

When can an experienced manager be fixed with constructive knowledge of an undeclared disability?

What is HR expected to know and do?

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Introduction

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?

- What is meant by “constructive knowledge”?
- Is the type of claim relevant?
- What should an experienced manager do?

What is meant by “constructive knowledge”?

- Employees may not actually say “I am disabled”
- An employer cannot evade liability (if it is obvious) by saying “he didn’t tell me”
- Not all workers who meet the definition of disability may think of themselves as a “disabled person”. Not all workers would want to label themselves as a “disabled person”
- A balance needs to be reasonably struck

What is meant by “constructive knowledge”?

- EHRC Code of Practice: advises that employers must “do all they can reasonably be expected to do” to find out this information (paragraph 5.15)
- Although it emphasises that “when making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially” (paragraph 5.14)

Is the type of claim relevant?

- Direct Discrimination
- Indirect Discrimination
- Discrimination arising from Disability
- Failure to make Reasonable Adjustments
- Harassment on the grounds of Disability
- Victimisation

Is the type of claim relevant?

- Direct Discrimination

Direct disability discrimination occurs where, because of disability, a person (A) treats another (B) less favourably than A treats or would treat others - section 13(1), Equality Act 2010

If A is not aware that B is disabled how can A treat B less favourably because of disability (that A is unaware of)?

Paras 5.17 to 5.19 EHRC Statutory Code of Practice on Employment provide that employers will usually not be able to use the knowledge defence to a disability discrimination claim if an employer's agent or employee (such as Occupational Health) has knowledge. The Guidance is clear that knowledge is not imputed if it is gained by a person providing independent services to a worker, such as counselling.

Is the type of claim relevant?

- Direct Discrimination

Gallop v Newport City Council UKEAT/0118/15/DM

In direct discrimination claims knowledge cannot be imputed to the organisation generally or to any or all of its employees for all purposes and in particular in the context of deciding whether there has been discriminatory conduct

Citing the Court of Appeal in CLFIS (UK) Ltd v Reynolds [2015] IRLR 562 - in the case of a sole decision maker it is his or her state of mind not the state of mind of those providing information to the decision maker which is material

Since the disability itself must be the conscious or subconscious reason for the treatment, there must be some evidence that A knew of the disability

Is the type of claim relevant?

- Indirect Discrimination

A applies to B a provision, criterion or practice (PCP).

B has a disability

A applies (or would apply) that PCP to persons who do not have B's disability

The PCP puts (or would put) those with B's disability at a particular disadvantage when compared to other persons

The PCP puts (or would put) B at that disadvantage

A cannot justify the PCP by showing it to be a proportionate means of achieving a legitimate aim

Is the type of claim relevant?

- Indirect Discrimination

There is nothing in section 19 Equality Act to suggest that an A needs to know about an B's disability to indirectly discriminate. The disadvantage experienced by B (and those sharing the B's particular disability) simply has to flow from the PCP

An employer could have no knowledge whatsoever and be liable for indirect discrimination

But sections 124(4) and (5) of the Equality Act provide that, if a tribunal finds that the PCP was not applied with the "intention" of discriminating against B, it must not make an order for compensation for indirect discrimination without first considering making a declaration or recommendation

Is the type of claim relevant?

- Discrimination arising from Disability

A person (A) discriminates against a disabled person (B) if—

- *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

There will be no discrimination if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability

- section 15 Equality Act 2010

Similar wording and tests as direct discrimination – i.e. "an employer must do all they can reasonably be expected to do to find out if a worker has a disability" (paragraph 5.15)

Is the type of claim relevant?

- Discrimination arising from Disability

An occupational health adviser working for an employer that becomes aware of a worker's disability that is relevant to his work, and the worker consents to this information being disclosed to the employer. The employer is fixed with this knowledge (Paragraph 5.18, EHRC Code)

An independent counselling service providing confidential counselling to workers would not fix the employer with the knowledge of a disability disclosed to the counsellor (Paragraph 5.19, EHRC Code)

Is the type of claim relevant?

- Discrimination arising from Disability

A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability (Paragraph 6.19, EHRC Code)

A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability (Paragraph 5.15, EHRC Code)

Is the type of claim relevant?

- Failure to make Reasonable Adjustments

Where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage – section 20 Equality Act 2010

An employer is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that the individual concerned has a disability and is likely to be at a substantial disadvantage compared with persons who are not disabled – paragraph 20 of Schedule 8 to the Equality Act 2010

Is the type of claim relevant?

- Failure to make Reasonable Adjustments

[DWP v Alam UKEAT/0242/09](#) – when deciding whether the exemption from the duty to make reasonable adjustments applies, it is appropriate to ask two questions:

- Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially?
- Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?

