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www.DisabilityatWork.co.uk (from November 10th)
Disability Talking
Film Messages

- Difficulties recruiting disabled contributors
- Disabled people are like everyone else in terms of aspirations and interests. One of their aspirations is to work
- Key to employment of disabled people lies with the employer at least as much as with the disabled job seeker or employee
- Disability discrimination is covered by the Equality Act (2010). Disability is different because equality of opportunity means difference in treatment
- Disability is complex and employers are fearful. External support can make a big difference
- Need to avoid escalation from grievance/disciplinary to an Employment Tribunal
- The stories illustrate but are not representative of disabled people’s experience or work (all the contributors are working)
Disability Employment Gap (DEG)
Definitions of disability

• Equality Act

• LFS 1998-2012

• Work Capability Assessment Criteria (WCA)
To be disabled according to the law a person has to have ‘a physical or mental impairment’ which has ‘a substantial and long-term adverse effect’ on a person’s ‘ability to carry out normal day-to-day activities’. However this has to be read along with ‘the rest of section 6; with the provisions of Schedule 1; with statutory Guidance issued by the Minister; with Regulations made by the Minister; and with a substantial and increasing body of case-law interpreting all of these’ (House of Lords, 2016).

“anything which is not ‘trivial’ or ‘insubstantial’” (Langstaff J in Aderemi v London and South Eastern Railway Ltd [2013] ICR 591)

- Do you have any health problems or disabilities that you expect will last for more than a year? Yes/No

If Yes:
- Do these health problems or disabilities, when taken singly or together, substantially limit your ability to carry out normal day to day activities? Yes/No
Activity limitation in LFS (DDA)

*manual dexterity* - loss of functioning in one or both hands, inability to use a knife or fork at the same time, or difficulty in pressing buttons on a key board.

*mobility* - unable to travel short journeys as a passenger in a car, unable to walk other than at a slow pace or with jerky movements, difficulty in negotiating stairs, unable to use one or more forms of public transport, unable to go out of doors unaccompanied.
Work Capability Assessment

*Stage One* Limited capability for work assessment (15 points threshold to proceed to stage 2)

*Stage Two* Limited capability for work-related activity assessment

Points awarded based on activity limitation with threshold of 15 points for ESA eligibility
15 points under WCA

**Manual dexterity**
- Cannot press a button, turn the pages of a book or pick up a £1 coin with either hand (15 points)
- Cannot use a pen or pencil to make meaningful mark (9 points)
- Cannot single headedly use a keyboard or a mouse (9 points)

**Mobility**
- Cannot unaided by another person either walk 50 metres on level ground without stopping in order to avoid discomfort or exhaustion or repeatedly mobilise 50 metres within a reasonable timescale.
- (100 metres = 9 points, 200 metres = 6 points)
Government pledge

“the jobless rate for this group remains too high and as part of our objective to achieve full employment we will aim to halve the disability employment gap. We will transform policy, practice and public attitudes so that hundreds of thousands more disabled people who can and want to be in work find employment”
Disability Inquiries in 2016


3. *Workplace health: support for employees with disabilities and long-term conditions*, NICE Inquiry April 2017

Disability at work statistics (individuals)

<table>
<thead>
<tr>
<th></th>
<th>Non-disabled</th>
<th>Disabled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-employment rate</td>
<td>22%</td>
<td>52%</td>
</tr>
<tr>
<td>Average hourly earnings</td>
<td>£13.50</td>
<td>£12.50</td>
</tr>
<tr>
<td>Part time (men)</td>
<td>10%</td>
<td>20%</td>
</tr>
<tr>
<td>Self-employed</td>
<td>13%</td>
<td>16%</td>
</tr>
<tr>
<td>Job satisfaction (1-5)</td>
<td>3.58</td>
<td>3.31</td>
</tr>
<tr>
<td>Fair treatment at work</td>
<td>3.47</td>
<td>3.15</td>
</tr>
<tr>
<td>Anxiety/contentment</td>
<td>2.37</td>
<td>2.0</td>
</tr>
</tbody>
</table>
## Disability at work statistics (workplaces)

<table>
<thead>
<tr>
<th>Description</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Written EO policy</td>
<td>77.0</td>
</tr>
<tr>
<td>Written EO policy supported by EO practice on disability</td>
<td>23.4</td>
</tr>
<tr>
<td>Monitor recruitment and selection</td>
<td>19.3</td>
</tr>
<tr>
<td>Review recruitment and selection</td>
<td>16.4</td>
</tr>
<tr>
<td>Monitor promotions</td>
<td>7.7</td>
</tr>
<tr>
<td>Review promotions</td>
<td>9.4</td>
</tr>
<tr>
<td>Review pay</td>
<td>3.2</td>
</tr>
<tr>
<td>None of the above disability equality practices</td>
<td>76.6</td>
</tr>
<tr>
<td>Assessment for accessibility</td>
<td>47.2</td>
</tr>
<tr>
<td>Targeted recruitment</td>
<td>7.6</td>
</tr>
<tr>
<td>No disabled employees</td>
<td>62.6</td>
</tr>
<tr>
<td>Over 10 employees and no disabled workers</td>
<td>54.4</td>
</tr>
</tbody>
</table>
Organisational practices

- Recruitment (Natasha)
- Retention (Scott)
- High performance work practices
- Job design flexibility (James, Scott and Meseret)
What Government can do

• Replace voluntary standards with legislation and statutory codes

• Include measures of disability inclusion in financial reporting requirements

• Public sector procurement (Living Wage Foundation)
Application of the DEG to the claim for future loss of earnings

The loss of future earnings calculation

*Pre-injury (non-disabled)*
annual wage $\times$ years of life $\times$ proportion in employment = lump sum 1

*Post-injury (disabled)*
annual wage $\times$ years of life $\times$ proportion in employment = lump sum 2

FLE = lump sum 1 - lump sum 2
Billett v MOD
Case details

- Mr Billett was 29 at trial
- Suffers mild NFCI in February 2009
- Joint Medical Employment Standing PULHHEEMS P2 (Medically Fit for Deployment)
- Completed a tour of Afghanistan 2009-10
- Leaves army in 2011 to become HGV driver (unrelated to injury)
- Requires painkillers, foot powder and specialist footwear
- Claim for FLE because he has restricted ability to work outdoors in cold weather
High Court decision

- Disabled under Ogden (equated with Eq Act definition)
- Application of Reduction Factors
- Upward adjustment applied because disability is unusually mild
- Wass adjustment mechanism is inadequate
- Mid-point adjustment 0.73 between non-disabled (0.92) and disabled (0.54) (para 61)
- Compensation for future loss of earnings is around £99k

‘a real divergence of view between Dr Wass and the judiciary about the way the tables should be used’ (para 47)
Court of Appeal decision

- Disabled under Ogden (on basis of Langstaff definition in *Aderemi*) (para. 92)
- But insufficiently disabled to apply the Reduction Factors (para. 94)
- Awards a *Smith v Manchester* £45k (two years of post-injury wage) (para. 100)

‘both she and I by different routes conclude that a direct application of the Ogden tables is not appropriate for assessing loss of future earning capacity in the present case’ (para. 104)

- Deficiencies in the *Smith v Manchester* approach
Any questions...