Recruitment and Discrimination

> "We are recruiting for a new technician. I have been through the applicants and there are two strong candidates. The most qualified candidate however has said in his application form that he suffered from depression in the past, but claimed it doesn't affect his work at the moment. I don't want to take the risk if he proves to be unreliable so I was going to choose the other candidate. I presume that is okay?"

The simple answer is no. The employer in this situation should be aware that discrimination law is very different from unfair dismissal law. The right protection from discrimination applies to job applicants, so the employer can be liable before they have even met the candidate, essentially from when the application arrives through the employer's door.

The risk in the situation above is that the job applicant could prove that the depression was a "disability" under the Equality Act 2010. To prove this they have to show that the condition has a substantial long term adverse effect on day-to-day activities. The effect of any medical condition on work is not the essential ingredient in determining the issue.

A further problem for employers is that, as a general rule, whether or not someone is disabled for the purposes of the Equality Act is assessed as if they were not taking medication for the condition. With someone with serious depression it follows that a Tribunal does not ask whether or not, when taking any medication or treatment, there is a substantial adverse effect on day-to-day activities, but rather how they would be coping with their medical condition if they were not taking such medication? The result is that a far greater proportion of the population in the UK can argue they are technically disabled in employment law than might be expected.

If the employer rejects the candidate above then the candidate can submit a claim to an Employment Tribunal. To defend such a claim the employer essentially has to show that the decision not to offer the job was not influenced by the disability (provided always the employee can prove they are disabled within the meaning of the Act).

Employers when recruiting should make job offers "blind" to medical information, albeit offers should be made subject to the satisfactory completion of a medical questionnaire. If it later transpires on further investigation that a medical condition is particularly serious and reasonable adjustments cannot be made to the terms of the job to accommodate that condition, then the employer can subsequently withdraw the offer and can raise a potential defence in the Tribunal.

In the situation above the claim may be difficult to defend if there is one very clear strong candidate then the job applicant may be able to prove to a Tribunal that the depression was the real reason the employer acted as it did. Of course in many situations it is more arguable and the fact that someone has a disability should not unduly scare an employer into offering the job if there are more able candidates. Treating all candidates fairly and openly is therefore important, as is laying a good paper trail in recruitment to demonstrate the relative candidate's strengths and weaknesses, so that the employer can prove that the

reason they didn't offer a job to someone who has a disability has nothing to do with the disability. Although not common, beware that this area of the law is sometimes abused and vexatious litigants can try to bring claims to force employers to pay out, simply by making applications.

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