Blog article by the Equality Commission's Advisory Services Team

Recruiting disabled people – Selection tests and interviews

Selection methods involving assessment tests and interviews seem, as a number of disability discrimination cases have shown, to cause particular problems for job applicants who have impairments that affect their ability to communicate with others or to interact socially with others, like autism, or their ability to understand written or verbal text, like dyslexia, or sensory impairments like deafness.

This is illustrated again by a complaint in which the Equality Commission assisted a disabled job applicant to obtain a settlement, including compensation of £12,500, against both the employer in question and their recruitment agent – see our press release relating to the case.

The case was settled by the PSNI and their recruitment agent Honeycomb Jobs Ltd without admission of liability, meaning that there was no tribunal hearing, decision or findings of fact. However, the allegations made by the complainant suggest some questions that the tribunal would have had to consider. Those are questions that employers in similar situations should also consider.

In this case, the employer was recruiting for Administrative Support Officers. Part of the selection process required applicants to participate in a group discussion with other applicants.

One of the questions the tribunal would have had to consider is the extent to which the employer and its recruitment agent should have adjusted the process for our claimant, who felt that because of his impairment (i.e. autism, ADHD and Tourette's syndrome) he could not and did not adequately participate in the group discussion, and who consequently did not pass that stage of the process. Should they, for example, have adjusted it by waiving the need for him to participate in the group discussion; e.g. by allowing him to give his answers when not under direct pressure, with appropriate time to do so, or in other non-verbal ways such as in writing?

He had asked for the opportunity to show that he met the relevant competencies for the job without participating in the group discussion; e.g. by giving his answers when not under direct pressure, with appropriate time to do so, or in other non-verbal ways such as in writing. His requested adjustment was not made.

It is certainly within the scope of the law that an adjustment of the kind requested by our claimant might have to be made; although not necessarily in all cases or circumstances. What should employers consider when they find themselves having to consider such questions?

The pitfalls of selection tests and interviews

The problems may arise where an employer makes an initial assumption that a single method of selection, whether it be a particular type of test or interview, must be applied to everyone consistently and uniformly; i.e. that to comply with equality law everyone must take the same test or interview under the same conditions.

That is not an unreasonable assumption because following that principle is recommended as a way to avoid unlawfully directly discriminating on a wide range of protected equality grounds; namely sex, pregnancy & maternity, gender reassignment, religious belief, political opinion, race, age, sexual orientation.

However, other principles are in play too, with the most important being the duty that the *Disability Discrimination Act 1995* imposes on employers in respect of removing or altering those aspects of selection processes that are creating uneven playing fields for (some) disabled people and which effectively make the selection competitions unfair for them when compared to non-disabled people.

> *"The [Disability Discrimination Act] does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment."*
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> **Lady Hale in the case *Archibald –v- Fife Council* [2004]**

The Equality Commission has previously produced guidance about the kinds of reasonable adjustments that are commonly made in parts of recruitment exercises involving tests and interviews. Quite often these are fairly simple steps and can include providing extra time to take a test or interview, or by providing a sign language interpreter or other form of assistance.

However, some pitfalls have been revealed by case law and they indicate that by asking the right questions at the planning stage of a recruitment exercise employers can help themselves to better promote equality of opportunity for disabled people and to minimise the risks of things going wrong later. Examples include:

First set of questions

- what is the purpose of the test or interview?
- does it measure what it is intended to measure?
- is it the only way to efficiently measure that thing?
- are there alternatives that it would be reasonable to use instead?

In the English case of Government Legal Service –v- Brooks [2017] (pdf, 72KB), the employment tribunal held that in a highly competitive recruitment exercise for trainee solicitors it was legitimate for the employer to use a Situational Judgment Test as

part of the process. This was because it sought to measure a fundamental competency required by post-holders; namely, *the ability to make effective decisions*.

