

Disabled people

Disability is the most frequent ground of enquiry and complaint to the Commission in the area of employment. Currently disabled people are estimated as having twice the level of unemployment as their non-disabled peers. However, there are a number of factors that lead the Commission to query whether or not this is an under-estimate.

Employment data for disabled people is only collected every five years in a survey conducted after the main census. It is not collected in other more regular surveys such as the Household Labour Force Survey sampled quarterly or the Income Survey sampled annually or the State Service Commission's annual human resources capability survey. Reliable statistics on the employment of people with disability are collected in the New Zealand Household Disability Survey conducted every five years after the general survey.

During the course of the National Conversation about Work the Commission heard that disabled people were experiencing a particularly difficult time accessing and maintaining employment. Discriminatory assumptions about what people were capable of is a significant barrier to the employment of disabled people.

Without more frequent data gathering, society is unable to monitor the situation for disabled people and also means progress cannot be tracked either. The Commission has identified the development of a full range of social statistics which measure key outcomes as an area of action to progress the rights of disabled people.⁶⁵

International obligations

New Zealand ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2008. The CRPD did not introduce any new human rights, but clarifies the obligations and legal duties of states to respect and ensure the equal enjoyment of all human rights by disabled people.

The purpose of CRPD, expressed in Article 1 is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity.” Included in the principles that govern the CRPD are non-discrimination, full and effective participation and inclusion in society, and equality of opportunity. Article 27 (1) provides a comprehensive list of the rights of disabled people in relation to employment including the employment of people in the public sector (Art.27 (1) g), the private sector (Art.27 (1) h) and the open labour market (Art.27 (1) j).

New Zealand legislation

Disabled people have the same rights and legal entitlements as other New Zealanders. The Human Rights Act 1993 (HRA) and the New Zealand Bill of Rights Act 1990 (BoRA) protect the right of disabled people to freedom from discrimination. Both rely on the HRA definition of disability:

- physical disability or impairment
- physical illness
- psychiatric illness
- intellectual or psychological disability or impairment
- any other loss or abnormality of psychological or anatomical structure of function
- reliance on a guide dog, wheelchair or other remedial means
- the presence in the body of organisms capable of causing illness.

⁶⁵ P278 *Rights of Disabled People* Human Rights in New Zealand 2010. Human Rights Commission

Reasonable accommodation

Reasonable accommodation is a term used to describe the creation of an environment that will ensure equality of opportunity for disabled people, family commitments or particular religious practices. It is most commonly used in the provision of goods and services and employment. The CRPD states "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The denial of reasonable accommodation is a form of discrimination, according to the Convention.

Employers find the legal concept of reasonable accommodation in the Human Rights Act difficult, while disability advocates believe that there are myths about the employment needs of disabled people that need to be countered. Grant Cleland, Chief Executive of Workbridge has observed that most disabled people do not require additional accommodation and the most commonly sought accommodation of those people who do require it, is flexible work hours. Another point made by disability advocates is that every employee requires accommodation of some sort or another, whether it is a desk, chair, or lighting.

In the employment context reasonable accommodation applies to changes to a workplace which are made to ensure that a person who has a disability, family commitments or religious requirements can do a job. This may be as simple as swapping shifts with another employee to accommodate religious observance or installing a ramp for a person in a wheelchair. Whether an employer must make such changes is balanced against the unreasonable cost that may result.

In relation to the provision of services for disabled people, the Court of Appeal has said that there is a presumption that a provider will provide the necessary accommodation unless it is unreasonable. If a person requires special services or facilities (for example, relocation of an office) that it is not reasonable to provide, then the employer or service provider is not obliged to provide them.

In addition, if there is a risk of harm to the individual or others, but measures can be taken to reduce the risk without unreasonable disruption, then the provider or employer should take those measures. If it is not reasonable to take the risk, or the measures necessary to reduce the risk to a normal level are unreasonable, then an employer or provider may be justified in discriminating.

