

THE DEPARTMENT FOR WORK AND PENSIONS (DWP)

DEVELOPING A FRAMEWORK FOR VOCATIONAL REHABILITATION

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL16/04)**

JULY 2004

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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VOCATIONAL REHABILITATION

Introduction

1. APIL welcomes the opportunity to put forward its comments in response to the Department for Work and Pensions (DWP) discussion paper concerning the development of a framework for vocational rehabilitation. APIL fully supports any incentives and schemes which promote rehabilitation. While APIL is a small employer in its own right, please note that the following response is submitted as a stakeholder representing the interests of personal injury victims. In summary, while APIL agrees with the proposed description of vocational rehabilitation, we feel that it needs to be expanded so as to recognise all the elements which are involved in rehabilitation. Furthermore we are concerned that the discussion document fails to consider the other aspects of rehabilitation outside the workplace – for example, initial therapeutic and medical rehabilitative intervention.
2. In order to effectively promote vocational rehabilitation, as well as rehabilitation in general, APIL feels that the business case for rehabilitation needs to be properly research and stated. If the advantages of rehabilitation are presented, employers will act out of benevolent self-interest to provide rehabilitation for their employees. APIL believes that it is vital that the provision of such rehabilitation should occur as early as possible and that the provision of rehabilitation should not in any way be affected by concurrent legal issues.
3. Although there are benefits to the employer of using rehabilitation, APIL feels that any proposed framework should also highlight the employer's statutory duties under current legislation. APIL's concern is that the present Disability Discrimination Act (DDA) is not being effectively used, as well as being confusing to both employers and employees. APIL proposes that the finalised framework for vocational rehabilitation should be included within any future developments within the DDA.

4. APIL feels that a more appropriate, and additional, legislative solution to the provision of rehabilitation would be to have a statutory implied term applicable for all employment contracts stating that the employer must consider rehabilitation for a worker wishing to return to work after an accident. This 'consideration' by the employer would in turn be monitored via an approved code of practice.
5. Finally, APIL considers that the information gained from responses to the discussion document should be used for educational and training needs in terms of what works for vocational rehabilitation within current workplaces.

Definition of Vocational Rehabilitation

Question 1

Does the description of vocational rehabilitation we are using correspond to your understanding and/or practice of vocational rehabilitation?

Yes **No**

If not, what do you suggest we might include or exclude from the description?

6. While APIL agrees with the description used, we feel that it should be further expanded to emphasise the importance of the entire rehabilitative process, in particular the initial and ongoing medical treatment, in addition to vocational rehabilitation. We are concerned that the description, and the discussion document as a whole, is overly focused on the provision of vocational rehabilitation as it occurs after a person has 'recovered' from an accident. It fails to take into account the initial therapeutic rehabilitative treatment. Admittedly the discussion document only purports to address vocational rehabilitation, but APIL considers that vocational rehabilitation cannot, and should not, be viewed as being

separate from the other elements involved in the rehabilitation process. The provision of medical and rehabilitative treatment should not occur in isolation from the provision of vocational rehabilitation.

7. A further problem is that while the discussion document considers the options open to an injured person returning to work, APIL has found that the difficulty with this scenario is that once a client has returned to a state of health from which they can return to work, the chances are they have already lost their job.

The business advantages of rehabilitation

8. APIL feels a key aspect of any proposed framework is to provide employers with a strong and robust business argument for their adoption of rehabilitation practices. Indeed this is also true of any move to promote the wider use of rehabilitation. We believe that a crucial part of any such business case would be to establish *why* it is worthwhile to have a rehabilitation strategy, in addition to what steps an employer should take to help an employee get back to work.
9. In order to establish a strong business case, APIL believes that further research on rehabilitation is necessary. The aim of this research would be to demonstrate that it is cost-effective for a company to put funds into the rehabilitation of injured workers. The benefits they would gain from an employee's early return to work – less business disruption, no need to re-advertise the post and no need to train the new employee – would outweigh the initial cost outlay of rehabilitation, and would eventually lead to the avoidance of other direct and indirect employment costs. Such considerations could be seen to lead employers to adopt rehabilitation through enlightened, or benevolent, self-interest.

