



*Mental Health and
Employment in the NHS*

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Preface

This guidance provides advice to NHS employers on the retention and future employment of people who have experienced or are experiencing mental health problems.

People with mental health problems frequently suffer discrimination in the workplace. This forms one of the greatest barriers to social inclusion – the lack of a job is an obstacle to independence generally. Unemployment affects those with long term mental disorders more than any other groups of people with disabilities (ONS 1998) - only 13% are in employment compared to over a third of people with disabilities generally. (Labour Force Survey 1997/98). This discrimination is wasteful of ability and loses the contribution to society that people with mental health problems can make. Discrimination will also be unlawful where a person with mental health problems has a disability that is protected by the Disability Discrimination Act 1995 (referred to in this guidance by the abbreviation “the DDA”).

A key objective of the Government is to enable all disabled people, including those with mental health problems, to make the most of their abilities at work and in the wider society. It will do this by:

- providing active help for people to move into work;
- by taking the obstacles out of the benefits system;
- by promoting equality and opportunity in the workplace.

As the largest public sector employer in the country, the NHS should be making a significant contribution to delivering these objectives. This guidance confirms the strength of the Department of Health’s commitment to anti-discrimination principles. Its implementation will make a difference to the lives of healthcare workers who have experienced or are experiencing mental health problems; to their quality of life, their self-confidence and their work prospects.

With the publication of this guidance, and the enactment of the Disability Discrimination Act 1995, NHS employers can tackle discrimination, promote equality and opportunity in their staff and provide the opportunities that people with mental health problems are now entitled to expect.

Professor Louis Appleby
National Director for Mental Health

Executive Summary

This guidance is the result of deliberations by a working group drawn from the NHS professions, management and unions, whose remit was to consider the management of staff, potential staff and students who have experienced or are experiencing mental health problems.

It takes the line that the stigmatisation of, and discrimination against, those who have experienced or who are experiencing mental health problems is unacceptable.

It is proposed that the NHS should take a lead, not only in caring for its present and future employees, but also in valuing diversity and in promoting good practice in the employment of people who have experienced or are experiencing mental health problems.

The guidance endorses best practice whereby decisions relating to the employment of people in the NHS with mental health problems are to be based on a person's merits and suitability and not prejudice, irrespective of whether that person is afforded to protection of the Disability Discrimination Act 1995.

It addresses the issues associated with assessing the mental health of candidates at pre employment health assessments and encourages NHS managers to consider the benefits of employing staff with mental health problems.

NHS managers and occupational health professionals are provided with tools to identify and assess the suitability of persons for employment, including those with mental health problems and the guidance stresses the need for careful risk assessment by the occupational health and safety department on a fair and equitable basis.

A clear message is presented that, as the largest employer in the UK, the NHS should set an example showing that;

- this type of discrimination is taken seriously and will be eradicated;
- mental health should not be the cause of derision or ridicule, and;
- people with mental health problems have the same right to be treated fairly and with respect as everyone else.

General Principles laid down include:

- Selection should be based on the best person for the job. Appropriate procedures should therefore be implemented so that persons with disabilities are not placed at a substantial disadvantage compared to non-disabled persons in the arrangements made for determining who should be offered employment in the NHS;
- Every assessment for a post is specific to that situation;
- All NHS staff should have a pre employment health assessment;
- NHS employers should ensure their policies and procedures comply with the Disability Discrimination Act 1995;
- No applicant should be refused employment on health grounds unless expert occupational medical advice has been sought;
- No person should be refused employment, or have their employment terminated on mental health grounds without the NHS employer first having made any adjustments that it would be reasonable to make in relation to that person in accordance with any duty placed upon them by the DDA;
- The “2 year rule” (suggested by the Clothier Report) which some occupational health professionals have used when carrying out pre employment health assessments is no longer to be used in the NHS;
- All NHS staff need help to develop an awareness of their own mental health, when to seek help and from whom;
- The NHS needs to develop a culture where staff can be open about their mental health status, are treated fairly and are encouraged to seek help when it is needed;

NHS managers should be aware that the DDA makes it unlawful to refuse employment or to terminate the employment of a disabled person for a reason relating to that person's disability without justification. The reason for that decision must be one that cannot be removed by any reasonable adjustment made by or on behalf of the employer.¹

¹ From *Psychiatric Patient to Citizen* (MacMillan) (Sayce 2000)

The over arching message to be taken from this guidance is that it is extremely unjust, a waste of human potential, a great cost to society, and potentially unlawful to exclude anyone from employment simply because that person has experienced or experiences mental health problems.

However, this guidance does not constitute legal advice. It is intended to supplement, and is not a substitute for, the expertise and advice of an NHS employer's own legal advisors.

Legal advice should always be obtained before taking, or refraining from taking, any action as a result of the contents of this guidance. NHS employers are responsible for ensuring that they comply with their legal obligations in relation to disabled persons, including persons having mental-ill health.

Every effort has been made to ensure the accuracy of this guidance and any third party opinion given in it. However, the Working Group and Department of Health accept no liability whatsoever for its accuracy and for any decisions that may be based upon it. This guidance is provided in good faith, and is not intended to be prescriptive or to act as a guarantee to employers.

Introduction

Recent tragedies, however exceptional, in which health professionals have killed or assaulted patients, have focussed attention on the implications of psychiatric problems at work (Clothier 1994²). However the Clothier Report raised unrealistic expectations that psychiatric screening could be an effective filter and diverted attention from other more important factors contributing to the case.

A further outcome of the Clothier Report has been the stigmatisation of people who have experienced or are experiencing mental health problems, leading to the use of inappropriate criteria to exclude people from employment and a reluctance on the part of NHS employees with mental health problems to disclose this information, where appropriate. This often results in additional worry for them and potentially jeopardises employment if non disclosure is subsequently discovered.

The Government believes people who have a disability or an impairment should be able to participate fully in society and live as independently as possible. For most people of working age the chance to get and keep a job is central to their independence and participation in society. The same should be true for people who have a disability or impairment ³

The NHS is already contributing to this challenging agenda. There are many examples of good practice in its approach to the employment of people who have a disability or an impairment, but some people are still not getting a fair deal when it comes to recruitment, retention and career development.

Tackling discrimination and inequality is a key commitment in the Government's drive to modernise health services. However, it is not possible to tackle discrimination in service delivery without first ensuring that the workforce reflects the community it serves, and is educated and equipped to respond effectively to diversity.

² The Clothier Inquiry, HMSO 1994

³ John Denham, Minister of State for Health, Introduction to "Looking Beyond Labels" NHS Executive May 2000

As part of the implementation of *Working Together*⁴, an equalities framework for the NHS *The Vital Connection*⁵ was launched on 6th April 2000 which commits NHS employers to take action to deliver on the Government's commitments on equality and social inclusion and to demonstrate that they have done so. *The Vital Connection* sets the target that each local employer should meet the criteria stipulated for using the Employment Services Disability Symbol *Two Ticks* by April 2001.

The New Deal for Jobseekers with Disabilities is helping people in receipt of Jobseekers Allowance who have a disability or health condition. It is in the light of the initiatives mentioned above, and in response to concerns expressed by NHS unions about recruitment of staff with mental health problems, that this guidance has been produced.

This guidance is based on the premise that:

- Decisions relating to the employment of people in the NHS having mental health problems should be based on a person's merits and suitability, not prejudice.

All of those affected by employment decisions, both as applicants for employment or training, staff in post, those caring for such staff (i.e. mental health professionals with health care worker patients) and their advisers, as well as employers, need to have confidence in the decision making process.

This will enable open and honest disclosure by persons having mental health problems to the appropriate personnel, whilst protecting the employee from stigmatisation and also facilitating access to ongoing support and rehabilitation in the NHS workplace.

This guidance:

- (i) addresses the issue of assessing the suitability of persons for employment, including those with mental health problems at pre-employment health assessments and should be seen as supporting the current occupational health guidance published by the NHS Executive;⁶

⁴ Working Together – Securing a quality workforce for the NHS, a framework for managing human resources in the NHS, NHS Executive HSC 1998/162

⁵ The Vital Connection: an equalities framework for the NHS, Working Together for Quality and Equality, HSC 2000/014

⁶ 'The Management of Health, Safety and Welfare Issues for NHS Staff 2000 NHS Exec Jan 2001'

- (ii) sets out the process for screening applicants for entry into training and for those already qualified and applying for posts with NHS employers;
- (iii) addresses the issue of how to manage staff already in post who have, or may have, mental health problems;
- (iv) clarifies the issues of confidentiality for occupational health and mental health professionals in the context of risk to patients;
- (v) encourages NHS managers to consider the benefits of employing staff with mental health problems;

Context

There is a stigma attached to having mental health problems that is caused in part by ignorance and also by concern and fear of the unknown. At one time it was believed that mental illness could be ‘caught’ rather like a cold. There is also sometimes the belief that, for example depression is a sign of weakness and that people who have depression should ‘pull themselves together’. Some sections in our society continue to portray people with mental health problems as being naturally violent and a danger to society.