Disability advocates have observed that health and safety concerns based on incorrect assumptions can become a barrier to the employment of disabled people. For example, the Commission heard that a person had been dismissed from his job collecting trolleys in a supermarket carpark because a Labour Inspector said he was unsafe around moving cars because of his learning disability. The trolley attendant had been working at the supermarket without incident for many years. A similar point was made by a group of Deaf who had sought employment that included driving. They said that a significant barrier was the assumption that because they did not hear traffic noise they were less safe than hearing drivers. This assumption ignored their heightened awareness of the visual environment.

State sector

Legislation

The State Sector Act “covers human resource management and general management practice, including requiring State services employers to be 'good employers', to promote equal employment opportunities and efficiency in the organisations that make up the service, and to ensure that employees are imbued with the spirit of service to the community. The CRPD also requires State parties to “employ persons with disabilities in the public sector.”⁶⁶

The wider state sector such as Crown entities and local government are also required to be good employers, have equal opportunities programmes and recognise the employment requirements of disabled people.

Data

The State Services Commission (SSC) no longer collects disability data in the annual Human Resource Capability Survey (HRCS). In the 2005 report the SSC stated, “The collection of disability data in the Public Service is currently under review and disability statistics collected by the survey have not been published since 2002 because of concerns about data quality.”

The HRCS reports on the employment of other equal employment opportunities (EEO) target groups, such as Māori, other ethnic and minority groups and women, and includes representation at senior management levels. Information about the employment of disabled people in the public service comes from the 2006 Household Disability Survey (Statistics New Zealand) and the 2005 Career Progression and Development Survey. *Enabling Ability*,⁶⁷ a 2008 report from the SSC on disabled people in the public service reported:

“The Statistics NZ 2006 Disability Survey indicates that 10.4% of the Public Service proxy group workforce has a disability, compared with 11.2% of the total employed labour force.”

Mainstream Programme

The Mainstream Programme provides a package of subsidies, training, and other support to help people with significant disabilities gain work experience in the State sector. The programme offers a 100% salary subsidy for the first year of employment, and 50% of the salary for the second year as well as funding to meet participants' adaptive technology or specialised assistance costs, training for participants and their supervisors and follow up support.

Currently 221 participants are in the programme, which places over a hundred a year. Mainstream workers are employed in schools and in the public service. The programme leads to permanent work for 41% of participants on average, although not all of the jobs are full-time. Mainstream participants placed in a school are more likely to get permanent work, but that work is more likely to be part-time. Public sector jobs tend to be better paid and for more hours, either fulltime or 30 hours or more a week.

⁶⁶ CRPD Article 27 (1) g

⁶⁷ http://www.ssc.govt.nz/upload/downloadable_files/Enabling-Ability.pdf

Private Sector

Legislation

The private sector is required to comply with the Human Rights Act and not discriminate on the grounds of disability. There is no positive duty toward disadvantaged groups to be ‘good employers’ including having an equal-employment opportunities programme. It is the Commission’s view that mechanisms to address systemic discrimination and disadvantage should be strengthened in both the public and private sectors. Extending the “good employer legislation” to the private sector is one such mechanism.

The CRPD also refers to the private sector specifically in Article 27 (1) (h) which states:

Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.

Employers’ Networks

The EEO Trust promotes equal employment opportunities in the private sector for all target groups and the Employers Disability Network (EDN) provides leadership and specifically encourages and supports disabled people. The network emphasises both the business case for employing disabled people and a rights-based approach. EDN is based on the UK Employers’ Forum on Disability and the Australian Network on Disability and is a not-for-profit network of organisations sharing best practice on working with disability in all areas of business. Patron Dr Roderick Deane writes:⁶⁸

- “The EDN is a group of employers dedicated to ensuring that disabled people get the same opportunities in life as the rest of us and, in particular, have access to jobs and work.
- The EDN aims to help employers understand ways in which jobs can be created for disabled people and to encourage welcoming and accepting attitudes to those with disabilities.
- The EDN believes that disability is simply part of the diversity of our society and that disabled people should not be disadvantaged in seeking work but rather be positively encouraged to do so. For this to happen, employers must have a welcoming and inclusive culture.
- The EDN aims to encourage and foster this sort of positive attitude and make it work in practice throughout New Zealand.”

The Ministry of Social Development provides secretariat support. To date EDN has set up a website, offering support and advice to employers.

