

Prove it: Discrimination by the Backdoor

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December 2020

EmployAbility is using its platform on International Day of Persons with Disabilities, to draw attention to the common practice of employers requesting that neurodiverse candidates provide medical evidence of their condition, before being provided with adjustments in the recruitment process. Our aims are threefold. First, to explain why we believe this practice is not permitted under the legislation. Second, to urge employers to refrain from making such requests, on ethical as well as legal grounds. And third, to invite the Equality and Human Rights Commission to provide clarification.

Background The Equality Act Section 60

Section 60 of the Equality Act 2010 contains a prohibition on asking pre-employment questions about disability or health. It is our understanding that this prohibition was intended to do two things: reduce discrimination (resulting from recruiters making decisions about a person's ability to perform a role based on their own assumptions); and address disabled applicants' reluctance to apply for jobs (knowing they would be asked intrusive questions). There are some necessary exceptions to the prohibition. For example, it is permissible to ask whether reasonable adjustments are required for any stage of the recruitment process.

Why We Don't Believe This Practice is Permitted by Law

The section 60 prohibition on asking disability or health-related questions, was included in the legislation to avoid discrimination in the form of wrong judgements about a candidate's ability to do the role itself, and to encourage disabled candidates to apply for roles without fear of having to divulge highly personal information. Asking for medical reports undermines both objectives. Moreover, the prohibition extends to questions about the adjustments that would be required in the workplace, yet demanding and having access to a person's medical records, provides exactly this information. Had it been Parliament's intention to allow employers to request evidence of this sort, we would expect the legislation to say so explicitly, particularly given that the right to ask for evidence of a disability is expressly provided for when the job in question requires its holder to have a specific disability.

More often than not, employers ask to see an educational psychologist's report, describing the person's condition and confirming the amount of extra time they need for university exams. And yet there is no reason why an identical adjustment would be appropriate for the sorts of assessments a candidate will come across during the recruitment process, such as psychometric tests. These tests are so different in nature to academic ones, that asking about the adjustments provided for one cannot legitimately inform what should be provided for the other. Demanding a report containing highly sensitive information about a person's disability, in order to draw a conclusion about which adjustments should be given for tests of a completely different nature, is both misguided, and possibly disproportionate under both the Equality Act and GDPR.

We also find this practice to be discriminatory in practice. We are not aware of a single case where a person with a physical or sensory impairment was asked to provide proof that the adjustment they requested was needed. The vast majority of candidates who are being asked to hand over their medical records or psychologists' reports, are those with a neurodiverse condition. Individuals with a hidden condition which requires adjustments similar to those which neurodiverse candidates need, are also being asked to provide proof. There cannot be different rules depending on the type of disability.

Why Employers Should Refrain from Requesting Evidence

Asking a prohibited question during the recruitment process, or failing to provide an adjustment because a candidate chooses not to share a medical report, could constitute unlawful disability discrimination.

Legal risks aside, employers have no reason to take this approach. There is a negligible chance that a candidate is being untruthful in asking for an adjustment. Disabled people tend to be extremely concerned about discrimination, and avoid asking for adjustments which would provide them with a level playing field. Their primary concern is often avoiding being seen as difficult in an already hyper-competitive job-market. It is counter-intuitive to suppose that significant numbers of non-disabled applicants are willing to risk subjecting themselves to exactly this discrimination in order to obtain adjustments that will provide them with limited or no real advantage.

The costs involved in providing adjustments are generally minimal. In contrast, the reputational advantages of being seen as an empathetic, inclusive employer are very significant. There is no need to ask for medical evidence that an adjustment is required for a particular element of the recruitment process since there are other stages, and other ways, of assessing whether someone has the right skills for the job.

And then there is the impact on mental health. Candidates describe feeling extremely anxious at being asked to hand over private medical information to potential employers. We repeatedly hear that they didn't know how to refuse, or if they did, came under pressure to comply. The incidence of mental health conditions amongst neurodiverse individuals is high, often because of the barriers and misunderstandings they face every day. It is unconscionable for employers to exacerbate these difficulties. In terms of equal access to work, they have a moral duty to be part of the solution rather than part of the problem.

Employers who are not comfortable providing adjustments for neurodiverse candidates without proof, may wish to rethink recruitment processes which have discrimination or bias built in to them. They should look at the points at which they ask candidates for medical evidence, and ask: Is this genuinely a core competency of the role? If so, can I test it in a different way?

Request for Clarification

We would welcome the Equality and Human Rights Commission to provide guidance on this issue.

Should you have any questions about any issue raised here, or anything else you wish to discuss, please contact either tab.ahmad@employ-ability.org.uk or cindy.mcalister@employ-ability.org.uk