None of these views has any basis in fact

All the evidence indicates that most people with mental health problems wish to live as normal a life as possible and to secure ordinary employment within an ordinary workplace. The majority of people with mental health problems are no more violent than the rest of the population. Better indicators of a propensity to violent behaviour would be drug or alcohol addiction and gender.

Judgements about an individual’s suitability in employment contexts must be based on justifiable standards. Preconceptions and value judgements made about people with disabilities or impairments are unacceptable.

- Between 15 and 30% of employees will experience mental health problems in any year and virtually any one is susceptible to psychiatric illness.
- One in 6 women and one in 9 men are likely to require treatment in a psychiatric unit during their lifetime yet only a minority of these will suffer long-term or permanent disability.

The stigma of mental health problems persists, yet many of those who recover from a psychiatric episode may have benefited from the experience. Some individuals describe a growth in personal awareness. Though they would not have wished it upon themselves, they may have had an experience akin to that in the American management training technique of ‘sensitivity training’. Also, there is no evidence that people with mental health problems_ necessarily make poor health care workers. As well as the growth in personal awareness referred to above there is the added advantage that service users can feel encouraged by staff who have “been there too” and are now succeeding.⁷

It is important for people with mental health problems undergoing treatment to be aware of, and respect, the legitimate considerations of employers, and be aware their own responsibilities for managing and planning their treatment. They should understand the need to continue their treatment if that is the course of action they have decided upon with their doctors. They should be aware of the consequences of discontinuing treatment just because they feel well and settled in their new job. Maintenance of treatment of a stable condition will not be a bar to_recruitment and continued employment.

Because of the issues referred to above, NHS employers such as South West London and St George’s Mental Health NHS Trust have set up a User Employment Programme⁸ to assist staff with mental health problems and also to encourage previous service users to apply for posts within the organisation. This action is based on the assumption that with the largest workforce in Europe, and the reported incidence of mental health problems in the general population, it is essential to ensure that people are not discriminated against or excluded from the workforce unnecessarily. This would be a waste of valuable resources (skills, training and manpower) and of the valuable positive insight that these people can bring to patient care. [See “**Reasons for employing staff with mental health problems** “ at Annex C]

NHS managers and employers must also recognise that students and trainees working in the health service may also need support in the workplace if they have mental health problems, as may volunteers working in the NHS, as part of rehabilitation either formal or informal.

⁷ Consumers as Providers (Mowbray et al 1997)

⁸ The Pathfinder User Employment Programme. Perkins, Evenson, Davidson. SW London and St George’s Mental Health NHS Trust

- Careful risk assessment by the occupational health service is essential where in the normal course of their duties the person will be engaged in work of a kind involving access to persons under 18 years of age or persons who are in receipt of health services, especially in the role of sole carer. Patient safety must remain paramount .

Tackling Attitudes in the Workplace

This guidance is aimed at providing NHS managers and occupational health professionals with the tools they need to assess the suitability of persons having mental health problems who :-

- wish to work in the NHS or enter training; or
- who are already working in the service

to ensure that such individuals are not unnecessarily excluded from work or training, and are not stigmatised or discriminated against in the workplace.

The guidance is produced against a background of Government and Department of Health legislation and initiatives encouraging employers to play a key role in ensuring an environment where discrimination against people with mental health problems no longer exists.

As the largest employer in the UK it is essential that the NHS sets an example and gives a clear message that:

- Eradication of this type of discrimination is taken very seriously by management;
- People with mental health problems have the same rights as everyone else to be fairly treated with respect;
- It is not acceptable for mental health problems to be the subject of ridicule or derision.

Current NHS policy on employment of disabled persons is laid out in guidance issued by the NHS Executive Equal Opportunities Unit⁹

⁹ Looking Beyond Labels - Widening the Employment Opportunities for Disabled People in the New NHS. NHS Executive May 2000

One way of ensuring that discrimination does not take place is for managers to ensure they encourage a culture where it is possible for staff to be open about their mental health status and to feel encouraged to seek help when they need it. This would be a culture that ensured fair treatment of staff and actively promoted a sense of self-awareness amongst staff of their own mental health and needs.

Impact in the Workplace

Employees and potential employees who may experience mental health problems are entitled to expect that confidential information about them will be treated sensitively, appropriately and in accordance with the ethics of confidentiality. A person's decision to tell their fellow workers about their illness is purely personal. In circumstances where fellow workers are ignorant of the causes and effects of mental health problems, it is possible that they will ridicule and ostracise that colleague. However, fellow work colleagues also have the potential to provide a helpful and supportive background and it is good practice for employers to facilitate an understanding attitude by arranging training sessions on mental health issues (**see Annex A regarding training for staff**). The encouragement of a culture of awareness and support will allow employees experiencing mental health problems to confide in close colleagues and to advise them as to what action they wish to be taken if difficulties arise.

Lack of confidentiality was raised as an issue by a number of supported workers at South West London and St George's who have subsequently issued a confidentiality policy which has tightened up on areas where confidentiality might previously have been breached. However, staff will need to recognise that absolute confidentiality is not possible in a situation where staff are being supported in their posts due to their health problems. Clearly the line manager will need to know about the support being given and it is possible that over time colleagues working closely with supported staff may become aware of the support being offered.

[See also Annex A and Annex C]

General Principles

Recruitment

With a few exceptions ¹⁰, employers are required to comply with the Disability Discrimination Act 1995 to ensure that fair and equal recruitment processes are followed in relation to disabled persons.

The Code of Practice “for the Elimination of Discrimination in the Field of Employment against Disabled Persons or Persons who have had a Disability” provides some useful indications of how employers should address practical issues when recruiting.

In this context, the Disability Discrimination Act¹¹ and Code of Practice reinforce the principles of good employment practice:

- Selection should be based on the best person for the job. A disabled applicant's suitability and merits must be assessed as they would be after making any reasonable adjustments that are required by the Disability Discrimination Act 1995;
- NHS employers are encouraged to develop appropriate recruitment procedures to enable applicants with disabilities to have the opportunity to indicate whether they have specific requirements in the interview or selection process, or whether there are reasonable adjustments that can be made to enable that person to perform the job, and for the purpose of making any reasonable adjustments that might bring an applicant whom they know to have a disability and likely to be at a substantial disadvantage, into the pool of those considered for selection;

¹⁰ ie, **The armed forces, employers with fewer than 15 employees**

¹¹ Disability Discrimination Act 1995. HMSO

- Disabled applicants should only be asked for information about a disability if it is, or it may be, relevant to that person's ability to do the job;
- NHS employers must not discriminate against disabled persons in the arrangements they make for determining who should be offered employment, and are encouraged to take a lead in valuing diversity and promoting equality of opportunity.

Health issues should be addressed via the process of pre-employment checks carried out by the Occupational Health Service. Specific account must be taken of any duty to the applicant under the DDA to make reasonable adjustments.

Key Points

- Selection should mean the best person for the job; see above;
- References are crucial to the process – they need to be honest, accurate, fair and made with reasonable care;
- Sickness absence data from the previous employer is essential - applicants must not be rejected for employment by reason of their absence record without regard to the obligations imposed by the DDA;
- The candidate should not start work until health screening is completed.

Further guidance on this subject can be found in ‘The Management of Health, Safety and Welfare Issues for NHS Staff 2001’¹².

In cases where NHS managers are intending to encourage applications from people who may be suffering from mental health problems, they will want to consider the issues set out in Annex D to ensure fair competition and to take advantage of lessons learned at Trusts where such open recruitment policies have been piloted.

¹² The Management of Health, Safety and Welfare Issues for NHS Staff 2001 NHS Executive Jan 2001

Assessment

- All decisions relating to the employment of persons with mental health problems must be made on the basis of a detailed risk assessment by a competent occupational health professional, taking into account the individual's health problems, the nature of the individual's employment, and any relevant adjustments which may be made to that work.

Occupational health services and employers need to appreciate that specific diagnoses of mental health problems may only be helpful in predicting the future course of the illness and likely problems to be encountered. Where appropriate, occupational health services will need to liaise with the person's own doctors to get a clearer picture of these.

Diagnosis itself is not a reliable predictor of either dangerousness or likely failure at any job.

Individuals may be vulnerable to periods of particular stress and colleagues may need to be alert to the development of possible episodes of further illness. Such support, however, must take into account the need for confidentiality and sensitivity to the individual's needs.

Where the occupational health service find that an individual is not suitable for a post it should be because the specific nature of their mental health problems puts the individual, patients or the service at serious risk in spite of reasonable extra efforts to support them, and where the DDA imposes a duty on the employer, there is no reasonable adjustment that would enable that person to do the job or to work in another vacant post.