It’s about who you know

During conversations conducted around the country as part of the National Conversation about Work it became apparent that employers who had a disabled family member were more likely to employ disabled people. The Commission also observed that people who had acquired their disability after they had been employed were more likely to be accepted as a disabled employee, because they were known in their workplace.

⁶⁸ <http://edn.org.nz/>

Minimum Wage Exemptions

Legislative background

The Minimum Wage Amendment Act 2007 was enacted after the repeal of the Disabled Persons Employment Promotion Act (DPEP). The DPEP had been regarded by many disabled people as “utterly improper and an abuse of human rights”, according to a submission by the Disabled Person’s Assembly (DPA). At the time, it was argued that the changes in the legislation would see disabled people’s employment brought into line with New Zealand and international human rights norms.

The then Minister of Disability Issues, Ruth Dyson said: “The repeal will mean that all sheltered workshops will have to pay everyone they employ at least the minimum wage, unless an individual worker has an exemption. It will also mean that all people who work in sheltered workshops will have access to holiday and sick leave entitlements. To counter concerns about the continuing financial viability of sheltered workshops, the ministry has put in place a system of individual minimum wage exemption permits for workers who are ‘significantly and demonstrably limited’ in their work.”

DPA said that this means disabled workers can be subject to minimum wage payment provisions on the basis of productivity. “In this context, productivity is about comparing a disabled employee’s output with another employee doing the same job and, if it is considered that the disabled employee’s productivity is lower, paying them at a lower rate. It is not a concept used elsewhere in the employment sector.”

The DPEP Act along with the 1983 Minimum Wage Act had allowed for blanket minimum wage exemptions to be given to workplaces that employed disabled people. These workplaces were commonly known as ‘sheltered workshops.’ The law change meant that the individual employee, following an assessment, had to be issued with a permit from the Department of Labour that entitled their employer to pay them a particular amount less than the minimum wage.

The Minimum Wage Exemption Act enables a Labour Inspector to issue a minimum wage exemption permit to a worker if the Inspector is satisfied that -

- (a) the worker is significantly and demonstrably limited by a disability in carrying out the requirements of his or her work; and
- (b) any reasonable accommodations that could have been made to facilitate carrying out the requirements of the work have been considered by the employer and the worker; and
- (c) it is reasonable and appropriate to grant the permit.

Various wage assessment tools are accepted for the purpose of exemptions. Before accepting a Minimum Wage assessment tool, Labour Inspectors have to consider it against set criteria. For example a tool should be balanced and look at both productivity and individual competencies. The tool should be transparent and clearly show how the assessment is linked to wage rates and how the wage rate is calculated. Disability advocates have advised the Commission that the tools used do not appear to be consistent.

National Conversation about Work

The Commission visited ‘business enterprises’ in Invercargill, Dunedin and Christchurch which provide employment for disabled people who would be unable to compete for work in the open labour market. The Commission also heard from disability advocacy groups about the very low rate of pay received by some disabled workers (as low as 15c an hour). They believe that while business enterprises which operate like sheltered workshops remained an option, supported work opportunities in the open labour market were not being fully

implemented. Forms of assistance include supported employment (such as job coaches). Supported employment is usually provided on the assumption that the person will increase their skill levels and competence and that support can be gradually phased out.

Other employment options include micro-financing small business ventures, a mixture of education/training and work and narrowing job descriptions to a range of tasks that the disabled person can manage.

Business enterprises came into being after the repeal of the DPEP Act, which resulted in the closure of sheltered workshops. In reality, people receiving a wage below the minimum have their income supplemented by a social welfare benefit.

The employment of disabled people at rates below the minimum wage is controversial. The Commission heard all sides of the argument – from employers and employees, from business enterprises, from disability advocacy groups and from family members. Opponents of the exemption system say that it is discriminatory and alternate processes that support disabled people to work in the open labour market are necessary. Proponents argue that workers in business enterprises would not otherwise be employed and that working supports social inclusion and promotes well-being.

Facts and figures

Greater transparency around the process of determining minimum wage exemptions has been called for by the disability community. Disability advocates reported difficulty in accessing information from the Department of Labour. The Human Rights Commission wrote to the department asking for information about the number of people receiving exemption permits, rates of pay and about whether or not there was a standardised method of assessing payment rates.