Employer's involvement in rehabilitation

10. APIL considers that in order for the rehabilitation process to work effectively the employer should be involved as early as possible and that rehabilitation should take place regardless of liability issues. With early dialogue between the employer and the employee, it is possible to monitor the success of early rehabilitative interventions and introduce the employee back into the workplace gradually. For example, an APIL member had a colleague who suffered from a heart-attack. After the initial recovery, the colleague was keen to return to the workplace. On returning to the workplace, however, he found that he was struggling with his caseload. Rather than lose a valuable employee the firm paid for a private medical assessment in order to monitor his medical and workplace needs. Early and constant communication meant that the needs of both parties – the employer's need for the return of a trained worker and the employee's need for the benefits of work – were satisfied.

11. One of the most difficult aspects of any rehabilitation claim is where there is a dispute over liability. APIL has found that it is in these circumstances, where both the employer and insurer are unwilling to pay for any initial rehabilitation treatment, that the employee is most likely to lose his job. APIL feels that rehabilitation should be provided to employees regardless of the continuing legal process, as the aforementioned financial and business benefits of providing such support outweighs any potential cost to the employer. Therefore the impact of a personal injury claim should have no bearing on the provision of rehabilitation for an employee looking to return to work.

Statutory Duties of Employers

12. Although there are benefits to the employer of using rehabilitation, APIL feels that any proposed framework should also highlight the employer's statutory duties under current legislation to make reasonable adjustments for injured employees returning to work. The appropriate

analogy for the use of both sanction-based and reward-based incentives would be that the benefits provided by rehabilitation should act as the carrot for the employer, while the legal penalties imposed by the Disability Discrimination Act 1995 (DDA) can be seen to be the stick.

13. APIL is concerned, however, that in order for the DDA to act as the effective ‘teeth’ of any rehabilitation framework, it must be working effectively. We feel that the DDA, while a significant piece of legislation, is not achieving its aims and is failing to provide injured people with the necessary protection in the workplace. The Disability Rights Commission’s 2004 monitoring report¹ on the DDA found that *“a number of barriers continue to have an impact on the effective implementation of the DDA”*. These barriers included *“financial costs and access to legal representation disproportionately affect[ing] ... claimants”*. In addition *“the DDA definition of disability continues to be highly problematic for both applicants and respondents”* with many claimants having the *“burden of proof on them to establish that they are covered by the DDA’s definition of a disabled person”*. In terms of the employers *“the justification defence was ... [a] legal issue in which there was confusion and lack of understanding”*.

14. Some of the problems which the implementation of the DDA faces are not related to the adoption of the act in the workplace, but rather relate to the provisions contained within the act. For example, one of the difficulties with the DDA and its interaction with the provision of rehabilitation is that there is a natural tension between dismissing somebody on the grounds of capability and the need to make reasonable adjustments to accommodate people with disabilities. This matter is further complicated via the confusion which the justification defence – i.e. an employee is dismissed on the justifiable grounds of lack of capability – produces, and the oblique definition of disability.

¹ Disability Rights Commission – ‘Monitoring the Disability Discrimination Act (DDA) 1995 Phase 3’. The full report can be found at: www.drc-gb.org/publicationsandreports/monitoring.asp

15. APIL believes that the laws surrounding disability discrimination can be both complex and bewildering, not just for claimants, but also for small and medium sized businesses (more commonly know as SMEs). APIL proposes that any final framework should detail the necessary provisions concerning the DDA for both employers and employees. This will allow both parties to be fully aware of their legal obligations and rights, and hopefully lead to a fuller consideration of returning an injured employee back to the workplace.

