

Question

- **When – either during or post recruitment – can an experienced manager be fixed with constructive knowledge of an undeclared disability, for instance, signs of dyslexia or a mental health condition?**
- **What is HR expected to know and do?**

When is constructive knowledge relevant?

- No disability discrimination if the employer:
 - did not know; and
 - could not reasonably have been expected to know about the disability
 - in (a) discrimination “arising ” from disability and (b) reasonable adjustment claims

Constructive Knowledge Defence

- EqA -no constructive knowledge defence in disability claims of:
 - Direct discrimination
 - Indirect discrimination
 - Harassment
 - Victimisation

Reasonable Adjustments cases only

- Constructive knowledge also relevant for a second reason
- Employer not liable unless it knew or could reasonably have been expected to know that the person is likely to be placed at a “substantial disadvantage”

Disability – Always apply the Statutory Test

- Deemed disabilities: Cancer-HIV-MS
- Key Definition:
 - physical or mental impairment
 - which has a substantial and long term adverse effect
 - on person's ability to carry out normal day to day activities

Warning !

- When considering if an employer could reasonably be expected to know of a disability.
- Best practice to use the statutory words and **NOT** a shorthand such as “Constructive Knowledge”
 - *EAT President Langstaff in Donelien v Liberata UK Ltd UKEAT/0297/14*

Burden of Proof on the Employer

- At Tribunal
- Burden of Proof is on the employer to show it was not reasonable for it to be expected to know about the disability
- Employer needs to show, in detail, what it did do and that this was reasonable in the circumstances

Employment Statutory Code of Practice(1)

- Provides guidance – Not legally binding
- Tribunal can take it into account
- See chapters 5, 6, 10 and 16 of the Code
- Issues to consider include
 - Dignity
 - Privacy
 - Ensure personal information is confidential

The Code (2)

- “If employer’s agent or employee (e.g. OH or HR) know of an actual or potential disability the employer will not usually be able to claim ignorance.”

Not applied in direct discrimination claim

- **Gallop v Newport CC UKEAT/0118/15**
- Single decision maker
 - Held the mind of the single decision maker only must be examined

The Code (3)

- Information may come through different channels
- Employers need to ensure there is a means – suitably confidential, subject to person's consent, to bring that information together to make it easier for employer to fulfill their duties.
- If person gives consent but OH fails to pass on relevant information in reasonable adjustments/discrimination arising from disability claims that provides no defence

Pre-recruitment Process

- Unlawful to ask about disability
 - 3 Exceptions:
 - To establish if person can sit assessment.
 - To establish whether employer should make reasonable adjustments for applicant to sit assessment.
 - To establish if applicant will be able to carry out a function which is “intrinsic” to the job.

Pre-Recruitment

- Prospective employer should:
 - Request job applicant to disclose any disability relevant to the “3 exceptions” (above) before interview

At Recruitment Stage – “Imputed Knowledge”

- Employer’s knowledge likely to be limited to what applicant has disclosed.
 - Best to have independent panel
- If 1 of several interviewers knows the applicant (and their condition) but does not disclose- this knowledge will be imputed to the others

DWP v Hall UKEAT/0012/05

Potential Signs of Undisclosed Disability during recruitment process may include

- Bad Stammer
- Poorly worded written responses (dyslexia ?)
- Very “down” (anxious or depressed?)
- Very obese/shortage of breath

But – There could be various explanations none of which are disability related

What should interviewer(s) do if they suspect potential disability?