Currently 1076 people receive a minimum wage exemption permit under s8 of the Minimum Wage Exemption Act⁶⁹. In 2001, under the DPEP Act, approximately 5400 people were employed in sheltered workshops. There are 136 employers across New Zealand who employ people who have a minimum wage exemption. Some but not all, are business enterprises.

Rates of pay vary from just under the minimum wage to less than a \$1.00 an hour.⁷⁰

Table 33: Pay rates minimum wage exemptions

| Pay range | Number of permits |
|--------------------------|--------------------|
| More than \$10.00 | 37 |
| \$5 - \$9.99 | 260 |
| \$3.00 - \$4.99 | 213 |
| \$2.00 - \$2.99 | 179 |
| \$1.00 - \$1.99 | 364 |
| Less than \$1.00 | 53 |
| Total | 1106 ⁷¹ |

⁶⁹ Data provided by Department of Labour March 2011

⁷⁰ . ibid

⁷¹ Some people have more than one exemption

The majority (54%) of people with minimum wage exemption permits earn less than \$3.00 an hour.

Disclosure of mental health

From the National Conversation about Work

A particularly vexed issue is whether or not to disclose experience of mental illness. People with experience of mental health issues told the Commission that disclosure on application forms or unexplained gaps in CVs meant they were unlikely to be offered a job interview.

However, non-disclosure carried the risk that their needs will not be accommodated should they become unwell, and in extreme cases be dismissed for dishonesty.

Legal considerations include the appropriateness of questions in the application form and the steps taken to avoid discriminatory practices. One participant with experience of mental illness said, “The crux of the argument around disclosure is that there is still a lot of stigma around employability - there’s the myth that if you’ve got a mental illness you’re actually not employable. You can’t handle stress, you’re potentially dangerous to yourself and to others, you are a lot of extra work, you’re unreliable, you will take lots of time off.”

There were risks either way, disclose and risk not being considered for the job, not disclose and risk being unsupported or being dismissed should you become unwell.

A further meeting attempted to tease out what advice the Commission could usefully provide to prospective employers and employees.

The group suggested that the focus should come off disclosing experience of mental health and onto equality for any worker and their employer. Their advice was to not make it about mental health but ensuring the best person for the job by:

- Focussing on what an individual can do, not do but could learn, and what is outside their capability.
- Challenging discriminatory assumptions about ability based on diagnostic labels.
- Having conversations throughout any person’s employment about their needs and support required to do a job well, regardless of labels and assumptions.

Ensuring best fit requires detailed job descriptions and person specifications that are inclusionary.

The Employers’ Disability Network suggests that employers concentrate on what needs to be done rather than how the work should be done, for example it is better to ask, “this job involves working under pressure to tight deadlines. Tell us about situations where you’ve been under pressure and how you ensured you met deadlines” rather than “how will the pressure of tight deadlines affect your disability?”⁷²

Conversations about how to meet people’s needs or to support them to develop their performance at work is good practice for all employees. However, honest engagement requires a safe and supportive work environment. This conversation could include meeting out-of-work needs such as childcare and in-work needs like professional development needs as well as being responsive to individual needs related to health. The group discussed the

⁷² See *Manager’s guide A best practice approach to working with disabled employees* Employers Forum on Disability and Workbridge 2007 This guide has been adapted for New Zealand and is available from Workbridge or Employers’ Disability Network.

mutual obligations inherent in acting in “good faith.” The employee should be able to say, “this is what I’ll do to keep well at work” and the employer needs to be able to say “this is what I can do if concerns arise.” This does not mean the employer takes on a social work role, rather that there is a plan such as someone to contact. The group commented that these discussions should be held after a 90 day trial period to ensure both employer and employee are confident in their ability to do the job and disclosure can be made without fear of prejudice or discrimination.

There is a cost to employers if employees are afraid to disclose. For example, if medication has been identified by the individual as a useful part of their recovery planning, the employee may stop taking this medication if drug screening might reveal a condition that they have not disclosed and which is not accepted by the organisation. Presenteeism and absenteeism may occur if a person does not feel confident to request sick leave to become well. The Commission heard that having experience of mental health issues could not be an excuse for lack of productivity “If you can’t do the job, you can’t do the job. Both parties need to be fair and reasonable”.

