

Pre-employment health questionnaires



A submission from NAT, THT and Rethink

Recommendation:

NAT, THT and Rethink recommend that the forthcoming Equality Bill prohibit the use of pre-employment health-related questions which are not directly relevant to the candidate's ability to do the job they have applied for.

Introduction

NAT, THT and Rethink would like the Government to use the Equality Bill to prohibit the use of **pre employment health questionnaires** before the offer of a job has been made.

Sadly people living with HIV or with mental illness still face discrimination; employers often do not understand that today someone living with such conditions can have a fulfilling and busy career. The lack of understanding about such stigmatised conditions and the advancement of treatment means that many employers will discriminate against people with HIV, mental illness or other disabilities, once disclosed, even if they are the best candidate for the job.

In the UK while there is no law that imposes an obligation on an employee (or a prospective employee) to provide specific information on health, there is also no law to stop an employer from asking health related questions. When people apply for a job, there may be questions on the application form about medication or having a medical condition. They may also be asked whether they have a disability. In both the United States and a significant number of EU member states such questions are unlawful – we are recommending a similar prohibition in the UK.

A recent Rethink survey of more than 3,000 mental health service users found that half of the respondents felt that they had to hide their mental health problems and 41% were put off even applying for jobs because of the fear of discrimination from employers.¹ People with HIV also repeatedly cite the job application process and fear of health or disability-related questions as a deterrent to seeking or changing jobs.² Disabled people in DWP research identified recruitment as the most common source of discrimination.³

It is estimated that fewer than 50% of people diagnosed with HIV are in paid employment – with the result that about one in three report not having enough income to cover their basic needs. People with mental illness have the highest 'want to work' rate of any group of people with disabilities⁴. Yet the actual employment rate for this group is one of the lowest: 13.3% compared to 59% for those with difficulty hearing⁵.

¹ Rethink, Stigma Shout 2008

² see for example 'Outsider Status' NAT/Sigma Research 2005

³ 'Disabled for life, attitudes towards and experiences of disability in Britain' DWP 2002

⁴ Social Exclusion Unit (2004) Mental Health and Social Exclusion

⁵ UK's Office for National Statistics (Sept - Dec 2006) Labour Force Survey - figures quoted for people of working age only.

The current reforms of the benefits system are designed to encourage people with disabilities back into appropriate work where possible. Also, Public Service Agreement 16 commits the Government to improving employment rates for people with severe mental illness. Whilst we strongly share this ambition to increase employment amongst disabled people, and thus reduce poverty and social exclusion, it will not succeed if we focus only on disabled persons and ignore barriers amongst employers.

Continuing discriminatory attitudes amongst employers

The need for this protection is illustrated by the Chartered Institute of Personnel and Development (CIPD) findings from 2003 that discovered that more than 60 per cent of employers said they disregarded applications from people with drug or alcohol problems, a criminal record, a history of mental health problems or incapacity. More than half of respondents said nothing would persuade them to recruit from these 'core jobless' groups.⁶ Furthermore, research carried out by Rethink highlights the fact that fewer than four in ten employers would consider employing someone with a history of mental health problems.

If employers were only permitted to ask people to fill out a health questionnaire after the offer of a job had been made, this would guard against this discrimination and make discrimination when it occurs much easier to prove. We believe it would have a substantial impact in encouraging people with disabilities, especially those which are stigmatised, back into employment.

This recommendation was also made by the Disability Taskforce and then again by the Disability Rights Commission in 2003.⁷

Case studies

This example from THT's report *21st Century HIV* illustrates the discrimination experienced in the job application process:

'Some time ago I did experience some discrimination in the first stages of the application process when applying for a job. In three different applications I got through the interview stages and I got to the point of doing the medical tests you need when you are practically in and have the job, but for some reason things didn't go any further. Since then I've gotten to the stage where I could go to interviews and I haven't, because of my fears, I suppose, of going through the same thing.'

The example below is from Rethink's recent report, *Breaking Down the Wall*,

"I have an honours degree in Education but never got to teach in spite of many interviews. At this point I had only been in the mental health system for less than two years. The Job Centre made me re-train and I did a Business Admin course, but I

⁶ CIPD (October 2005) Labour Market Outlook: Survey Report Summer/Autumn 2005

⁷ 'Disability Equality: Making it happen' Disability Rights Commission April 2003

couldn't even get a job in filing after 86 applications. I felt useless, rejected and the motivation and enthusiasm I had struggled so hard to retain, was fast disappearing.

It had a huge impact on my mental health. I lost all belief in myself and seemed to lurch from one mental health crisis to another. I felt as if I had diagnostic labels stamped on my head and when people approached me and saw them – they turned away.”

Health-related questions and deception

If someone lies in a job application in relation to their health status and this is later discovered, they could lose the job (this is called a breach of mutual trust). Research reveals that one in ten employers has withdrawn a job offer because the applicant had lied or misrepresented their health situation on the health-screening questionnaire. Seven per cent of employers have dismissed an employee while in employment for the same reason. Withdrawn job offers or dismissal on these grounds is twice as common in large organisations.⁸ This is particularly relevant to people living with HIV or with mental illness as people's experience of stigma and discrimination mean that some are unwilling to disclose their status on health-screen questionnaires in advance of a job offer being made.