The risk assessment must be specific to the individual and the post.

It is important to recognise here that health and safety should not be used to debar people from employment without justification. Employers must therefore first make:

- Reasonably practicable adjustments under health and safety law to reduce risk, which may involve making;
- Reasonable adjustments required of them under the DDA

Pre Employment Health Screening

- All NHS staff should have a pre-employment health assessment carried out fairly, objectively and in accordance with equal opportunities legislation and good occupational health practice.

Suitable and sufficient health screening should be carried out:

- On taking up a first post, whether or not this is preceded by a period of training;
- On subsequent appointment with new NHS employers, and;
- On job change, where this involves a significant change of duties.

The purpose of pre-employment health assessment is to ensure that:

- Prospective staff are capable of carrying out the work proposed, taking into account any current or previous health problems and any duty to make reasonable adjustments under the DDA;
- Anyone likely to be at excess risk of developing work related health problems from hazardous agents present in the workplace is identified

The assessment also aims to ensure, as far as is possible, that the prospective employee does not represent a risk to patients, themselves or colleagues and that the work is suitable and safe for the prospective employee.

There should not be any tests carried out to detect conditions, which are not likely to be relevant to the person's ability to undertake the specific job in question.

Disability Discrimination Act 1995 (the DDA)

- NHS employers should ensure that the requirements of the Disability Discrimination Act 1995 are met, including compliance with any duty upon them to make reasonable adjustments that would enable the disabled person to work in the NHS.

The introduction of the Disability Discrimination Act 1995 has reinforced the need to deal fairly when considering the employment of staff with mental health problems ¹³.

There is now a growing body of case law to help in determining how the DDA will affect the employment of staff with mental health problems and Employment Tribunals are paying particular attention to the selection process and how applicants are treated at interview. [See Annex F for examples of recent cases]

The DDA lists a number of factors to which an employer should have particular regard when determining whether it is reasonable to make a particular adjustment. These are:

- (i) the extent to which taking the step would prevent the effect in question;
- (ii) the extent to which it is practicable for the employer to take the step;
- (iii) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of the employer's activities;
- (iv) the extent of the employer's financial and other resources; and
- (v) the availability to the employer of financial and other assistance with regard to taking the step.

The DDA should be read in conjunction with the Code of Practice and Guidance ¹⁴.

¹³ For further information see Annex C and also "Looking Beyond Labels". NHS Executive May 2000

¹⁴ See Annexes C & J

The Pre Employment Process

- No applicant should be refused employment on health grounds unless expert occupational medical advice has been sought, including as where necessary, liaison by the occupational physician with appropriate mental health professionals and with the applicant's general practitioner and/or specialist. The applicant must first have the opportunity to discuss the issues raised with the occupational and mental health professionals, and with the person or persons responsible for making the recruitment decision, who must consider all relevant facts.

Responsibility for taking up references including information about absence and making registration checks (with NMC, GMC, HPC, GDC etc) rests with the employing manager. They must also ensure that they have procedures in place to enable them to respond appropriately to requests for references from other Trusts when their employees change employer.

NHS employers are reminded that their measures to comply with this requirement must comply with the Data Protection Act 1998.

It is for the employing manager to ensure that all relevant occupational health checks have been made and to decide in the light of information received whether the applicant should be employed. The employing manager is expected to obtain, and to take into consideration, advice from the occupational health service concerning any requirement on the employing organisation to make adjustments to posts that would enable a disabled applicant to do the job (or another vacant job) but may decide that there are no adjustments that it would be reasonable to make. They may also choose to employ an applicant despite concerns expressed by the occupational health service. In either case they will need to be able to fully justify their decision, and responsibility for the appointment rests with the employing organisation. External advice on job modification is available from the Employment Service Regional Disability Service Team.

Links to Occupational Health

- In order for occupational health services to carry out a full assessment of the applicant they must be provided with a copy of the person and job specifications, health and safety risks associated with the post, the sickness absence record obtained from the previous employer and any relevant information obtained in the recruitment process, including any information provided by the applicant or on their behalf.

This will allow the occupational health service to provide appropriate advice to the employing manager regarding an applicant's fitness, and any work place adjustments that may be required in relation to a disabled applicant. It is also fundamental to the provision of both pre-employment assessment and in-service review that the occupational health service is aware of the different ways of working throughout the organisation and familiar with the different requirements for the wide variety of posts.

The Need for Rehabilitation

People recovering from depression may be left with residual symptoms such as low self-esteem, pessimism, loss of confidence and a perception of being vulnerable and helpless. They and others who have suffered a serious psychiatric episode, and who may have lost their jobs will probably require additional care and support in their re-entry into a demanding work environment. Such a candidate will not always be confident. There may be a setback or even intermittent withdrawal from work in the early days of earning a living once more. [See details of the Pathfinder support programme in Annex E]

- It is important for the occupational health team to participate in the process of rehabilitation into work in a constructive way. applicant or on their behalf.

Individuals should be honest in declaring any health problems.

Whilst good employers value diversity, applicants must understand the need for employers to make informed decisions concerning recruitment. It is a grave mistake for an individual to knowingly or recklessly deny or conceal a medical condition, an episode of ill health, or incapacity or to attempt to do so.

Failure to disclose such matters may result in dismissal, but equally importantly, may make it difficult for an employer to take a positive and sympathetic approach. The more serious the episode, the greater the challenge of resuming normal life, and the greater the employer's need to acquire the information necessary to assess their responsibilities to the applicant, including any duty to make reasonable adjustments under the DDA. The OH process needs to be supportive and constructive in responding to people with such histories to facilitate disclosure.

The Role of Occupational Health Services

Statutory Role

In the United Kingdom, the occupational health physician who advises an enterprise has statutory responsibility under Health and Safety¹⁵ legislation for the competence of medical advice given regarding the safety and improvement of the health of employed persons and of persons seeking or training for employment.

Role of Occupational Health Services in the NHS

Initial involvement of the occupational health service with an individual will be through the pre employment process when they are referred for pre employment health screening. This process will be similar whether the person is applying for training to enter the health service or for a position post-training. The process for assessing suitability is laid out in the next chapter “*Review and Risk Assessment in Pre Employment Health Screening*”. The role of the occupational health service when an individual is already in post is set out in chapter 5 of this document “*The Management of Mental Health Issues in Employment*”¹⁶. The general principles of occupational health service involvement in all of these processes are set out below.

General Principles

The need for employers to have access to competent expertise in occupational mental health has never been greater. Provision of such a service by occupational health and mental health professionals working together will ensure that impartial advice is available to employers on the suitability of persons for specific employment and concerning their responsibilities under the DDA to persons having mental health problems.

¹⁵ The Health and Safety at Work Act 1974

¹⁶ The Management of Mental Health Issues in Employment: NHS Exec Jan 2001

Currently general practitioners and consultants in other specialist fields are often the main source of occupational health advice and practical guidance about an individual's fitness for work. This raises a potential for conflict if the general practitioner or consultant, whilst needing to maintain a therapeutic relationship with the client, has also to advise the employer on suitability for work. For these reasons it is essential that the individual should be referred to the occupational health physician who can evaluate the case and who will also be able to take into account the particular conditions relating to the individual's current or proposed post.

If there are reasonable grounds to believe that an employee may be developing mental health problems, the occupational health service should be involved from the beginning. Their role will vary depending on the individual circumstances but may include:

- Helping the employee and the employer to understand whether particular behaviour observed in the workplace is related to mental health problems (the occupational health physician may wish at this stage to enlist the help and advice of a mental health practitioner)
- Assisting the employee to access appropriate support through their GP, local mental health services or elsewhere, if more appropriate (e.g. if they work in the local mental health service and have concerns about confidentiality).
- working with the employee and clinicians to facilitate a return to work through job modification and rehabilitation in the workplace

There is also an important role for the occupational health service in the rare situation where a mental health professional looking after a health care worker has doubts about that person's fitness to be at work. There may be concerns about the safety of patients and of the individual themselves and in this situation it might be helpful for the clinician to discuss the case with an occupational physician. This would certainly be the case where the patient's right to confidentiality might need to be breached in the public interest.

- The key role of the occupational physician is to act as an impartial assessor and advisor, ensuring that information flows appropriately to ensure that employment decisions are well founded (based on full medical information and risk assessment) reflect good employment practice, and that employers are alerted to the applicability of the DDA.

Key Principle to be Observed in Making Recommendations

In all cases, before a final recommendation is made on fitness to undertake duties, the occupational physician must ensure that a full assessment of the facts in the individual case has been carried out, taking into account any views expressed by the client or on their behalf, including where necessary, obtaining information from the employee's GP or psychiatrist. In some situations, independent psychiatric assessment specifically to assess fitness for work will be needed. Occupational physicians should seek advice from mental health professionals, especially in complex cases, unless they are clinically competent to assess the condition in question. The occupational physician should be asked to provide advice concerning whether or not the DDA applies to work capacity, recommended restrictions, time scales, and suitable work place adjustments.