However, the particular nature of the test that was used on this occasion - an online multiple choice test seeking “right” or “wrong” answers – was ruled to be unlawfully discriminatory against the disabled complainant, a woman who has Asperger’s (an impairment that comes within the Autism spectrum) and who failed the test.

It was accepted that the nature of the test placed her (and potentially some other disabled people) at a disadvantage compared to others.

Given the nature of her impairment, she was best able to demonstrate that she met the underlying job criterion (i.e. the ability to make effective decisions) by way of providing answers in a short, written narrative format rather than in a multiple choice format.

In coming to its conclusion that the nature of the test was unjustified and that the requested adjustment was reasonable, the tribunal accepted that it was not “ideal” that the employer would have to run two separate tests in parallel and that there could be some difficulties in comparing the complainant’s scores against those of other applicants, but on the whole the tribunal noted that:

- this was not a situation, like those that have been recognised in some other cases, where the method of testing and the competency it was measuring were essentially one and the same thing, so much so that they cannot be separated, and that if the complainant could not pass the one, it necessarily followed that she could not pass the other,

- although the employer tried to make that argument, it provided no expert evidence to support it – meaning that evidence from experts in psychometric testing is likely to be needed to support such claims,

- furthermore, it rejected the employer’s argument that working as a government lawyer was “unique” and called for different skills to those needed in other areas of legal practice, such as in commercial law firms, in which the complainant had worked previously,

- finally, the complainant had given the employer over one month’s notice to make the adjustment before the test date and it was not argued that this was insufficient time to make the adjustment.

Second set of questions

- can the underlying competency be adjusted?
- if yes, is there a need to measure it at all?

There is a *“chicken or egg”* relationship between a selection test or interview format used by an employer, or the interview questions they ask, and the underlying competencies that they are intended to measure.

Employers should base their selection criteria, including interview and test questions, on the underlying job descriptions and personnel specifications for their jobs – that is good practice.

But, the reasonable adjustment duty applies to those matters too and in some cases it may be more appropriate to ask whether the adjustments that some disabled people may need lie with the competencies. That, in turn, may lead to changes in how the following tests or interviews are conducted.

This is illustrated by the English case of **Keane -v- United Lincoln Hospital NHS Trust [2002]** (unreported)**.** In this case the job applicant was a partially deaf man who applied for the post of night shift medical records officer. Two of the thirteen duties in the job description involved telephone use, but in practice this meant that someone should always be available in the office to answer any telephone calls. On the night shift in question there were always four or five other staff members available to do this.

At his interview, the applicant informed the interview panel that he would be unable to answer the telephone and for that reason alone the panel rejected his application. The panel gave no consideration to adjusting the job description in relation to the applicant by removing the telephone duties. An employment tribunal ruled that it would have been reasonable for the panel to have made this adjustment as it would not have caused any great inconvenience or expense. Their failure to do so was an unlawful breach of the reasonable adjustment duty.

Thus, the employer should not have made the ability to answer the phone a job selection criterion in relation to Mr. Keane. It should not have made his answer a deciding factor without first considering whether it would have been reasonable to adjust the job description for him.

How far that principle goes will vary from case to case depending on the particular nature of the jobs in questions and the employers' business needs and circumstances. In the case of *Brooks*, discussed above, it was not argued that the competency – *the ability of a solicitor to make effective decisions* – was not essential and could be adjusted, such as by waiving it or by transferring it to others, so the question was not examined in that case.

If it had gone to a tribunal hearing, this question may also have featured in our claimant's case.

The job description in this case set out eleven main duties, only one of which, the complainant alleged, required an ability in verbal communication (i.e. answering telephone enquiries from the public), all other duties were seemingly based on the ability to write reports, emails, memos, letters, or to do filing and photocopying.

As in the case of *Keane*, the tribunal would have had to decide whether it would have been reasonable for the employer to have adjusted the duties of the job to remove the need for the complainant to answer the telephone, or to engage in other duties requiring verbal communication abilities?