Is the type of claim relevant?

- Harassment on the grounds of disability

A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

- section 26 Equality Act 2010

No need for B to be disabled(!). Therefore knowledge of (Bs) disability irrelevant

Is the type of claim relevant?

- **Victimisation**

A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act

- section 27 Equality Act 2010

No need for B to be disabled(!). Only to have done a protected act.
Therefore knowledge of disability irrelevant

What should an experienced manager do?

The key question is likely to be - ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?

The EHRC Code suggests that an employer should be alert to potential disability being the cause of a downturn in performance or significant change in behaviour. Those are specific examples.

What should an experienced manager do?

Case Law:

[DWP v Hall UKEAT/0012/05](#) - employer should have known about an employee's disability. Negative replies in a health declaration form, her refusal to let her employer have access to her medical records, and her volatile behaviour should have been a "warning sign".

[Ridout v TC Group \[1998\] IRLR 628](#) – applicant for a role disclosed “epilepsy” but not the rare form of light sensitive epilepsy and failed to alert employer to it before or during interview – employer not expected to make detailed investigations into the effects of a rare type of disability without some help from the individual.

What should an experienced manager do?

Case Law:

[Cox v Essex County Fire and Rescue Service UKEAT/0162/13](#) - despite an employee advising that he was suffering from bipolar disorder, the absence of a definitive diagnosis and the employee failing to disclose key information and failing to co-operate meant that the employer did not know, and could not have reasonably been expected to know, that the employee was disabled.

[Donelien v Liberata UK Ltd UKEAT/0297/14](#) – the employer did not acquire constructive knowledge of the employee's disability when it took reasonable steps to ascertain whether the employee was disabled. The employer relied on an occupational health report, minutes of return to work meetings, other meetings with the employee and correspondence from her GP.

What should an experienced manager do?

For Job applicants (i.e. you have no prior experience of the employee) – there is a difficulty in that section 60 Equality Act 2010 precludes health questions before a job offer is made.

There is an exclusion for determining whether it is appropriate to make reasonable adjustments during a recruitment process.

It would be difficult to fix constructive knowledge of a disability through a recruitment process – unless it was obvious.

If it was obvious (i.e. the manager reasonably ought to know) then the duty to make reasonable adjustments, discrimination arising from disability and direct disability are all potential claims.

Indirect discrimination is possible without knowledge.....

What should an experienced manager do?

Many application forms contain a section asking whether the applicant requires any adjustments during the recruitment process.

If it appears as though an employee is disabled – it may be sensible to ask again during an interview/recruitment process whether there are any potential adjustments that the employee believes should be made to alleviate any substantial disadvantage that they may suffer. There is no need to use the label “disability”.

Following a recruitment process, if you believe that an employee may have a health condition that may affect their performance (whether or not you believe them to be a “disabled person”) - it would be sensible to speak with the employee regarding their health and again whether there are any adjustments that it would be appropriate to make and/or potentially ask them to attend an OCH interview following receipt of an offer.

What should an experienced manager do?

If a recruitment process is competency based and appropriate to the role – then an employee with (for instance) dyslexia may struggle with (for instance) a reading comprehension test.

If it is apparent that they are struggling – and have not highlighted their dyslexia previously, then it would be appropriate to consider whether you could read questions to them, as an adjustment, or consider whether another adjustment would be appropriate.

Ultimately, if the role itself required a significant amount of reading and comprehension work, (and no reasonable adjustment was possible) then it may be justified not to offer the role to that employee. If it didn't – then a failure to amend the recruitment exercise could be discriminatory.

What should an experienced manager do?

A mental health condition may be more difficult to spot – even for an experienced manager – in a recruitment process.

It may also be difficult to raise with an employee – particularly when you will have spent little time with them.

Be alert for obvious mental health concerns – but it would be unusual for an undisclosed mental health condition to be spotted in a recruitment process.

Summary

Employers must “do all they can reasonably be expected to do” in terms of determining if a candidate or employee is disabled.

Different disability discrimination has different tests for knowledge:

- Direct – mindset relevant (so must know of disability)
- Indirect – knowledge irrelevant
- Arising from – ought he reasonably have known
- Adjustments – ought he reasonably have known
- Harassment – knowledge irrelevant
- Victimisation – knowledge irrelevant (protected act relevant)

Summary

Look out for signs of potential disability with existing employees

Likely to be harder to spot during a recruitment process (and harder to raise directly)

Sympathy from courts where employer tries to act reasonably – particularly where employee is obstructive



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