The advice provided should be impartial and confidential. It is not the role of the occupational health physician to define what adjustments are "reasonable" for the employer to make; this is a decision to be made by management and may reflect a number of factors.

Important Note

With the role of occupational health becoming more important than ever in a wide range of employment issues it is essential for NHS occupational health services to publicise their role and the services they can provide. Recent guidance published by the Health Services Commission has laid special emphasis on the role of the employer and occupational health services to address the issue of rehabilitation into and back to work following ill health. These services should be highlighted to all staff and managers to ensure that they are aware of the important role the occupational health service has to play in delivering safer, healthier workplaces. It is no longer acceptable for the perception of occupational health services to be that of "the nurse who chases staff around the hospital trying to persuade them to eat more healthily".

Managers and others must also ensure that they do not deliberately or unintentionally foster the common misapprehension that occupational health services are an arm of management and are only there to “sort out” the problem members of staff or staff who have large amounts of sickness absence.

Health Assessment in Pre Employment Health Screening

The general principles for health assessment (given in more detail in Chapter One) are:

- Every assessment of an individual for a post has to be specific to that situation;
- Diagnosis of itself is not a reliable predictor of either dangerousness or failure at any job;
- Health assessment must be specific to the individual in relation to the post and not to the post itself
- Prior to making an unconditional offer of appointment, all NHS staff should have a pre employment health assessment carried out fairly, objectively and in accordance with equal opportunities legislation and good occupational health practice;
- In assessing a person's suitability for a post, the requirements of the Disability Discrimination Act 1995 should be complied with

- The key role of the occupational physician is to act as an impartial assessor and advisor, ensuring that information flows appropriately to ensure that employment decisions are well founded (based on full medical information and risk assessment) reflect good employment practice and employers are alerted to the applicability of the DDA.

The Role of the Occupational Health Assessment

The role of the occupational health assessment is to provide advice concerning:

- Is there a significant health problem?
- Work capacity; will the illness interfere with this individual's ability to do this specific job?
- Does anything in this job pose a risk to the candidate's mental health?
- Is there any risk to the welfare of others?
- Work adjustments; what modifications or adaptations are needed to accommodate the candidate's health problem/minimise the risk to them or their patients, and/or if the DDA applies, what adjustments can be taken to enable the person to do the job?

To carry out the last of the actions listed above it is essential that the occupational health practitioner has knowledge of the DDA and of the range of reasonable adjustments possible for people with mental health problems.

When a serious or potentially significant mental health problem is identified by the initial occupational health assessment, the occupational physician must carry out a detailed **risk assessment** that, in most cases, will involve seeking further information from mental health professionals.

The occupational physician will need to make an assessment of the individual's health problem and its effect, initially by the normal process of medical assessment, followed by information collection.

The Risk Assessment Process for Potentially Significant Mental Health Problems

The following points will need to be considered:

- The nature of the health problem including diagnosis
- How does this affect the individual?
Is there any reason why this person poses a risk to others in the workplace?
 - Inattention, loss of concentration, drug effects

- Particular behaviours: loss of control, risk of violence, deliberate acts
- Degree of insight (do they have strategies to manage their mental health difficulties?)
- Could this problem give rise to other problems in the workplace?
 - Frequent sickness absence
 - Inability to make decisions, cope with emergencies
 - Seeking therapeutic relationships with colleagues
 - Is this condition treatable, controllable, is maximum control being achieved?
- How does the individual intend to manage his/her health in the new post
- Is this work likely to harm this individual's health?
- Is there evidence of how well the individual has managed in previous employment and can this be taken into account as part of the decision making process?
- If the DDA applies, are there any steps that can be taken so that the person can do the job (or to work in another vacant post)?

The Clothier Report and the "2 Year Rule"

An opinion was expressed in the Clothier Report into the case of Beverley Allitt that suggested no applicant for a post in the NHS, who had a previous mental health problem, should be accepted for employment unless they had been free of drugs and other support for a period of at least two years.

This proposition was **not** taken up by the Department of Health but has been accepted by some occupational health professionals and used as a reason for recommending some applicants be refused posts.

This guidance supersedes previous guidance on the subject and makes it plain that all cases should be judged on an individual basis. It will not be acceptable to use the "2 year rule" as a reason for refusing employment.

Assessment Format

The assessment should include consideration of a confidential occupational health questionnaire completed by the applicant at the appropriate stage of the appointment process, and an interview with an occupational health nurse adviser (should it be felt the questionnaire answers require clarification). This initial interview may be carried out by telephone if it is considered that this will elicit sufficiently clear answers to any questions raised by the form.

Questionnaire Format

A questionnaire that is capable of providing the means to identify whether there are grounds for further investigation should be used. An example of a pre employment questionnaire, devised as part of research into pre employment policies is given at Annex A of “*The Management of Health, Safety and Welfare Issues for NHS Staff 2000*”¹⁷. This should not be considered as the only possible format but is offered as an example.

It is likely that in the majority of cases the OH questionnaire will be passed first to an OH nurse adviser for consideration. If they consider it to be necessary they will arrange an interview with the applicant to assess their fitness for the post. If an OH nurse adviser feels that they have not been able to gain a clear and unequivocal picture of the applicant’s past medical history from the questionnaire and the interview, they should refer the matter to an occupational physician for further consideration.

Further assessment by an occupational physician will be needed if the answers to the questionnaire and/or the interview identify significant health problems, or the nurse feels that the candidates responses have not given a full picture of the past medical history or current health problems.

Where necessary the occupational physician will seek information or advice from the individuals GP or mental health professionals.

At this stage the occupational health service should be able to answer the key question

- Does this applicant have a *relevant health problem*?

¹⁷ The Management of Health, Safety and Welfare Issues for NHS Staff 2000. NHS Executive Jan 2001

If this is the case they will then need to assess the implications of this for employment by:

- a process of information gathering to understand the extent of the impairment to the individual
- coupled with careful risk assessment to determine the suitability of the proposed post for the individual.

- It is essential that a detailed risk assessment based on the facts of the individual case is carried out

Seeking GP Assistance

In the small number of cases where the amount or nature of sickness absence, or other factors indicate that the applicant's fitness for work may be affected and further information is required concerning the past medical history, this may be obtained from the applicants GP. This process will require the applicant's signed consent and they must be told precisely what information is being requested and why before their fully informed consent can be obtained. A copy of the person's signed consent should be sent to the GP with a request for specific information.

Key Points in the Assessment Process

Throughout the process it is essential to remember the following key points:

- Patient safety is paramount;
- Risk assessment is individual and not based on diagnosis;
- Decisions need to be based on evidence, not prejudice;
- The process needs to be transparent; applicants need to understand how information about them will be used, to whom it will, or may be disclosed, and how decisions are made and on what grounds;
- The process requires trust and honesty from all parties.

The OHS will also need to consider the applicant's previous sickness absence record – taken from previous job references and any reports from clinicians – and whether or not the applicant has a disability to which the DDA applies.

Seeking Additional Information

Where a mental health problem is identified, further information is usually required e.g. from a psychiatrist or other mental health professional and should always be sought in cases where the applicant's fitness for work may be affected.

The Access to Medical Reports Act¹⁸ applies and the process will require the applicants signed consent. They **must** be told precisely what information is being requested and why, before their fully informed consent can be obtained.

- To avoid a possible conflict of interest the GP or Psychiatrist should be asked only specific questions that are designed to assess the applicant's suitability for the post applied for

Applicant's clinicians should not usually be asked simply to comment on the person's fitness for the proposed post, as that decision is the responsibility of the occupational physician and ultimately the employer.

At the end of this process the occupational physician will have a clear picture of the impact of the individual's illness on their employment, and will be in a position to advise the employer on suitability for employment and modification to the work to accommodate the individual, where appropriate.

¹⁸ The Access to Medical Reports Act 1988

Entry into Training for Health Care Professionals

Students entering vocational training courses in health care (medicine, dentistry, nursing, physiotherapy, radiography, occupational therapy, clinical psychology etc) will work on placements in NHS environments during their course and, at the end of that course, be expected to be suitable for employment in the NHS. The educational institutions should reflect this assumption that the institution is training health care professionals for the NHS in their occupational health procedures.

This process is, therefore, to ensure fitness to work in the NHS at the end of the course as well as the ability to complete the course and undertake placements in NHS establishments as part of that course.

- Occupational health services and training establishments need to be aware that this process is intended not only to ensure ability to complete the course of training, but also to ensure fitness to work in the NHS at the end of the course.