The tribunal would then have had to consider whether it would have been reasonable to adjust the interview process. If the verbal communication elements of the job could reasonably be removed, was there any need for that competency to be measured during the selection process? If it was not needed, then it follows that it would probably have been reasonable to waive the requirement for the complainant to participate in the group discussion.

Other factors to consider

In addition to asking those questions, employers should also consider the following points:

The job applicant is not under any duty to suggest possible adjustments

It is always good practice for the employer (or, their agent) to ask job applicants to disclose at the application stage whether there are any reasonable adjustments they may need during the selection process and, thereafter, to contact those who do disclose this information so that a better understanding may be obtained about those needs. This should be done in good time before the dates set for any tests of interviews.

The reason for that is that impairments such as autism affect different people in a wide variety of ways and an adjustment that may be suitable for one person (e.g. an additional 15 minutes to take a test) will not necessarily be so for another (for they may need 30 minutes, or a different adjustment).

Whilst many disabled people may have a good knowledge of what they need, and may be able to suggest good solutions, that may not always be the case.

In any event, once a disabled job applicant has given the employer notice that they are disabled and are likely to be disadvantaged by some aspect of the selection process, be it a test or interview, the applicant is not obliged by the law to offer solutions to the problem.

The duty to think about solutions lies always on the employer. If the applicants cannot suggest possible adjustments, the employer must still consider this question and must be pro-active in ascertaining what steps they may need to take to fulfil the duty.

This principle was highlighted by the Northern Ireland Court of Appeal in the case of British Telecommunications Plc –v- Meier [2019] and that employer's failure to follow that course was central to the finding that they had failed to comply with the reasonable adjustment duty.

The *Meier* case was similar to that of *Brooks*, noted above, in that it concerned a requirement that applicants sit an online Situational Strengths Test in an early part of the selection process, which the complainant could not pass for reasons related to his disability; namely, Asperger's, dyslexia and dyspraxia.

It was held by the tribunal, and upheld on appeal, that it would have been reasonable for the employer to have adjusted its selection process either by waiving the need for Mr. Meier to take the test or by ignoring his test score and allowing him to proceed to the interview stage of the selection process.

This shows too that Ms. Brooks and Mr. Meier who, although they had similar impairments, also had different needs and that they needed different adjustments to the tests that they were required to take.

Take expert advice

Employers may base their decision to use selection tests or different varieties of interview methods (individual or group based) for good reason. Perhaps, there is some evidence that one or other of these methods is a more reliable way to measure particular competencies.

Any claims that employers make about the reliability of such methods should be capable of being corroborated by evidence from independent experts or the commercial companies who develop and sell these products.

Such evidence could also support any defence claims that an employer may wish to make that the test cannot be adjusted in the ways sought. In the *Brooks* case, the employer sought to raise such a defence by alleging that the test method (online multiple choice) and the competency it was intended to measure (ability to make effective decisions) were one and the same and could not be separated. That claim was rejected by the tribunal because it was not supported by expert evidence.

Another benefit is that it will help employers to deal with the issue highlighted in the *Meier* case; i.e. the need to be pro-active in searching for possible adjustments that might be made. The companies that develop and sell psychometric tests have usually studied these issues and may be able to suggest possible solutions.

But it is also important to act on the expert advice that is given. The *Meier* case illustrates this for the employer there did ask the test's developer for such advice. That advice indicated that it would be appropriate to allow an applicant with Asperger's to by-pass the test if no other adjustments could be made. The employer did not follow that advice and it too was one of the key reasons why the employer could not successfully defend this case.

Further advice and information

Guidance on the various factors that employers should consider when recruiting disabled people can be found our website: Recruiting people with disability. This subject-matter is also covered in several of the webinars on our online training programme.

For telephone advice on employers' obligations under equality and discrimination law, contact our helpline on **028 90 500 600**. Alternatively, you can email edenquiries@equalityni.org and we will answer as soon as possible.