

Draft with care

If employers want to find out about the state of job candidates' health, they have to ask the right questions, warn Mark Levine and Laura Ford



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'In *Laird* the High Court did not uphold the council's claim of negligent and/or fraudulent misrepresentation by Mrs Laird because of the inadequacy of the questions asked of her in the medical questionnaire.'

A recent case has highlighted the dangers of failing to draft medical questionnaires for job candidates carefully enough. In *Cheltenham Borough Council v Laird* [2009] the council brought an unsuccessful action against its former managing director, Mrs Laird, alleging that she had made fraudulent and/or negligent misrepresentations when she completed a pre-employment medical questionnaire.

Mrs Laird had a history of depression that she had not included in her response to the council's pre-employment questionnaire. On the face of it, such an omission might be expected to amount to a misrepresentation by Mrs Laird. However, the High Court found that Mrs Laird provided correct answers to all the questions asked of her. As her responses were neither false nor misleading, there was no misrepresentation. The council therefore failed in its attempt to recover the 'extraordinary expenses' of almost £1m to cover costs including Mrs Laird's ill-health pension, which it would have been unlikely to incur had it hired someone without her medical condition.

Facts of the case

Before Mrs Laird's appointment, she had suffered three episodes of stress-related depression over four years. These episodes caused her to take a total of three months' sick leave over this period.

In addition, Mrs Laird was regularly prescribed anti-depressants. After the third episode, which arose following problems with her work, she took

medication for a sustained period between June 2001 and February 2002.

Towards the end of 2001, Mrs Laird applied for a role as the council's managing director. She was offered the job and agreed a salary. The council wrote to confirm this offer, and stated that it was:

... conditional upon medical clearance being obtained from our medical adviser.

Mrs Laird subsequently completed a medical questionnaire. She made no mention of her history of stress and depression and did not indicate that she was taking anti-depressants. The material questions contained within this medical questionnaire and Mrs Laird's answers are set out in the table on p7.

Mrs Laird commenced her role following approval by an occupational health representative, who informed the council that:

... based on the information given on the health questionnaire, the applicant has been found to be... fit.

Following local elections a few months later, a new council leader was appointed. He and Mrs Laird struggled to work with each other. Mrs Laird raised a series of grievances and the leader made a series of allegations. Eventually, Mrs Laird was suspended on full pay and suffered a further episode of depression.

This suspension continued until 2005 when a consultant psychiatrist reported that Mrs Laird was unfit to undergo the council's investigation into the allegations made against her.

In August 2005, the council ended her employment, on the basis that her contract had been frustrated because there was no reasonable prospect of any investigation taking place. Mrs Laird was awarded an ill-health pension.

A year later, the council obtained a copy of Mrs Laird's pre-employment medical questionnaire (held by the local County Occupational Health Services). On discovering that she had made no reference to stress or depression, it brought proceedings against Mrs Laird.

The council failed in its claim. Mrs Laird also failed in various counter-claims against the council. Crucially, the High Court did not uphold the council's claim of negligent and/or fraudulent misrepresentation by Mrs Laird because of the inadequacy of the questions asked of her in the medical questionnaire. These allowed her to complete the questionnaire truthfully without revealing anything about her history of depression.

Use of medical questionnaires

Medical questionnaires can be a useful tool for understanding an applicant's suitability for a role, avoiding the risk of problems of ill-health during employment or assessing eligibility for membership of health-insurance schemes. Even if the physical requirements of a role are minimal, it is often still useful for employers to understand the general health of a candidate, particularly one applying for a senior management position. However,

questionnaires must be carefully drafted to ensure that the employer is provided with full disclosure of medical conditions.

Equally, employees must ensure that they give full and truthful answers to the questions asked. If false or misleading responses are provided, an employer can take disciplinary action (including dismissal) or, in extreme circumstances, bring a misrepresentation claim arising from

Where a person is disabled within the meaning of DDA 1995, or the employer believes that there is a risk that they may satisfy the statutory definition, care must be taken when deciding whether to appoint that person.