Health Screening

Students should be health screened on acceptance onto these courses in the same way as health care workers applying to work in the NHS. This screening is designed to ensure:

- Fitness to undertake the course;
- Fitness for placement in the NHS during the course;
- Fitness for employment in the NHS upon successful completion of the course.

The process is essentially the same as that for new employees in the NHS and the same standards of fitness should be applied, but there are certain special considerations in addition.

The scope for modification of the course to accommodate health problems may be limited by the academic and competence requirements of the qualifications to be obtained – the occupational physician should be aware of these although the educational institution will have to make the final decision on whether or not any restrictions or modifications can be accommodated in each case.

- Students should not start the course until health screening is completed

In order to assist an otherwise capable student, it may be reasonable to make special arrangements to extend the assessment over a longer period during the course of training.

There is a need for all concerned in this process to appreciate and acknowledge that the occupational health service provides advice and that the ultimate decision rests, in this case, with the educational institution.

It is because of this that differences of opinion sometimes arise between the occupational health service advising the institution and that advising the first employer. A person who may have been fit for training, or who was taken onto a course despite occupational health service reservations, may not be fit for the kind of work involved in their first post, or subsequent posts. The right to refuse a candidate in these circumstances belongs with the employer.

Careful assessment by the occupational health service at recruitment and in the management of health problems arising in students during their studies, with occupational health assessment as appropriate, should reduce the risk. Occupational health services advising educational institutions should be familiar with NHS working environments and health standards.

Role of the General Practitioner

As references from previous employers and sickness absence records may not be available, reports should routinely be obtained from the candidate's GP.

An example of a form to do this is to be found in current Department of Health occupational health guidance¹⁹. This is for guidance only and alternatives may be used.

¹⁹ The Management of Health, Safety and Welfare Issues for NHS Staff 2000. NHS Executive Jan 2001

The GP should be asked specific questions related to the health of the student limited to enabling the occupational health service to assess the student's suitability for the course. The GP should not be asked to give an opinion on the student's general fitness for the proposed training – that is the responsibility of the occupational health service carrying out the health assessment.

Where significant health problems are identified, further information to support the assessment will be required from the student's psychiatrist or other clinicians, as described in Chapter 3.

Overseas Students

Overseas students should be screened to the same standard as all other students as, although they may not be employed in the NHS on completion of their studies, they will be carrying out placements in the NHS.

Overseas students may not have family doctors on the UK model. In cases where it is not possible to obtain information about their previous health record the occupational health service may suggest ongoing health monitoring during the course of training.

The Management of Mental Health Issues in Employment

When an employee displays behaviour in the workplace that causes the employer concern, the question of whether or not this is health related often arises. The process should be no different for staff experiencing mental health problems than for any other form of health problem affecting performance.

To inform the management process the employer may also need information on:

- the extent to which any identified health condition may be amenable to treatment;
- whether modification of the work activities is needed to facilitate clinical management of the employee's health;
- are there reasonable measures that can be made to both support the health care worker in the work place and to ensure that patient protection is accomplished?
- is the person disabled under the terms of the DDA?

This clearly requires detailed risk assessment.

The occupational health service has a key role in this; both in collecting the required information, carrying out the risk assessment and giving the employer relevant information while ensuring that medical information is kept appropriately confidential.

Questions to the occupational health service should be phrased in a way that does not require the doctor to disclose details of sickness or disability without the person's express consent.

The principles of this process in the context of behaviour at work that is, or that may be, attributable to mental health problems are no different in the case of a doctor to that of any other health care worker or employee.

The Role of the Occupational Health Service

The role of the occupational health service is to determine the following:

- Is there a significant health problem?
- Is the health problem likely to have a significant effect on the performance of his/her duties?
- Does it explain the observed behaviour?
- Does the health care worker need professional help?
- Is it safe for them to remain at work?
- What might the employer do to assist them further?
- Provide advice required on rehabilitation, job modification etc;
- Work adjustments; what modifications or adaptations are needed to accommodate the person/minimise the risk to them or their patients;
- if the DDA applies, what adjustments can be taken to enable the person to do the job?
- Does the employer need to be advised on referral to professional body (e.g. GMC, UKCC) under fitness to practice procedures?

Triggers to Referral:

The triggers to referral of an employee by their manager might include any or all of the following:

- Sickness absence
- Poor performance
- Unusual behaviour
- Complaints
- Untoward incidents
- Employee asking for help

Managers will also want to take account of local disciplinary procedures as appropriate.

In doing so, managers are reminded that adjustments may be required to the disciplinary process to take into account their obligations under the DDA.

The Occupational Health Process

Referral

The employee is formally referred to the OHS by letter by the appropriate manager. The occupational physician must be given detailed information about the nature of the issue giving cause for concern.

- The employee must be aware of the nature of the concerns, the referral for OH assessment and the purpose of it.

Assessment

The occupational physician makes a detailed assessment of the health of the employee based on clinical assessment supplemented by sickness absence records, information given by the manager, any other relevant information they may seek and information the employee may wish to introduce. A report from the employee's GP or specialist may be sought.

The following points will need to be considered;

- The nature of the health problem including diagnosis;
- How does this affect the individual?
- Does this explain the observed behaviour?
- Is there any reason why this person poses a risk to others in the workplace?
 - Deliberate acts?
 - Inattention, loss of concentration, drug effects

- Abnormal behaviours; loss of control, risk of violence
- Degree of insight
- Could this problem give rise to other problems in the workplace?
 - Frequent sickness absence
 - Inability to make decisions, cope with emergencies
 - Seeking therapeutic relationships with colleagues
 - Is this condition amenable to treatment; is other/better treatment available?
- Is this work likely to harm this individual's health?
- If the DDA applies, advice on suitable adjustments and time scales.

Further Mental Health Assessment

- In some cases detailed assessment by a psychiatrist or clinical psychologist may be required to determine whether or not the employee has a mental health problem and to advise on its prognosis and treatment.

In this situation the occupational physician has an important role in asking the right questions of the clinician but also ensuring that the mental health practitioner is aware of the full background to the case, especially if the employee cannot or will not recognise the employer's concerns.

Where specific referral to a consultant psychiatrist or psychologist is made for the purpose of assessment in an employment context and not for therapeutic reasons, the occupational physician may refer directly but this would constitute a private referral and would have to be funded by the employer unless there are local arrangements. The report would form part of the employee's confidential OH record.

Report

Having collected all the relevant information the Occupational Physician will be able to advise the employer in non-medical terms and without breaching the confidentiality of the individual's medical information:

- whether or not the individual has a health condition
- how this will impact on their ability to do their job both in the short and the longer term
- where a treatable long term condition is identified,
- any work place adjustments that would enable the person to do the job. Where an employer's occupational health advisers knows that a person has a disability, as defined by the DDA, the employer is obliged to comply with the Act. This places a requirement on OHS to advise management of any adjustments, even where the employee wishes the disability to remain confidential.

Supporting the Employee

The occupational physician has a key role, if a health problem is identified, in ensuring that the employee is receiving appropriate health care. This may be particularly important in medical staff, both to overcome any reluctance to recognise health problems and to seek help, and in facilitating 'out of area' treatment if appropriate.

Managers, working with the patient and occupational health staff, will want to encourage the employee to make use not only of the 'in house' support but also of informal support systems. They should also aim to be as flexible as possible in helping the employee to manage their own time and needs in a way that works best for them.

Subsequent Management

Depending on the nature of the health problem identified, the occupational physician may have a role in supervising adherence to on going treatment or assessing the impact of treatment on employment e.g. where behaviour is changed in response to treatment.

They also have an important role in assisting with the development of rehabilitation programmes, working with the clinicians responsible for the employee's care.

Where treatment and rehabilitation are not an option, the occupational physician will be able to advise the employer on the eligibility of Ill Health Retirement. The employer may wish, or may have to consider other exit strategies eg termination of employment

- The key role of the occupational physician is to act as an impartial assessor and advisor, ensuring that information flows appropriately to ensure that employment decisions are well founded (based on full medical information and risk assessment) reflect good employment practice, and that employers are alerted to the applicability of the DDA.

Management of Mental Health Problems in Doctors

The principles of management of these situations in medical staff are no different from those in other employees. Doctors do, however, raise special considerations, for example:

- Higher degree of risk to patients
- Strong denial of health problems both individually and collectively hostility to “management” processes
- Poor understanding of own duties to employer.
- Difficult patients for other doctors to deal with

In order to deal with these issues, the occupational health service providing a service to a doctor should normally be consultant led or have access to a consultant occupational physician who can work with the employee in accordance with “The Management of Health, Safety and Welfare Issues for NHS Staff 2001”.

Guidance to Employers on Advertising Posts, Recruitment, and Interviewing of People with Mental Health Problems

Schemes such as that run by South West London and St George's Mental Health NHS Trust have endeavoured to create an environment in which people can expect to be treated both fairly and equally and where the rights of the individual are respected.

