



Is it the “disability” or the impairment itself that is the best predictor of employment prospects?

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On the International Day of Persons with Disabilities, it seems appropriate to reflect on whether it is the disability—or the impairment itself—that better predicts an individual's employment prospects.

A useful starting point is the Ogden definition of disability. Under this definition, a person is treated as disabled only if all three of the following conditions relating to ill health or disability are met:

1. **Duration:** The person has an illness or disability that has lasted, or is expected to last, more than a year, or is progressive in nature.
2. **Impact:** The definition in the Disability Discrimination Act 1995 (DDA) is satisfied, meaning the condition has a *substantial adverse effect* on the person's ability to carry out normal day-to-day activities.
3. **Work Limitation:** The effects of the impairment restrict the type or amount of paid work the person can undertake.

"Substantial" simply means "neither minor nor trivial". "Normal day-to-day activities" are those commonly performed by most people both in daily life and at work.

Guidance Notes produced by the Labour Force Survey (LFS) were intended to help interviewers and respondents determine disability status. They included examples relating to:

- **Hearing**, such as being unable to hear without a hearing aid or difficulty understanding speech in normal conditions or by telephone.
- **Memory, concentration, learning or understanding**, such as intermittent loss of consciousness, confused behaviour, difficulty remembering close family names, needing assistance to write a cheque, or being unable to follow a recipe.
- **Perception of physical danger**, such as reckless behaviour putting oneself or others at risk.

Under section 1 of the Disability Discrimination Act 1995, a person is disabled if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Section 3 sets out matters to be considered in determining this. An impairment is long-term if it has lasted at least 12 months, is likely to last at least 12 months, or is likely to last for the rest of the person's life.

The Court must therefore determine whether a claimant meets the *stricter* Ogden/DDA definition, rather than the broader definition now found in the Equality Act 2010. The DDA Guidance Notes were never intended to be exhaustive and were removed in the Equality Act because they were considered overly restrictive.

Case Law: Billet v MOD [2015] EWCA Civ 773

In *Billet v MOD*, the Court of Appeal considered the correct approach to assessing future loss in cases involving *minor* disability. The Claimant suffered a non-freezing cold injury to his feet, causing pain in cold conditions. Despite this, he remained medically deployable, and his disability was considered minor. His earnings as a lorry driver were equivalent to what they would have been absent the injury.

The Claimant invited the court to use the Ogden reduction factors (Tables A–D), while the Defendant argued for a *Smith v Manchester* award. At first instance, the judge accepted that the Equality Act definition of disability was met but viewed the disability as minor; the court adopted a mid-point between the disabled and non-disabled reduction factors.

On appeal, Jackson LJ rejected the argument that damages had been over-assessed and that the incorrect approach had been adopted on the assessment for the future loss. Citing Langstaff J in *Aderemi v London & South Eastern Railway Ltd* [2013] ICR 591, he confirmed that “substantial adverse effect” encompasses any effect that is not trivial, and that emphasis should be placed on what the claimant *can* do rather than what they *cannot* do.

Nevertheless, the Court of Appeal held that the proper basis for assessing future loss in this case was a *Smith v Manchester* award. Three factors were formative in taking the case outside the Scope of Tables A-D:

1. *“Disability covers a broad spectrum. The Claimant is at the outer fringe of that spectrum;*
2. *The Claimant’s disability affects his ability to pursue his chosen career much less than it affects his activities outside work;*
3. *Because of (i) and (ii) in this case there is no rational basis for determining how the reduction factors should be adjusted.”*

Reduction Factors and Departure from Averages

Reduction factors are based on statistically verifiable group averages. Observations typically cluster closely around the average, meaning most departures should be modest. Professor Wass, a co-author of the reduction factors, argues strongly that simply adopting an arbitrary mid-point between

the pre- and post-accident factors is statistically unsound. In my opinion each case is fact-specific, and mid-point adjustments should not become general practice.

Residual disability and residual earnings potential can vary greatly depending on the individual Claimant and their chosen or expected career path.

Ultimately, disability—rather than the impairment—is the more reliable predictor of employment prospects. Parties must therefore examine both the Claimant's impairment and the specific impact it has on their actual or intended work.

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