How would a prohibition on pre-employment health-related questions work in practice?

An individual's health and disability may well be relevant to his or her suitability for a particular job. There is a legal obligation not to discriminate on grounds of disability but even where an employer is willing to provide reasonable adjustments it may not be possible for someone to fulfil a particular role. There is therefore a place for appropriate and relevant health-related questions (and medical examinations) as part of some recruitment processes.

We are not arguing that such questions should never be asked – but most health- or disability-related questions should only be asked after a conditional/provisional job offer has been made. There could then be cases where a job offer is withdrawn because of health-related concerns or because reasonable adjustment for a disability is not possible. The process would be transparent, and where there is disagreement as to the decision, further consideration or mediation are possible, and complaint if appropriate to an Employment Tribunal in instances of discrimination.

In limited circumstances, to be clearly defined, it could be appropriate to ask health-related questions in advance of a job offer, where a particular state of health is absolutely necessary for the specific role: where, for example, there is an absolute prohibition on persons with certain health conditions taking on particular healthcare roles.

⁸ Labour Market Outlook: quarterly survey report – Autumn 2007' (2007) Chartered Institute of Personnel and Development

Other national jurisdictions

Prohibition of pre-employment health-related questions is found in a significant number of comparable developed countries. For example in **many European countries** (France, Spain, Belgium, Italy, the Netherlands, and Portugal) there are laws prohibiting employers from asking job applicants irrelevant medical questions. The table below sets out the models in several European countries:

SPAIN

In Spain, the Law on Occupational Risk Prevention (Law 31/1995) does not specifically require job applicants to declare a disability, unless it impacts adversely on the performance of the job. This is interpreted as indicating that health-related questions are illegal in Spain.

FRANCE

Under the terms of the Law of 12 July 1990, employers do not have the right to ask health-related questions in job interviews. If such a question is asked, candidates have the right to give incorrect information, without this being used against them if their condition are disclosed or discovered at a later stage. In addition, job applicants may make appeal to the Labour Inspectorate.

ITALY

In Italy, employers are not allowed to ask health-related questions during a job interview, unless a condition would impact adversely on the candidate's performance of the job.

BELGIUM

In Belgium, article 11 of the Collective agreement (no.38) provides that the private life of the worker should be protected. This has been interpreted as indicating that an employee does not have to disclose a disability, or their HIV status. The Law regarding medical examinations in the framework of an employment relationship confirms this interpretation, as it provides that HIV tests and genetic tests are explicitly forbidden, although a Royal Decree may authorise exceptions in certain cases.

PORTUGAL

The New Portuguese Labour Code that came into force on 1st December 2003 forbids medical examinations in the workplace, except those necessary for protection of third parties or the worker themselves. This can be interpreted as indicating that HIV testing for jobs is illegal in Portugal.

THE NETHERLANDS

Since 1998, it is unlawful for employers in the Netherlands to ask health-related questions in job interviews. In addition, the Dutch Medical Examinations Act provides that a medical examination of a future employee may only take place in regard to functions for which special medical requirements are required. In such circumstance, the medical examination must be limited to the purpose for which it is deemed necessary. This can be interpreted as indicating that HIV testing for jobs is considered unlawful in the Netherlands.

It is not only in Europe that the UK is behind in this area. In **the United States** employers cannot ask people if they have a disability until after a job offer has been made. The Americans with Disabilities Act 1990 states that employers:

“shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability”

Pre-employment questionnaires are only allowed if they relate to “the ability of an applicant to perform job-related functions.” This ensures that it is easier to recognise cases where employers have discriminated against potential applicant: 16,000 charges are filed under the Americans with Disabilities Act every year.⁹

Conclusion

NAT, THT and Rethink all share a commitment to supporting as appropriate those with stigmatised disabilities such as HIV or mental health problems back into work. Too many people in the UK are consigned to unemployment, benefit dependence and poverty through no fault of their own but simply as a result of society’s prejudice and stigma.

Irrelevant and inappropriate health-related questions prior to job offer are a major deterrent to job application for those with stigmatised conditions. Prohibiting such questions will encourage people with disabilities back into work, deter discriminatory behaviour from employers, and where discrimination does take place, make it much easier to identify and address. Prohibiting such questions will not force employers to appoint someone unable, even with reasonable adjustments, to fulfil the role.

About NAT, THT and Rethink

NAT is the UK’s leading charity dedicated to transforming society’s response to HIV. We provide fresh thinking, expert advice and practical resources. We campaign for change.

THT is the UK’s largest sexual health and HIV charity, with over 30 service centres across England, Scotland and Wales, providing both direct services and policy and campaigning based on our experiences.

Rethink, the leading national mental health membership charity, was founded over 30 years ago to give a voice to people affected by severe mental illness. Today, with over 7,800 members, we remain determined that this voice will continue to be heard. We help around 50,000 people every year through our services, support groups and by providing information on mental health problems.

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⁹ DWP Research Report 2002