The following guidance is aimed at pointing out particular issues that may arise once a Trust decides to make positive moves to ensure it:

does not discriminate against people who have experienced or who experience mental health problems take measures to overcome barriers to employment that such people may face.

Pre Recruitment

Once a decision has been made to make available support to people who have experienced mental health problems, irrespective of whether they are afforded the protection of the Disability Discrimination Act 1995, to enable a greater uptake of posts in the organisation, a series of further decisions need to follow before they can be advertised. These are likely to include:

- **What changes need to be made to the job descriptions and person specifications?** Does the employer wish to add “positively welcoming applications from people with personal experience of mental health problems” ?
- **Should the opportunity be taken to specifically target advertisements at local organisations and centres that work with people with mental health problems as well as in the usual places?**

Caution on the part of both employers and managers requires that in agreeing contracts the usual probationary rules 9 (if they exist) are followed and applicants with mental health problems are not treated differently i.e. if it is not usual to require a probationary period one is not introduced for applicants with mental health problems.

Recruitment Process

Managers will need assistance with the recruitment process itself. Detailed information sheets should be provided to all who apply for the jobs, describing the jobs, the support available and giving guidelines for filling in the application form. People who have experienced mental health problems and been unemployed for a long time may find it difficult to complete applications and fail to present themselves in the best possible light.

Due to the difficulties in obtaining work references the employer may wish to consider asking for personal references (voluntary sector workers, health professionals or education professionals). References from health professionals must NOT seek clinical information.

For those short-listed, guidelines concerning interviews and the offer of an informal chat about interview practice might be offered.

Unsuccessful applicants should always be offered feedback.

Interviews

Managers taking part in the interviewing process should be reminded, particularly if they are clinicians, that they are looking for competence in being able to undertake the work required.

- All managers should be reminded that they are interviewing for the post. Save for the purpose of making reasonable adjustments to ensure that a disabled applicant is interviewed fairly and on merit, any pre knowledge that the interviewer may have about the applicant's medical history should not enter into their judgement.

Where a person specification states “personal experience of mental health problems “ is either a necessary or a desirable qualification for the post, the interviewer should explore this experience in the same way as they would test for other criteria.

Some managers may experience difficulty with this part of the interview and find it difficult to discuss the problem. Examples of the type of question they might ask are:

- *“I wonder if you could tell us about the ways in which you would manage your health if you were to be successful in your application for this post?”*
- *“How do you think that your experience of mental health problems might be of benefit in your work as a*”

Referral to Occupational Health

The successful candidate will be referred to the occupational health service for pre employment checks in the usual way. Even if the post was specifically designed for applicants with previous mental health problems and adjustments have already been made, recommendations for reasonable adjustments to assist the successful applicant may still need to be made by the occupational health service.

The OHS must be informed about the nature of the post and the adjustments already made but may still make recommendations for reasonable adjustments.

It should be recognised that the applicant may never have been to an occupational health service before or experienced pre employment screening.

- It would be helpful to the applicant and to the service if they were to provide a short outline of the process, possibly in leaflet form, which would prepare them for the screening.

In Trusts where such leaflets have been developed it has proved so successful that the process has been extended to all applicants for posts and to staff who use the service. (See note on promoting the occupational health service in Chapter 2)

Raising Awareness Among Staff: Common Questions

Whilst many staff may be enthusiastic about the introduction of people with mental health problems into the workforce and may see the benefits to the person, colleagues, patients and the organisation, there will be some who are deeply sceptical. Broader societal prejudices are bound to be represented in an organisation the size of a NHS Trust and this will lead to concerns being expressed.

A programme of education for staff will need to be introduced, starting initially with those who will be working closely with the new recruits and widening out to cover all staff over time. This awareness programme will also assist in dealing with concerns felt by staff who become aware that colleagues they have worked with for some time are also experiencing mental health problems.

This document is not intended to give all of the answers to concerns that may be raised but rather just a selection of the more common ones. Further information can be obtained in the report of the Pathfinder User Employment Programme²⁰.

Working in the health service is very stressful – will they really be able to cope?

When employees have mental health problems they don't pull their weight – they take lots of time off sick!

Won't they be unreliable?

We once had a member of staff with mental health problems – it was a disaster.....

One of my staff is already on long-term sick leave because of stress.....

²⁰ Pathfinder User Employment Programme: Perkins, Evenson and Davidson: SW London and St George's Mental Health NHS Trust

Such potential difficulties are precisely the reason for providing support in employment. The need for support for all staff is widely recognised in the provision of occupational health and counselling services.

Without the support proposed for these staff, helping them would be left as an extra burden on line managers which could pose them enormous problems. The extra support for these staff also supports the manager by taking care of additional responsibility and not placing it on them.

Whilst it is true that frequent or lengthy sickness absences impose a strain on other staff and management and can make running a service very difficult, evidence both from the USA²¹ and early indications from the UK²² suggest that with proper support staff with mental health problems, on average, take less time of sick than other staff.

Simply because an employee has mental health problems, this does not mean that the skills/qualifications they possess are lower, or that expectations of their performance are reduced. Unless there is a material and substantial reason that cannot be obviated by any reasonable adjustment, the DDA provides that disabled persons are employed on the same terms and conditions as everyone else, and must do the job expected of them in the normal way. If, despite support, they are unable to perform their job, then just like any other employee, they will not be able to remain in employment.

What about Beverley Allitt – patients may be at risk from staff with mental health problems.

Most people who have experienced mental health problems are not, and never have been violent, and present no risk to anyone else. **It is extremely unjust, a great waste of human potential and a great cost to society, to exclude everyone with mental health problems from employment because of the actions of a few.** In other areas we would consider such over exclusion ludicrous and inconceivable. For instance, there is evidence that men are more likely to commit violent offences than women are but we would never consider excluding men from the health service workforce.

²¹ Sherman and Porter 1991; Mowbray et al, 1997

²² Pathfinder User Employment Programme 1999

The employment discrimination that people with mental health problems typically experience leads to a climate where secrecy is encouraged. Many people who experience such difficulties prefer to deny that they have them and fail to acknowledge them on occupational health screening forms in order to gain employment. This has been precisely the situation in all high profile cases like that of Beverley Allitt. If people with mental health problems are unable to reveal their difficulties for fear of losing their job it causes problems that actively increase risk:

- The employer remains ignorant of any potential risks
- The individual employee cannot ask for any help, support, or adjustments (like time off for doctor's appointments) that they might need for fear of losing their job if their difficulties are discovered.

If employment discrimination is decreased, then people will be able to be open about their mental health problems and receive the help and support that they need to manage these in a work context. It ensures that:

- Individual employees can receive the support they need to minimise the likelihood of a recurrence of their symptoms, and help them to take necessary action if their problems worsen in a way that might affect their performance.
- Medical reports can be obtained at the recruitment stage to reassure the employer on the issue of risk.

If the NHS does not employ those who have experienced or who experience mental health problems within our own services, then it says little for the confidence we have in the effectiveness of the treatment and support we provide as a service.

The Disability Discrimination Act 1995

This annex is intended as a very brief introduction to the Disability Discrimination Act 1995. It is not intended to be prescriptive nor is it a statement of the law. You are advised to obtain legal advice concerning the legal obligations imposed by the 1995 Act.

Further, more detailed information on the implementation of the Act can be found in “Looking beyond Labels”²³

The Disability Discrimination Act 1995 (DDA) was the first attempt by the British Government to legislate against the discrimination faced by disabled persons or persons who have had a disability and sits alongside the Government’s manifesto commitment to establish *“enforceable civil rights for disabled people against discrimination in society or at work, developed in partnership with all interested parties”*.

Tackling inequality and discrimination is a key commitment in the Government’s drive to modernise health services. However, it is not possible to tackle discrimination in service delivery without first ensuring that the workforce reflects the community it serves.

The employment provisions of the Disability Discrimination Act came into force on 2nd December 1996. The Act gives disabled persons and persons who have had a disability rights in the field of employment.

Under the Act, it is unlawful for most employers to treat a disabled person less favourably than someone else because of his or her disability without justification, or to fail to comply with a duty upon them to make reasonable adjustments without showing that the failure is justified.

The Act applies to most employment matters, including recruitment, promotion, transfer, development and training, and dismissal (including compulsory early retirement).

²³ Looking Beyond Labels – Widening the Employment Opportunities for Disabled People in the New NHS. NHS Executive 2000

Definition of Disability

According to the Act, a disabled person is someone who at the relevant time:

- Has a physical or mental impairment;
- The impairment has an adverse and substantial effect on his or her ability to carry out normal day to day activities;
- The effect of the impairment is long term; (has lasted for twelve months, is likely to last for at least that period, or is likely to last the rest of that person's life, or in the case of a past disability, if the effect is likely to be recurrent).

The Act also prohibits discrimination against people who have had a disability as defined by the Act in the past but no longer do so.