Experience of mental health issues is common in New Zealand:⁷³ Almost half (46.6%) of the population are “predicted to meet criteria for a disorder at some time in their lives, with 39.5% having already done so and 20.7% having a disorder in the past 12 months.”⁷⁴

Legislation

Discrimination

Because disability, which includes “mental illness”, is a prohibited ground under the Human Rights Act 1993 an employer should not seek general information about a job applicant’s medical or ACC history. Employers can ask whether or not a job applicant has the abilities needed for the job. This includes establishing whether or not an applicant has any medical conditions or disabilities that might mean the work could not be satisfactorily carried out. A job applicant should first be made aware of the job’s requirements and then asked about any medical conditions or disabilities that might prevent them from carrying out the work satisfactorily.

Without the context of a full job description the following question could be construed as an intention to discriminate:

Do you have, or have you ever had, a medical condition caused by an injury, illness, disability or gradual process that the tasks of the position may aggravate or contribute to, or that may affect your ability to carry out the work of the position applied for?

If confronted with such a question the applicant could answer “No”, if they believe that any medical condition will not affect their work. Alternatively the applicant could say, “On the limited information available to me my answer is ‘No’”. If the answer is “Yes” the applicant could then describe what they will do to keep well at work and what the employer could do.

However, once a full job description is given, questions about a person’s ability to meet specific job requirements are legitimate. In some instances, where a medical condition makes performance of the job unsafe (for example, a driving job when medication causes drowsiness) then the applicant has a responsibility to declare the medical condition.

⁷³ Oakley Browne, M. A., Wells, J. E., & Scotts, K. M. (Eds). (2006). [Te Rau Hinengaro: The New Zealand Mental Health Survey](#). Wellington: Ministry of Health.

⁷⁴ Ibid

A guidebook for job seekers⁷⁵ with experience of mental health issues advised that there are two situations in which a job seeker must disclose:

1. If your disability or health condition would pose a risk to yourself or others in the workplace. (e.g. if you were applying for a job as a truck driver but you were on medication that made you very drowsy making it unsafe for you to drive).
2. If your disability or health condition meant you would not be able to satisfactorily perform the tasks required in the job AND would be unreasonable to accommodate (e.g. if you were applying for a job in sales with lots of customer contact, but you had a social phobia and couldn't talk to strangers.)

The guidebook goes on to say, "if either of these applies, you need to ask yourself: "Is this the right job for me?"

Good faith

Under the Employment Relations Act both employee and employer are required to act in good faith. The Department of Labour explains good faith in the following way:

"Employers and employees are obliged to deal with each other at all times fairly, reasonably and in good faith.

In broad terms, this means that both employers and employees must:

- act honestly, openly, and without hidden or ulterior motives
- raise issues in a fair and timely way
- be constructive and cooperative
- be proactive in providing each other with relevant information and consider all information provided
- respond promptly and thoroughly to reasonable requests and concerns
- keep an open mind, listen to each other and be prepared to change opinion about a particular situation or behaviour, and
- treat each other respectfully.

Good faith generally involves using practical common sense. Acting in good faith reduces the risk of conflict and problems. It is also a minimum requirement of the Employment Relations Act 2000.⁷⁶

Legal cases

In 2002 the Employment Court ruled that a question on a pre-employment form – *Do you have any medical problems of any kind?* – was unlawful in light of s. 23 of the Human Rights Act which prohibits questions that indicate or could reasonably be understood as indicating an intention to unlawfully discriminate against an applicant for employment. The question would enable an employer to reject an applicant on the basis of a condition which would have minimal or no impact on work performance.

In this case the employee answered "yes" to the question and gave details of one condition; but she did not mention several other medical conditions. After time off work because of illnesses the employer ascertained that she suffered from several medical conditions which she had not disclosed. The employer dismissed her because of her failure to disclose her full medical situation. The court decided that she was not obliged to disclose all her medical conditions.⁷⁷

⁷⁵ *Taking the first step A guidebook for job seekers with experience of mental health issues* LEAP Like Minds Employment Advocacy Project 2005

⁷⁶ <http://dol.govt.nz/er/solvingproblems/keyprinciples/goodfaith.asp>

⁷⁷ *Imperial Enterprises Ltd v. Attwood* [2002] 2 ERNZ 740.