16. APIL proposes that any framework produced should be explicitly included within any future revisions to the DDA. While the statutory obligations imposed by the DDA can be seen to act as a sanction-based incentive for employers to fully consider returning an injured, or disabled, employee to the workplace it does not directly advocate the provision of rehabilitation. The inclusion of a rehabilitative framework within the DDA would help endorse vocational rehabilitation in conjunction with the detailed statutory provisions contained within the act.

Implied term in contract for rehabilitation to be considered

17. APIL proposes that the Government should legislate so that all employment contracts have an implied term which specifies that the employer must consider rehabilitation in the event of an employee being injured or incapacitated. In addition there should be a minimum level of activity which must be shown to indicate consideration. The inclusion of such an implied term is reflective of the recent introduction of statutory minimum dismissal and disciplinary and grievance procedures within the Employment Act 2002 and which are due to come into force from October 2004. APIL believes that this measure would ensure that rehabilitation, vocational or otherwise, would be considered in all possible situations, and would hopefully lead to its wider use.

18. In terms of the consideration of rehabilitation, APIL proposes that the minimum level of activity which would need to be shown by the employer

so as to comply with the implied term could be evidenced by a generic rehabilitation policy, for example an Advisory, Conciliation and Arbitration Service (ACAS) Approved Code of Practice. Please note that APIL was directly involved in the development and formulation of the Rehabilitation Code with insurers, judges and BICMA², and we are in the process of producing an APIL Best Practice Guide to Rehabilitation. If an approved code of practice was to be drafted, APIL would be more than willing to meet and be involved.

19. APIL feels it is essential that rehabilitation is an integral part of an employer's health and safety strategy, and we believe this change will only be effected if employers are under a duty to consider rehabilitation. A precedent for statutory consideration can be seen in the Government's legislation concerning the right to flexible working. From April 2003, employers have been required to *consider* applications for flexible working from employees who are parents of children aged below six, or of disabled children aged below 18. Employers who do not consider requests seriously risk being taken to an employment tribunal and possibly having to pay compensation to their employee. It is also possible that the tribunal will order the employer to reconsider the request. We are not suggesting (at this stage at least) a right to rehabilitation. This proposed measure is intended to raise the awareness of rehabilitation in the workplace and to remove the employee's apprehension of requesting rehabilitation from his employer. By ensuring that employers have a statutory duty to consider rehabilitation the needs of the employee shall be suitably protected and they would hopefully receive the full benefits of rehabilitation.

² Bodily Injury Claims Management Association

Question 3

From your experiences of vocational rehabilitation which approaches work best and which work less well and for whom?

20. APIL members' experience of vocational rehabilitation is that in the vast majority of cases it is simply not provided by companies, regardless of size or composition. APIL believes there is still a cultural reluctance for many companies to keep a job open and available once someone has been badly injured or hurt. Subsequently the injured person finds it difficult to find his way back into the labour market. This reluctance can be seen to be partly due to the 'all-or-nothing' approach which 'sick-notes' endorse; either you are fit to work or not. There does not appear to be a half-way house between these two extremes. APIL proposes that the eventual framework should help endorse a culture of value in respect of workers who have been injured and are looking to return to the working environment.

21. While APIL believes that there are companies and firms who do provide excellent rehabilitation services, including vocational rehabilitation, to their employees, we are concerned that these types of companies are few and far between. Any proposed framework needs to educate the vast majority of companies about the way and means of gaining access to rehabilitation, as well as the benefits which rehabilitation can provide to a business. In particular SMEs need to be targeted, as it is these businesses which tend to have under-funded and less specialised human resource (HR) or personnel departments.

22. APIL considers that the examples of good vocational rehabilitation practices, as requested by the discussion document, will greatly enhance any educational programme which accompanies the framework. Yet we feel that simply providing examples of good practice will not compel the wider use of rehabilitation amongst many businesses. Indeed APIL envisages that replies to the current discussion document, and users of the eventual framework, will come from organisations which are currently

active in promoting rehabilitation. Organisations which do not currently offer rehabilitation are unlikely to either respond or potentially pay much attention to the final framework.