this to the employer's attention.

As the recruiter is acting as the employer's agent, it is unlikely to be a defence for the employer to claim that they did not know about the disability. This is because the information gained by the recruiter on the employer's behalf is likely to be attributed to them.

3.3 The duty to consult

There is no requirement on a disabled person to either make a request for reasonable adjustments, or when asked to suggest what those adjustment should be. The Ordinance does, however, introduce a specific duty on employers to consult.

Before a person (A) makes a reasonable adjustment, it must consult the disabled person to ask their view as to what steps would avoid the disadvantage and may also consult such other persons as A considers appropriate.

Section 32(3) of the Ordinance

The duty to consult a disabled person over reasonable adjustments is different to the position in the UK and Jersey, where it is only considered good practice. There is no particular specific form or duration of consultation required under the Ordinance, but it is recommended that this should take place in a meeting, with minutes kept and any agreed outcomes recorded.

Whilst many adjustments will be straightforward and can be agreed directly with the individual, from time to time it might be useful to consult with third parties,

including medical professionals, as well as charities and other third sector organisations. There is no requirement to do so, but this might be helpful and most advice is either free, or available at minimal cost. Wherever advice is sought, it is recommended this should also form part of the consultation process with the disabled person.

In addition, it should be remembered that when dealing with information relating to a disability that this constitutes special category data, and particular care should be taken when using and storing this kind of information in order for employers to comply with their duties under the Data Protection (Bailiwick of Guernsey) Law, 2017. For further information please refer to the website of the Office of the Data Protection Authority at https://www.odpa.gg/ .

3.4 Who pays for adjustments?

Whilst many adjustments have either no or minimal cost, the Ordinance makes it clear that it is the employer’s responsibility to pay for any adjustments, and these costs cannot be passed on to the disabled person.

A person (A) may not require a disabled person to pay any or all of A's costs of complying with a duty to make reasonable adjustments.

See section 32(7) of the Ordinance

When assessing if an adjustment is reasonable, all factors should be taken into consideration. It might be that the adjustment has a significant cost but when considering the alternative costs, such as the costs involved in recruiting and training a new member of staff to replace the disabled person, the adjustment might be seen as being a more cost-effective option. Note however that it is not just the cost that determines whether the adjustment is reasonable, but considerations such as practicality and resources of business as well.

There may be financial support available to some employers towards the cost of making an adjustment. As such, it may be unreasonable to decide not to make an adjustment based on its cost before finding out whether financial assistance for the adjustment is available. See access to work scheme.

3.5 What are the consequences of a failure to make reasonable adjustments?

A failure on the part of an employer to take steps to avoid a disadvantage to a disabled person is a failure to comply with a duty to make reasonable adjustments. The employer is deemed to have committed an act of discrimination. This is why it is important to consult with the disabled person in respect of any reasonable adjustments and where appropriate to seek advice.

It is important to note that the complaints process starts with trying to resolve the issues between the employer and the employee. This is called pre-complaint conciliation.

It may be that the conversation about reasonable adjustments did not take place. It may be that the disadvantage the disabled person was experiencing was not recognised or it may be that the reasonable adjustment to avoid the disadvantage was not identified or not provided when it could have been. In such cases both parties are encouraged to find a resolution to the situation.

For more on the complaints process please see Chapter 10.