Physical impairments are not defined by the Act, but examples of conditions include:

- diabetes; epilepsy; multiple sclerosis; cancer; cerebral palsy; heart disease.
- Sensory impairments, such as blindness, having partial sight or hearing loss are also included within "physical and mental impairments".

The Act does not include any impairment resulting from or consisting of a mental illness unless it is a clinically well-recognised illness. Examples of conditions include:

- depression, schizophrenia; dyslexia; bi-polar disorder (manic depression); learning disabilities.

The Government has published Guidance on matters to be taken into account in determining whether an impairment has a substantial adverse effect on a person's ability to carry out normal day-to-day activities.

The Discrimination Provisions

The Act recognises two forms of unlawful treatment in the field of employment:

- (1) an employer discriminates against a disabled person if, for a reason that relates to the disabled person's disability, the employer treats that person less favourably than the employer treats or would treat others to whom that reason does not or would not apply; and the employer cannot show that the treatment in question is justified. Treatment is justified, if and only if, the reason for it is both material to the circumstances and substantial.
- (2) an employer also discriminates if it fails to comply with a duty imposed upon it to make reasonable adjustments and cannot show that the failure to comply with the duty is justified.

The duty to make reasonable adjustments

Where any arrangements made by or on behalf of any employer, or any physical feature of the employer's premises place a disabled person at a substantial disadvantage in comparison with persons who are not disabled.

The Act gives a number of examples of steps that an employer may have to take in order to comply with that duty:

- (i) making adjustments to premises;
- (ii) allocating some of the disabled person's duties to another person;
- (iii) transferring the disabled person to fill an existing vacancy;
- (vi) altering the disabled person's working hours;
- (v) allowing the disabled person to be absent during working hours for rehabilitation, assessment or treatment;
- (vi) giving, or arranging to give, the disabled person training;
- (vii) acquiring or modifying equipment;
- (viii) modifying instructions or reference manuals;
- (ix) modifying procedures for testing or assessment;
- (x) providing a reader or interpreter
- (xi) providing supervision.

Nothing in the Act imposes any duty on an employer if the employer does not know and could not reasonably be expected to know that that person has a disability, and is likely to be at a substantial disadvantage by reason of the arrangements etc made by or on behalf of the employer.

The Act states that less favourable treatment cannot be justified where the employer is under a duty to make reasonable adjustments but fails, without justification, to do so unless that treatment would have been justified even after having made that adjustment.

The Act lists a number of on exhaustive factors to which an employer shall have particular regard when determining whether it is reasonable to make a particular adjustment. These are:

- (i) the extent to which taking the step would prevent the effect in question;
- (ii) the extent to which it is practicable for the employer to take the step;
- (iii) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of the employer's activities;
- (iv) the extent of the employer's financial and other resources; and
- (v) the availability to the employer of financial and other assistance with regard to taking the step.

The Government has published a Code of Practice “for the Elimination of Discrimination in the Field of Employment against Disabled Persons or Persons who have had a Disability” which is intended to give practical guidance and assistance to employers and to others in eliminating discrimination.

Scope of the Act

The Act is intended to cover all members of staff, full or part-time, and contract workers who perform work personally – whether they are hired from an employment agency or are directly self-employed. Employers with less than 15 members of staff (individuals not posts), for example many General Practices, are currently exempt from the Act. However, employers with fewer than 15 employees should make reasonable efforts as far as possible to address the spirit of the law and to meet the obligations placed on larger employers.

In 2000 the Disability Rights Commission came into being to enforce the Act and to promote equality of opportunity and best practice. The Commission can be contacted on 08457 622633.

The Disability Rights Taskforce have reviewed implementation of the Act, and made many detailed proposals for legislative and policy change²⁴.

In March 2001 the Government announced that the exemption for businesses with fewer than 15 employees will be removed from 2004. The Government also intends to remove the provision in Section 5(2) of the Act allowing employers to justify a failure to make a reasonable adjustment because that issue is already covered by the need for the adjustment to be reasonable.

The Government also proposes to add to the list of adjustments that an employer should consider; namely, (1) training in disability issues or in the use of equipment and (2) the provision of support or access to external support.

²⁴ From Exclusion to Inclusion 1999 DfEE

Reasons for Employing People with Mental Health Problems

There are a variety of reasons why NHS employers might usefully include in their workforce people who have had or who continue to experience mental health problems. Some of these are:

- Ensuring that people who have experienced or who currently experience mental health problems and who can be accommodated in the workforce can enhance the quality of mental health services offered.
- People who have experienced or who currently experience mental health problems have a wealth of experience and expertise in living and coping with such problems. This may prove useful to clinician colleagues who have not experienced such difficulties.
- Researchers have described such people as being best placed to understand the needs of patients due to their own personal experience.
- The employment of people with personal experience of mental health problems can increase the skill mix of staff and act as an important role model for both clients and staff.
- As well as being a major service provider, the NHS is a major employer and should be seen to give a lead in the employment of people with disabilities.
- Retaining staff avoids the cost of replacing them (estimated £80,000 per member of staff in recruitment and training costs)
- Given that an estimated 1 in 4 GP consultations relate to mental illness, increasing the numbers of disabled staff is a practical way of showing the organisation's commitment and openness to utilising the skills people with mental health problems can bring. This helps develop a culture that is more open and valuing, building staff confidence (job security) and the organisations ability to identify and support staff earlier, both of which can support work to prevent some cases of mental illness.

NHS expertise puts it in an ideal position to demonstrate to other employers the ways in which people with disabilities, including those with mental health problems, can effectively be accommodated into the workforce and is well placed to take a lead in taking measures to eradicate discrimination in the field of employment on the grounds of disability.

Good Practice in the Employment of People with Mental Health Problems: The Pathfinder Experience

**South West London and St George's Mental Health NHS Trust
(formerly Pathfinder Mental Health Services NHS Trust)**

Introduction

1. South West London and St George's Mental Health NHS Trust, in line with its Equal Opportunities Policy Statement endeavours to create an environment in which people can expect to be treated both fairly and equally and where the rights of the individual are respected. This principle applies equally to staff where the Trust seeks to operate employment procedures and conditions that do not discriminate on any grounds other than an ability to meet the requirements of the job.

Confidentiality for Supported Employees

2. The aim of the supported employment programme for people who have experienced mental health problems is to help people to gain and maintain employment. If an individual is offered employment on a supported basis, this will be agreed between the potential employee, their manager and the User Employment Programme at the time when the offer of a job is made.
3. A person's user/supported status will be known only to members of the User Employment Team, their manager/mentor, Human Resources Department, the panel who interview the individual for their post and the Occupational Health Department. These people will not reveal the supported employee's status to others at the person's place of work.
4. The User Employment Programme staff team, and others aware of the individual's supported status (see above), will not reveal this status to others either directly or indirectly.

5. It is entirely at the supported employee's discretion whether they tell their colleagues about their mental health problems or not. This can be a difficult decision, and User Employment Programme staff will be happy to discuss the pros and cons of such self-disclosure with the individual, but the decision to disclose or not rests with the supported employee.
 6. All records and information held by the User Employment Programme are confidential and will be available only to members of the User Employment Programme staff team.
 7. Information held by the User Employment Programme will only be released to other parties with the approval of the supported employee or in the case of an emergency when the individual or others are in immediate danger.
 8. In the interests of confidentiality, the primary contact between User Employment Programme staff and the supported employee will either be in the User Employment Programme offices or outside work as negotiated with the supported employee.
 9. User Employment Programme staff will not contact supported employees at their place of work unless:
 - The supported employee and support staff agree that the person will receive help at their place of work, or
 - Reasonable attempts have been made to contact the supported employee elsewhere and these have failed, or,
 - An emergency has arisen in which the supported employee's job is in jeopardy.
- If it is necessary to contact the supported employee at work, efforts will be made to ensure that confidentiality is preserved as far as possible.
10. Each supported employee will have an individual written support plan agreed between themselves and the User Employment Programme support worker. The individual's manager will also be involved in matters that concern them. This plan will specify ongoing support provided for the individual, help to be provided in the event of difficulties arising and contact that will be maintained with the person's manager to ensure that all is going well.

11. Support plans will be reviewed as necessary with the supported employee, and must be reviewed with them at least once every three months.
12. Supported employees will be expected to maintain contact with the User Employment Programme staff team as specified in the support plan.
13. If an individual wishes to move from supported to non-supported employment then this must be agreed by their manager.
14. Any breaches of confidentiality should be reported to the manager of the User Employment Programme who will investigate the matter and take necessary action.

The Pathfinder Charter

Charter For The Employment of People Who Have Experienced Mental health problems : Revised February 2000

South West London and St George's Mental Health NHS Trust, in line with its Equal Opportunities Policy Statement endeavours to create an environment in which people can expect to be treated both fairly and equally and where the rights of the individual are respected. This principle applies equally to staff where the Trust seeks to operate employment procedures and conditions that do not discriminate on any grounds other than an ability to meet the requirements of the job.

