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Explanations

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Direct discrimination

Direct discrimination is when someone treats you less favourably, or proposes to treat you less favourably, than they would treat someone else who does not have a disability, in similar circumstances. For example, charging a person more to use facilities because they use a wheelchair.

The people you are comparing yourself with are called the 'comparators'. When complaining about direct disability discrimination, you need to be clear who your comparators are – that is, whom you are saying receives better treatment than you.

Indirect discrimination

Indirect discrimination is when you are expected to meet some sort of criteria that you cannot meet because of your disability, and people without your disability would probably be able to meet.

For indirect discrimination to be unlawful, the expectation or criteria that is placed on you has to be something that is unreasonable in the circumstances. For example, making the only entrance to premises by stairs, which means the premises are inaccessible to people with mobility disability.

Aiding and Abetting

Under the DDA and ADA, it is unlawful for another person to cause, instruct, induce, aid, or permit another person to commit an act that is unlawful.

Discriminatory Questions

Under the DDA, it is generally unlawful for someone to ask you to give information that may be used to discriminate against you on the basis of your disability. An example of a discriminatory question is 'Does any member of your family have any one of the following medical conditions? It is not unlawful to expect you to provide this information if people who do not have disabilities are also expected to provide it in similar circumstances. It is also not unlawful to ask you for information about your disability before or after you have been offered a job if your disability is linked to the tasks of the position. In addition, it is not unlawful for someone to

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ask you about 'adjustments' that you need to ensure that you are not treated less favourably because of your disability.

Harassment

Harassment on the grounds of disability is unlawful under the DDA, but only if it happens in employment, in education or in the provision of goods and services. There is sometimes an overlap between discrimination and harassment.

Vicarious liability

Under the DDA and ADA, where an employee or agent has engaged in unlawful discrimination, that person's employer or principal may also be liable for unlawful conduct if they failed to take all reasonable steps to prevent the unlawful discrimination from occurring.

Victimisation

Victimisation occurs when one person subjects, or threatens to subject, someone else to some form of detriment or harm. Under the DDA and ADA, it is unlawful to victimise a person because they have taken action under anti-discrimination law.

Vilification

Vilification is any public act that incites hatred towards, serious contempt for, or severe ridicule of someone on the grounds that they are HIV/AIDS infected, or thought to be HIV/AIDS infected. Under the ADA, it is unlawful to vilify a person because of their HIV/AIDS status.

Charities

The DDA and ADA do not apply to certain charities, which confer benefits for a particular group.

Compliance with other laws

Under the ADA, where an employer, service provider, landlord etc. must comply with another law and the obligations imposed by the other law make it impossible to avoid discrimination, then the discrimination will not be unlawful.

Court orders

It is lawful to discriminate if it is necessary to comply with a decision of:

- ★ The commission
- ★ A court order
- ★ An award made by an industrial court of tribunal
- ★ A statutory authority

Inherent requirements of the job

When complaining about disability discrimination in relation to employment, you

need to show that your disability does not stop you from completing the essential features of the job.

This does not mean you have to be able to meet all the requirements of the job, only those that are essential to the position. This is known as meeting the 'inherent requirements' of the job. For example, it is probably an inherent requirement of a painter's job to be able to climb ladders and carry paint tins.

In order to meet the requirements of the job, you might need some adjustments to be made. Provided the adjustments will not impose an 'unjustifiable hardship' on the employer, the employer is not allowed to discriminate against you simply because you need adjustments.

Insurance and superannuation

It is lawful to discriminate in the provision of insurance if it is based on actuarial or statistical data that is reasonable to rely on.

Migration

Discriminatory provisions of the Migration Act 1956 are exempt from the DDA.

Peacekeeping and combat duties

Employment in the Defence Force in combat or peacekeeping roles is exempt from the DDA.

Pensions

Discriminatory provisions of various Federal laws concerning social security, pensions and allowances are exempt from the DDA.

Public health (DDA)

It is lawful to discriminate against a person with an infectious disease if the discrimination is 'reasonably necessary' in order to protect public health.

Public health (ADA)

It is lawful to discriminate against someone if it is necessary to do so for public health and safety.

Special exemptions

The Commission or the Minister has power to grant an exemption under the Act.

Unjustifiable hardship

If the employer's ability to make adjustments or a service provider's ability to provide services will result in an unjustifiable hardship, then it may be lawful for the employer or service provider to discriminate against a person with a disability.

The factors that need to be taken into account to determine whether there will be unjustifiable hardship include:

- ★ Benefits the adjustment will have for other people who may be affected
- ★ Disadvantages the adjustment will have for other people who may be affected
- ★ Effect of the disability on the particular person, and what this means in terms of the adjustments they need
- ★ Costs of making the adjustment

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