

Disability discrimination law post 1 October 2004

1 BACKGROUND

On 1 October 2004, significant changes to disability discrimination legislation come into force which will affect both employers and trustees of occupational pension schemes. The impetus behind the changes is the EU Framework Directive on Equal Treatment. This Directive was also responsible for the December 2003 changes relating to non-discrimination on grounds of sexual orientation and religion or belief, and under which we will see the advent of age discrimination legislation (probably in 2006).

We explore below some of the important issues which employers and trustees of occupational pension schemes need to consider.

2 THE DISABILITY DISCRIMINATION ACT 1995 ("DDA")

The DDA makes it unlawful for an employer to discriminate against a disabled person in the workplace (which includes terms relating to occupational pensions). "Disability" is broadly defined as "a physical or mental impairment which has a substantial and long-term adverse effect on [the individual's] ability to carry out normal day-to-day activities".

Until now, direct discrimination under occupational pension schemes could be justified in certain circumstances. For example, reduced benefits could be provided to a disabled person if the cost of providing full benefits would be substantially greater because of that person's disability. But the ability to justify direct discrimination will be swept away when the Disability Discrimination Act 1995 (Amendment) Regulations 2003 and the Disability Discrimination Act 1995 (Pensions) Regulations 2003 ("the Regulations") take effect on 1 October 2004.

3 THE MAIN CHANGES

The Regulations, which generally only apply to pensionable service on or after 1 October, make crucial amendments to the way the DDA operates.

- An overriding rule is inserted into all occupational pension schemes which prohibits scheme trustees from discriminating on the

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grounds of disability. Trustees are given unilateral power to amend scheme documentation (if necessary, retrospectively) so that it complies with this rule from 1 October.

- The ability to justify direct discrimination is removed. On the face of it, this means that employers will have to swallow any additional cost of providing benefits (such as insured death benefits and incapacity benefits) however high.
- It will still be possible to justify indirect discrimination, but only if the reason for it is "both material ...and substantial". "Indirect" discrimination may occur where an apparently neutral provision in a pension scheme has a disproportionate effect on disabled people. It is not yet clear how the new law will work here. The requirement to pass a medical to join a scheme is an apparently neutral criterion. But if a person fails a medical because of a disability, Employment Tribunals could well interpret this as direct discrimination.
- Quite separately, trustees, as well as employers, will have a duty to make "reasonable adjustments" to any "provision, criterion or practice" if this places a disabled person at a substantial disadvantage in comparison with a person who is not disabled (see paragraph 4 below).
- Currently, businesses with fewer than 15 employees are exempt from the obligation not to discriminate and the duty to make reasonable adjustments. However, from 1 October 2004, this exemption is removed.

4 WHAT ARE "REASONABLE ADJUSTMENTS"?

This key duty applies to all service, not just service from 1 October 2004. For pension scheme trustees, the duty to make reasonable adjustments will extend to scheme rules, literature and any premises occupied by them (for example, to allow access).

In a nutshell, trustees will need to consider whether scheme provisions could be discriminatory and, if so, how they can be changed. A reasonable

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adjustment to scheme literature would be to make it available in formats accessible to members and prospective members with a disability, such as in large print or on audio cassette.

Factors which may influence whether an adjustment is "reasonable" will include costs, practicality, the size of the organisation, and the resources available to it. But it will be a matter of fact and degree in every case, with the possible need for actuarial and/or medical evidence to support a cost-based argument.

Trustees looking to justify indirect discrimination will also generally need to show that they have made reasonable adjustments. (*Interestingly, the Disability Rights Commission has issued a draft code of practice on Employment and Occupation and the DDA which suggests that, when an adjustment is a reasonable one, it must be made.*) Tribunals may well consider it reasonable to increase the ultimate cost on employers if this is what is required to stop a scheme discriminating.

5 SOME PRACTICAL STEPS TOWARDS COMPLIANCE

There is, inevitably, much debate about the implications of the new legislation. But refusing membership of an occupational pension scheme on grounds of disability is likely to be unlawful from 1 October 2004. Schemes will no longer be able to fall back purely on cost as a justification. However, there are various practical steps which may help reduce uncertainty going forward:

- Trustees should consider whether scheme rules need to be amended. Also, communications with members or prospective members (even those issued before 1 October 2004) may need revisiting as they will be caught by the new Regulations.
- Criteria applied for admitting members to a scheme (including late entrants), awarding ill-health pensions and providing death benefits are all worth a look to ensure non-discrimination.

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- Find out who has previously been declined admission to a scheme on grounds of disability, or turned down for ill-health benefits or life cover, as this may amount to direct discrimination for service from 1 October.
- If a higher premium is payable in respect of an individual because of disability, the cost of this may not be passed onto the member, as this in itself will be an act of discrimination. (Restrictions preventing insurers providing group life cover from discriminating on grounds of disability are in the pipeline which should help to keep additional costs in check.)

6 CONSEQUENCES OF A SUCCESSFUL CLAIM

A disabled employee can bring a complaint before an Employment Tribunal.

Where a complaint is upheld, the Tribunal may make a declaration that the complainant has a right to be admitted to membership from a specified date, or is entitled to membership without discrimination, in respect of a specified period. The Tribunal may also award compensation for injury to feelings, and for failing to comply with an earlier order of the Tribunal.