In 2009 the Employment Relations Authority considered a situation where an employee had not disclosed her bi-polar condition on two separate occasions when her failure to do so provided an inaccurate answer. The employer subsequently failed to accommodate her condition. The applicant was able to establish that her condition was one that her employer needed to reasonably accommodate but had failed to do so. The Authority deducted 25% from the damages as the employee's failure to disclose contributed to the discrimination grievance arising.⁷⁸

In 2010 the Authority upheld a decision by an employer to dismiss an employee who failed to disclose on a pre-employment questionnaire that he had a pre-existing mental health condition. Of critical importance to the Authority's decision was the employer's practice in assessing the information about physical and mental health provided by applicants. The information is considered by a different person to that who assesses work history and standard CV-type information. The employer considers in detail an applicant's medical history before making a decision whether to employ or arrange a suitable programme to facilitate employment.

The Authority concluded that the separate consideration of the detailed medical information from other aspects of the recruitment process indicated that the medical information was requested for the purposes of assessing an applicant's physical and mental fitness to perform the role and duties, it was part of assessing whether the person was qualified for the job. The Authority did not accept that the form could reasonably be taken as indicating an intention to unlawfully discriminate.

The employee said that such questions should only be asked after the initial assessment had determined that an applicant was otherwise suitable for employment. Otherwise there is a risk that a suitable applicant, who is entitled to reasonable accommodation, might be discriminated against.

The Authority said that employer was entitled to assess its legal obligations. It can only do that by asking appropriate questions to elicit the necessary information from the applicant and, if necessary, seeking expert reports. The Authority noted that there was evidence of the employer continuing to employ people who suffer from mental illness and the employer does not discriminate against people with a mental illness. The evidence supported the employer's claim that it needs to know about the nature of a person's illness in order to assess whether it can reasonably and safely be accommodated so as to continue or permit the person's employment.

The Authority commented on the employee's evidence that he had been advised by an advocate to say that his false answers resulted from miscalculation rather than a deliberate decision to withhold information because of his fear of discrimination:

"The statutory obligation is for those in an employment relationship to deal with one another in good faith which includes not misleading one another. Acting on advice, [the employee] breached that obligation ... That leads on to a point made by counsel about the stigma attached to mental illness. It might be understandable that a young man such as ... would think he should hide his mental health history to avoid any risk of discrimination. There will be differing views on that. In doing so, however, [the employee] exposed himself to the risk of adverse consequences should his employer later discover his falsehood. His other option was to properly answer the questions asked and rely on the anti-discrimination provisions in the Human Rights Act, and the remedies available for a proven breach of that Act if necessary."⁷⁹

⁷⁸ *Atley v Southland District Health Board* (2009) 8 HRNZ 888; (2010) 9 NZELC 93,427.

⁷⁹ *Lidiard v New Zealand Fire Service Commission* ERA Christchurch CA51/10, 8 March 2010.

Future action

- Urgent action is required in the state sector, led by SSC which includes:
 - Adequate data capture so that progress can be monitored and is transparent
 - Special measures (affirmative action programmes) with targets to increase the numbers of disabled people into decent employment in the public service.
 - Target setting for major public service departments to improve the employment of disabled people. This is required by Article 27 (1) (g) by the CRPD that New Zealand has ratified which reads, *Employ persons with disabilities in the public sector.*
- Promote inclusive employment practice in the private sector through organisations such as the newly-formed Employers' Disability Network.
- Amend the Employment Relations Act 2000 to include a positive duty to be a good employer to the private sector in addition to the public sector.
- Review the implementation of the minimum wage exemption legislation in consultation with the disability community and make transparent its current operation through annual disclosures by the Department of Labour. The review should include: assessment of eligibility and rate; numbers of exemptions; pay rates determined; Human Rights implications of the policy and its implementation; the extent to which employment in open settings is being supported and; employers issues.
- Provide guidance on the disclosure of mental health issues to employers, employees and job seekers through the Commission's widely-distributed *Getting a job: An A to Z for employers and employees, Pre-employment guidelines.*