In particular, and in line with the Disability Discrimination Act (1995) and the Positively Diverse Initiative, the Trust will not discriminate against people who have a disability or an impairment and will make reasonable adjustments to overcome barriers to employment that such people may face. Being an organisation committed to mental health, the Trust recognises that:

- The absence of employment is detrimental to mental health
- Prospective employees may be subject to discrimination in recruitment and selection procedures as a consequence of mental as well as physical health problems
- People who have experienced mental health problems have gained a specific expertise that is valuable to others who experience similar difficulties
- For many people who have experienced mental health problems, the only barrier to employment is an unwillingness on the part of employers to consider them because of their psychiatric history, and
- Many people who have experienced mental health problems can successfully gain and sustain employment if they are provided with the appropriate help and support.

The Trust's User Employment Programme has been successfully developing ways in which employment can be made available to those people who have experienced mental health problems. In line with these initiatives, and in recognition that personal experience of mental health problems among staff can actively enhance the quality of mental health care provided, the Trust will:

- Maintain a Supported Employment Programme Team to provide support in employment, where necessary, to recruits who have experienced mental health difficulties, and take a lead in minimising employment discrimination against people who have experienced such problems throughout the Trust
- Identify “personal experience of mental health problems ” (in addition to the other qualifications and experience necessary for the post) as a **desirable** part of the selection criteria for all clinical posts within the Trust (unless specific exemptions are agreed by the Chief Executive or appointed deputy). Where it is considered that the employment of someone who has experienced mental health problems might be facilitated by the provision of additional employment support, this will be provided by the User Employment Programme Team.
- Actively seek to increase the skill mix of the workforce to include the expertise of personal experience of mental health difficulties by identifying a number of positions where specific accommodations can be made to provide additional support (in the recruitment and retention process) to allow people who have more marked disabilities resulting from their mental health problems to gain and sustain employment. For these supported posts, experience of mental health problems will be an **essential** part of the selection criteria and support will be provided by the User Employment Programme Team.
- Ensure that for all other posts, the experience of using mental health services will not form a barrier to selection to the post providing that the person is otherwise able to carry out the requirements of the job. The Trust will seek to encourage applications from those people who have had mental health problems to demonstrate its commitment not to discriminate against them.
- Offer work experience placements, co-ordinated and supported by the User Employment programme, to people who have experienced mental health difficulties to enable them to prepare for open employment within and outside the Trust.
- Establish a system to monitor success in recruitment of people who have

experienced mental health problems and work towards a position where the Trust's workforce reflects the proportion of the general population who have experienced such difficulties. That is, the Trust should progress towards a target of 25% of its recruits having experienced mental health problems.

- Recognise that the employment discrimination experienced by many people who have had mental health problems may have discouraged them from seeking employment. The following Equal Opportunities statement will appear on advertisements for posts:

The Trust is actively seeking to recruit people currently under represented in the workforce. This includes people from ethnic minorities and people who have experienced mental health problems.

Recent Disability Discrimination Act Cases

Fu v London Borough of Camden (2001) IRLR 186 EAT - Tribunals must consider all of the adjustments requested by a disabled employee;

Cosgrove v Caesar & Howie (2001) IRLR 653 - Tribunal erred in holding the employee's views and those of her doctor were decisive on the issue of reasonable adjustments; the onus is on the employer to consider what reasonable adjustments could be made;

British Gas Services Ltd v McCaull (2001) IRLR 60 EAT - "reasonableness" relates to what an employer did or did not do, not to what the employer thought about; the relationship between employer's knowledge of the disability and the duty to make reasonable adjustments;

London Clubs Management v Hood (2001) IRLR 719 EAT- finding that payment of sick pay could constitute a reasonable adjustment under the Act;

Leonard v Southern Deryshire Chamber of Commerce (2001) IRLR 19 EAT - lower Tribunal erred in finding that an employee's clinical depression was not a disability because on the whole the employee coped quite well, even though her depression affected her mobility, manual dexterity and co-ordination; guidance concerning how a Tribunal should approach the question of mental impairments;

Post Office v Jones (2001) ICR 805 CA - Tribunal's role in determining justification under the Act;

A v London Borough of Hounslow EAT/1153/98 - dismissal for failure to take medication; the relationship between justification as a defence and the Human Rights Act 1998;

Rugamer v Sony Music Entertainment UK Ltd; McNicol v Balfour Beatty Rail Maintenance Ltd (2001) IRLR 644 EAT - upheld Tribunals' finding that employees suffering from functional or psychological overlay did not have a physical impairment; employees not presenting sufficient evidence to show clinically well-recognised illness;

Edwards v Mid Suffolk District Council (2001) ICR 616 EAT - Tribunal erred in failing to consider the impact of an employee's disability on his behaviour at work;

Cave v Goodwin & anor (2001) All ER (D) 163 CA - substantial disadvantage is a question of fact for the Tribunal to determine; duty to make reasonable adjustments does not arise where the employer's working arrangements do not place the disabled person at a substantial disadvantage;

Abadeh v British Telecommunication Plc (2001) IRLR 23 EAT - the meaning of "disability" and the role of the medical expert;

H J Heinz Co Ltd v Kendrick (2000) IRLR 144; the relationship between an employer's knowledge of an employee's disability and "justification" as a defence;

London Borough of Hammersmith & Fulham v Farnsworth (2000) IRLR 691 EAT - the relationship between knowledge of the disability and "justification";

Kapadia v LB Lambeth (2000) IRLR 699 EAT - effect of treatment; attitudes towards depression generally;

East v Lawsons (Bury St Edmunds) Ltd (2000) Bury St Edmunds ET - premature dismissal following absence because of schizophrenic episode;

Goodwin v the Patent Office (1999) IRLR 4 – a leading case concerning mental health and the Act;

Clark v TGD t/a Novacold (1999) IRLR 318 CA – clarifies the appropriate "comparator" for the purpose of the Act; the Act requires a disabled person only to show less favourable treatment on the grounds of disability that is not justified;

Baynton v Saurus General Engineers Ltd (1999) IRLR 604 EAT – emphasises the need for employer to check up-to-date medical position before dismissal; balancing the interests of employer and employee; the interpretation of "justification";

Vicary v British Telecommunications Plc (1999) IRLR 680 EAT - the relevance and provenance of medical evidence to the question of disability;

Watkiss v John Laing PLC (24th December 1999) The Times – case settled when employers admitted discrimination in making assumptions about capacity to do job. Compensation believed to be substantial;

Lang v Redland Roofing (1997) Edinburgh ET – claimant (bipolar disorder) dismissed following sickness absence without finding out full information about her condition;

McLauchlan v Fife Healthcare NHS Trust (1997) Edinburgh ET – Occupational physician made unwarranted assumptions about bipolar condition;

References

1. **The Allitt Inquiry, The independent inquiry relating to deaths and injuries on the children's ward at Grantham and Kesteven General Hospital during the period February to April 1991. HMSO 1994**
2. **Looking Beyond Labels, Widening the Employment Opportunities for Disabled People in the New NHS, NHS Executive May 2000.**
3. **Working Together – Securing a Quality Workforce for the NHS, a framework for managing human resources in the NHS, NHS Executive HSC 1998/162**
4. **The Vital Connection: An Equalities Framework for the NHS, Working Together for Quality and Equality, NHS Executive, HSC 2000/014**
5. **The Management of Health, Safety and Welfare Issues for NHS Staff 2000, NHS Executive, Jan 2001.**
6. **The Pathfinder User Employment Programme, Perkin's Evenson, Davidson, SW London and St George's Mental Health NHS Trust.**
7. **Disability Discrimination Act 1995; HMSO**
8. **Disability Discrimination (Meaning of Disability) Regulations 1996; (SI 1996/1455)**
9. **Disability Discrimination (Employment) Regulations 1996; (SI 1996/1456)**
10. **Code of Practice for the Elimination of Discrimination in the Field of Employment against Disabled Persons or Persons who have had a Disability; HMSO**
11. **Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability; HMSO**

12. **The Health and Safety at Work Act 1974**
13. **The Access to Medical Reports Act 1988**
14. **Guidance on Ethics for Occupational Health Physicians, fifth edition, 1999. The Faculty of Occupational Medicine**
15. **Confidentiality: Protecting and Providing Information, General Medical Council, September 2000**
16. **The UKCC code of Professional Conduct**
17. **Guidance on Professional Practice by the UKCC,**
18. **The Data Protection Act 1998**
19. **The Provision of Counselling Services for Staff in the NHS, NHS Executive, 2000**
20. **Securing Health Together, A long term occupational health strategy for England, Scotland, and Wales, The Health and Safety Executive, 2000**

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