- NB stammering/dyslexia/mental health issues are not automatic disabilities.
- Check that applicant was asked to disclose any disability for any of the 3 permissible reasons
- Ask again at interview if applicant has a disability relating to fitness to undergo assessment/
/reasonable adjustments/condition which impacts ability to carry out an intrinsic function of the job)

Claims are fact specific

- **Yaqub v Calderdale Council (Northern Ireland IT)**
- Employee disclosed stammer in application form but did not state he had a disability or seek adjustments
- ET held it was obvious to interviewers that the job applicant with a severe stammer was placed at a substantial disadvantage
- Providing more time wasn't enough
- The employer should have recognised the disability and re-arranged interview to allow written answers or use of technology
- Held failure to make reasonable adjustments

The Code's guidance at Interviews (P 239)

- *“The practical effects of an employer’s duties may be different if a person whom the employer previously did not know to be disabled (and it would not be reasonable to expect them to have known this) arrives for interview and is substantially disadvantaged because of the arrangements. The employer will be under a duty to make a reasonable adjustment from the time that they first learn of the disability and the disadvantage. However, the **extent of the duty is less** than might have been the case if they had known (or ought to have known) in advance about the disability and its effects.”*
- **Treat this guidance with caution**

Dyslexia and recruitment (1)

- Not everyone with Dyslexia has a disability
- Problems unlikely to emerge at verbal interview
- Most issues relate to the written word
- If no (written) assessments to be undertaken you cannot raise the disability issue unless specific reading or writing skills are an “intrinsic” part of the job which may be difficult to argue
- Risk that any initial written response (not part of “an assessment”) may influence outcome

Dyslexia and recruitment (2)-Scenario

- Great job application ruined by spelling errors.
- Is the applicant dyslexic (and possibly disabled) or a “texting cryptic guru” (who can’t spell)?
- Do you relax the rules if potential dyslexia not disclosed?
- Options –Don’t reject but phone up to ask if anything needs to be done to assist the applicant in any “assessment process”.
- OR simply proceed to interview

Post Recruitment – Key Issues (1)

- HR should write to newly appointed employee and ask them to confirm in writing if they have any disability for which the employer may need to consider reasonable adjustments
- NB Employees not obliged to disclose a disability under the Equality Act

Post Recruitment – Key Issues(2)

- Warning bells should ring if problems develop re employee's performance /attendance/ behaviour
- Manager /HR should investigate
- Issues should be raised with employee and any explanation or reasons for the “problems” discussed to elicit any underlying disability

Post Recruitment – Key Issues (3)

- Undisclosed mental health issues
- Warning sign if employee refuses to co-operate /consent to release of medical reports
- Employer needs to consider—Any evidence that the statutory test of Disability applies?
- Do all that is reasonable to have the employee referred to Occupational Health
- Consider if there is a contractual right to require the employee to undergo a medical

Medical Assessments

- Remember different rules apply for a GP's report (requires employee's consent /can review and suggest amendments) subject to Access to Medical Records Act 1988
- And report commissioned from a medical practitioner not involved in treating employee (employee has no right to seek to amend report) but still requires employee's consent

The buck stops with the Employer!

- Employers decide if person has a disability **NOT** Occupational Health

Gallop v Newport CC [2013] EWCA Civ 1583

- Provide OH with detailed instructions appropriate information – job description /work role and ask them to address the statutory definition of disability
- If OH say employee is disabled that will normally suffice

Do what is “reasonable” to determine if person has a disability (1)

- If OH report states worker not disabled do not rubber stamp this
- Examine if:
 - The report analyses the statutory definition
 - If not, and no detailed reasons given seek written clarification
 - Check whether your understanding of employee’s condition is similar to medical findings

Do what is “reasonable” to determine if person has a disability (2)

- If required seek an alternative opinion
Consider additional checks. For example:
 - Arrange and minute return to work meetings
 - Engage with Employee on a regular basis
 - With consent, seek dialogue with the GP
 - Check Absence records/duration /Fit Notes
 - Check HR file for any relevant information
 - If employee not co-operative – consider why?
 - NB Each case will be fact specific

Summary

- And remember
- The test of whether the employer ought to have reasonably been expected to know of the disability is just that
- “The test is nota counsel of perfection the test is one of reasonableness”

Mr J Langstaff (EAT President) in

Donelien v Liberata UK Ltd EAT/0297/14

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