

A teal-tinted photograph of a classical column standing between two multi-story buildings. The column is the central focus, with its ornate capital and fluted shaft clearly visible. The buildings on either side have many windows, creating a strong sense of perspective. The overall color scheme is a monochromatic teal.

White Paper Conference

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When can you be fixed with constructive knowledge of an undeclared and hidden disability? What are you supposed to know?

When might an employer not know that a job applicant or employee is disabled?

Job applicant doesn't disclose hidden disability in response to pre-employment health questionnaire

Employee develops a hidden disability during employment and doesn't update employer

Employee hasn't realised they have a hidden disability or doesn't identify as a disabled person

What is a disability?

Does the person have a physical or mental impairment?

Does this have an adverse effect on their ability to carry out normal day to day activities?

Is the adverse effect substantial?

Is the adverse effect long-term (i.e. has lasted more than 12 months, or is likely to last more than 12 months) or would that be the case were it not for medical treatment or coping mechanisms?

Examples of “hidden” disabilities

Mental health conditions	Post-traumatic stress disorder	Autism Spectrum disorders	Obsessive compulsive disorder	Attention deficit hyperactivity disorder
Dyslexia	Chronic fatigue syndrome / ME	HIV	Crohn's disease	Asthma
Diabetes	Epilepsy	Lupus	Cystic fibrosis	Rheumatoid arthritis

What protection is afforded to disabled people?

Direct
discrimination

Indirect
discrimination

Harassment
relating to
disability

Victimisation

Discrimination
arising from
disability

Reasonable
adjustments

Three types of knowledge

Actual

- The employer knows that the person is disabled

Imputed

- The employer's employee or agent knows that the person is disabled
- This knowledge will usually be attributed to the employer

Constructive

- The employer has neither actual or imputed knowledge of the disability, but ought to have known about it



Three key elements of constructive knowledge

1. The employer would have to have known had they made appropriate enquiries
2. The employer must have knowledge of facts relevant to the definition of disability
3. The knowledge must have been present at the time of the alleged discriminatory act or omission

How does knowledge affect liability for disability discrimination?

Claim	What type of knowledge of the disability is required?
Direct discrimination	Actual or imputed knowledge
Indirect discrimination	None
Harassment	None
Victimisation	None
Discrimination arising from disability	Actual, imputed or constructive knowledge
Failure to make reasonable adjustments	Actual, imputed or constructive knowledge

What must employers know in order for constructive knowledge to be fixed?

Discrimination arising from disability

1. Knowledge of facts relating to the disability at the relevant time
2. Not necessary for the employer to know that the “something” that provoked the unfavourable treatment arose from the disability

Failure to make reasonable adjustments

1. Knowledge of facts relating to the disability at the time relevant time
2. Knowledge that the individual was likely to be placed at a substantial disadvantage by the PCP, physical feature or lack of auxiliary aid

How have the Courts and Tribunals approached the issue of constructive knowledge?

- **Cases where knowledge was fixed**

- Presence of “warning signs”
- Reliance upon inadequate occupational health advice

- **Cases where knowledge was not fixed**

- Failure by employee to inform employer of possible disadvantage
- Failure by employee to co-operate with the employer
- Concealment of disability by employee
- Inadequate occupational health advice not relied upon



What can employers do to protect their position?

1. Investigate the position and keep under review
2. Seek specialist advice at the appropriate time
3. Give clear instructions when seeking specialist advice
4. Follow up where necessary
5. Be pragmatic and don't be afraid to make adjustments

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