Obviously, any disability should not be the deciding factor in whether to appoint a candidate, even if this means making certain adjustments to the role. However, if the employer feels that an applicant's disability is such that they

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any omissions if that individual is subsequently unable to carry out the role due to ill-health.

Disability discrimination

An employer must consider carefully how it will use information provided in a medical questionnaire, as any unreasonable reliance on a candidate's medical condition could give rise to issues under the Disability Discrimination Act (DDA) 1995.

In *Laird* the Court was not required to address whether refusing to employ someone on the basis of their medical condition would constitute disability discrimination, as the parties agreed that at the time of recruitment Mrs Laird was not 'disabled' for the purposes of DDA 1995.

could not do the job, or that employing them would create a health and safety risk, it would be well advised to seek an independent medical opinion before making a final decision on the appointment.

The use of pre-employment medical questionnaires increases the likelihood that the duty to make reasonable adjustments will be engaged. An employer cannot be under a duty to make reasonable adjustments if it 'does not know, and could not reasonably be expected to know' about an applicant's or employee's disability (s4A DDA 1995).

If an employer is considering a candidate who is or may be disabled for a role, it must take care to consider any reasonable adjustments that would allow the individual to perform that

Cheltenham Council's questionnaire		
Questions asked	Mrs Laird's response	High Court's analysis
Do you normally enjoy good health?	Yes.	A reasonable person would conclude that the 'normal' state of Mrs Laird's health is good, given that she only suffers from depression for short periods.
Do you have either a physical and/or mental impairment?	No.	Although susceptible to depression, Mrs Laird did not have any physical or mental impairment when the question was put to her.
Date when you last had medical treatment and reason.	17 September 2001, bruising to lower back following a fall at work.	Mrs Laird's response is accurate. It answers the question, which asks about treatment and not current medication.
Have you any ongoing condition which would affect your employment?	No – I get occasional migraines but this does not affect my ability to work or usually require time off work (treated with Zonig).	A reasonable person would conclude that being susceptible to depression is different from an ongoing state of depression. As such, Mrs Laird's vulnerability would not affect her employment.

role. Again, employers would be well advised to seek medical advice on the reasonable adjustments they could implement and on how these would overcome any provision, criterion or practice, or any physical feature of their premises, which places the disabled individual at a substantial disadvantage compared to people who are not disabled.

If the employer is satisfied that no reasonable adjustments could be

within a questionnaire, or indeed the use of medical questionnaires at all, is consistent with its general policy and is necessary for the job in question. Only relevant information should be sought in order to avoid allegations of discrimination or harassment on grounds of disability.

Lessons to be learnt

The council's claim failed on its specific facts and particularly on the

condition that had an impact on her working life.

The High Court recognised that had misrepresentations been made, damages could have been recoverable from the employee for time spent on subsequent disputes, including the cost of additional HR support, legal advice, independent investigations, medical experts' reports and some administrative and management costs.

Accordingly, the precise phrasing of the questions asked as part of a medical questionnaire is key. Employers and their advisers should:

- Include sufficient questions to cover all conditions. It may be helpful to specify that:
 - information about past medical conditions is required;
 - the questions covers mental as well as physical conditions; and
 - even illnesses of a short duration may be material and should be disclosed.

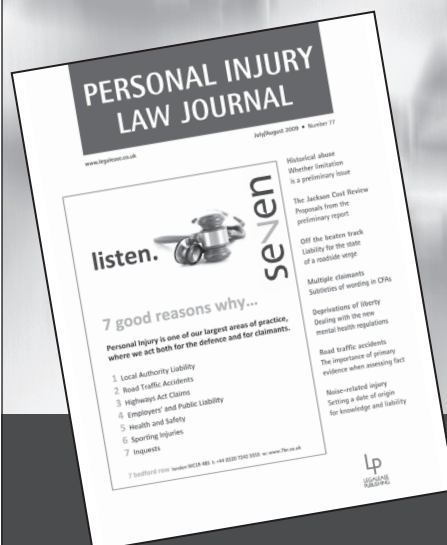
Consider carefully how to use information provided in a medical questionnaire, as unreasonable reliance on a candidate's medical condition could give rise to issues under the Disability Discrimination Act 1995.

made, it must ensure that it rejects such candidates by reference to the requirements of the job, not because they are disabled. The employer should also ensure that any line of questioning

inadequacy of the questions included in the medical questionnaire. This allowed Mrs Laird to provide truthful answers while avoiding the submission of any information about a recurring

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- Consider using examples and notes to explain exactly what responses and level of detail the employer requires. Expert evidence before the High Court in this case criticised the questionnaire for being too brief and not including any explanatory notes or examples.
- Avoid ambiguity. If a question can be answered in several different ways, as in this case, applicants cannot be criticised for answering it in any one of those ways.
- Consider adding a table to the questionnaire listing common types of conditions, with a requirement that candidates indicate whether they have ever had the conditions mentioned. In this case, a checklist that included 'anxiety, depression or any other psychiatric disorder' would have sufficed.
- Ensure that general catch-all questions are included. The one proposed by the High Court was: 'Is there anything else in your history or circumstances which might affect our decision to offer you employment?' The employer could also ask a more factual catch-all question such as: 'Do you suffer from, or have you ever suffered from, any medical condition or illness which has affected your ability to do the everyday activities required of you in any previous job, or which may affect your ability to do the job in question?'
- Tailor questions to particular roles. If a position has certain physical requirements, ensure that questions are included that relate to those requirements.
- Work closely with occupational health practitioners when designing medical questionnaires to ensure that the responses will be as useful as possible to them when assessing a candidate's suitability. Occupational health and/or other medical professionals should also be involved in assessing the responses to the questionnaire, particularly if the employer believes that there may be an issue.

- Include a catch-all question asking whether applicants are currently seeing a doctor, undergoing any medical treatment or taking any prescribed medicine. In Mrs Laird's case, she would have had to answer 'yes' to this last question, which would have given the council the opportunity to explore the issue further.
- Include a question about past periods of sickness absences, such as: 'Have you had more than 20 days' sickness absence in the past two years?'

data protection purposes. Consent should be sought to obtain, hold and process information about a candidate's health. Employers should also explain why the information is required and to whom it might be disclosed.

- If a full medical report is required from an applicant's doctor, employers must ensure that they comply with the Access to Medical Reports Act 1988.
- Alongside internal medical questionnaires, employers should

Had misrepresentations been made in answers to the medical questionnaire, damages could have been recoverable from the employee for time spent on subsequent disputes.

- Ask whether an applicant is registered as disabled. This is a useful way of identifying more obvious disability situations (although this will not pick up all employees who have a disability for the purposes of DDA 1995).

In addition, the employer must handle the process of using medical questionnaires properly and should consider the following:

- Any offer of employment should be conditional on medical approval or clearance.
- The employer must see a copy of the responses to the medical questionnaire before employment commences. This is particularly important where a questionnaire is handled by a third party.
- If the candidate is to be employed and there are medical considerations, the employer must ensure that line management is aware of any issues that affect the employee's ability to do their job and of any reasonable adjustments that are to be made.
- Information about a candidate's health is sensitive personal data for

consider obtaining information from former employers.

Choose your weapon carefully

If drafted carefully, medical questionnaires can be very effective at flushing out potential problems and allowing employers to deal with new employees' medical issues at an early stage. However, if disclosures by employees in medical questionnaires elicit responses that may indicate the presence of a disability, this can trigger the duty to consider reasonable adjustments and will impart a level of knowledge to the employer that the employee may later rely on if such adjustments are not made.

Even with the best-drafted questionnaires, further enquiries are advisable where problems may exist. The employer should never attempt to put itself in the place of a medical professional and should seek independent medical advice where it has concerns. The moral of *Laird* is this: if employers use pre-employment medical questionnaires, they must be drafted and handled with care. Such questionnaires can be a double-edged sword. ■

Cheltenham Borough Council v Laird
[2009] EWHC 1253