

# A Thorogood Special Briefing

## Chapter 1

### The law on recruitment

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# Chapter 1

## The law on recruitment

All employers, Occupational Health Physicians and nurses need an understanding of how a contract of employment is formed, when a contract is formed and the consequences of breaching that contract. This is because so much of occupational medicine and employment law concerns the terms of the contract and the policies and procedures. The following chapter gives a brief insight into this aspect of employment law and covers issues such as conditional job offers subject to satisfactory medicals.

### How do you form a contract?

A contract is formed when five elements are present:

1. An offer;
2. An acceptance;
3. Consideration – not necessarily financial. It can be a promise for a promise (for example, the employer promises to provide the work and to pay for that work and the individual promises to turn up for work and undertake that work).
4. The parties intend to create legal relations. In other words if the offer and acceptance is exchanged in an interview setting, then the Courts would conclude that the parties intended to create legal relations.
5. The terms are certain. Where terms are ambiguous they are normally struck out as being void for uncertainty.

### Conditional offers

It is prudent of an employer to make a conditional offer of employment subject to the receipt of satisfactory references, credit and Criminal Records Bureau (CRB) checks, checks on immigration and nationality status (under the Immigration, Asylum and Nationality Act 2006), checks for valid driving licences where the job applicant will have to drive, checks on professional and educational qualifications where relevant and medical assessments and/or examinations.

## Precedent 1

If this is to be the case, the offer should be worded in the following terms:

Thank you for attending the interview with us on ..... We are pleased to inform you that we intend to make you a formal offer of employment once we have received two references from former employers and receive the results of your pre-employment medical assessment/examination which satisfy us.

This is not a formal offer of employment, which can only be made once we have received and are satisfied with the references and the medical assessment of your fitness for work.

We advise that you do not resign from your current employment until we can confirm an offer of employment to you, in which case we will send you a formal offer letter with a summary of the terms.

Yours sincerely

XXXXXXXXXX

## Precedent 2

If the job applicant commences employment before all, or some, of the references have been obtained or before the 'fitness for work' report has been received, then the offer of employment should read:

We are pleased to make you an offer of employment conditional upon our receiving references and a medical assessment on your fitness to work which satisfy us.

If you have already commenced employment before all such references or the medical assessment have been received, please be aware that the Company reserves the right to terminate your employment by the giving of one week's written notice or pay in lieu, should any of the references not meet our approval or if the medical assessment determines that you are unfit for any work for which you are competent. This assessment would only be used where for example you failed a drug or alcohol test or where no modified duties or reasonable adjustments could be made.

Yours sincerely

XXXXXXXXXX

## Breach of contract

Once a job offer has been made and any conditions satisfied, if the job offer is then revoked by the employer, this is regarded as a breach of a collateral contract (a contract to employ) and if the individual has already resigned from their previous employment, their damages would be for as long as they take to find new employment. Damages are not limited in such a case to the notice period that would have applied had the individual started employment.

In cases where it is the employee who breaches the contract, by changing their mind and reneging on their acceptance, it is only in rare cases where damages can be pre-estimated, that a job applicant can be sued by the disappointed and rejected employer (see *Tullett Prebon Group Ltd v Ghaleb El-Hajjali* [2008] EWHC 1924 QBD). Here the High Court held that a sum that was to be paid pursuant to a clause in an employment contract after a prospective employee, in breach of contract, failed to start work for the employer was not extravagant or unconscionable compared to the greatest loss or range of losses that could conceivably be proven to follow the breach of contract, and, therefore, the clause was a liquidated damages clause rather than an unlawful penalty clause.

In *Gill v Cape Contracts* [1985] IRLR 499 and *Stubbes v Trower, Still and Keeling* [1987] IRLR 321, in both cases the claimants were awarded damages based on the length of time they were unemployed as a result of the breach of contract and not on the notice period that would have applied had they commenced employment.

## LESSON

If such a case arises, it may be more sensible for an employer to allow the employee to commence employment and then to terminate the contract lawfully by the giving of proper notice or pay in lieu. In that way only a payment in lieu of notice required under the contract of employment would become due.

## PRE-PLACEMENT MEDICAL QUESTIONNAIRES

Under s.60 of the Equality Act 2010 headed “Enquiries about disabilities and health” asking job candidates questions about their health, whilst in itself is not unlawful, it could be. It could lead to an inference of disability discrimination if the individual is not selected for the job and considers the questions led to a discriminatory decision not to employment them.

The exceptions in s.60 to the rule that job candidates should not be asked about their health at interview i.e. before being offered the job are to:

- a) establish whether the job candidate will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustments is or will be imposed on the employer in relation to the job candidate in connection with a requirement to undergo an assessment;
- b) establish whether the job candidate will be able to carry out a function that is intrinsic to the work concerned;
- c) monitor diversity in the range of persons applying to the employer for work;
- d) taking action to which the positive action provisions would; or
- e) the employer applies in relation to the work a requirement to have a particular disability, establishing whether the job candidate has that disability.
- f) where the employer reasonably believes that a duty to make reasonable adjustments would be imposed on him in relation to the job candidate in connection with the work.

If there is an 'occupational requirement' justifying employing someone with a particular disability, then the requirement must be a proportionate means of achieving a legitimate aim.

So questions about health may be necessary to establish whether the job applicant will be able to comply with a requirement to undergo an assessment (such as an interview or selection test); whether a duty to make reasonable adjustments will arise in connection with any such assessment; or whether the applicant will be able to carry out a function that is ESSENTIAL to the work concerned, for example, working at heights or in confined spaces.

An employer is also entitled to ask questions necessary to monitor diversity in the range of job applicants; to enable the Company to take positive action; or to establish whether the job applicant has a particular disability, where having that disability is an 'occupational requirement'.

An 'occupational requirement' arises where having a protected characteristic is a genuine and determining requirement for the job in question. Under the Disability Discrimination Act 1995, 'genuine occupational requirements' did not apply to disability.

The Explanatory Notes state that *‘an organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL’*. This suggests a fairly low standard for ‘occupational requirement’, at least where disability is concerned – there is no need for a particular disability to be indispensable to a person’s ability to perform a particular role.

## Medical assessment by non-medical personnel

It is not good practice for employers to require completion of a pre-employment medical questionnaire or to require completion of a pre-placement questionnaire other than by qualified Occupational Health professionals.

Pre-placement medical questionnaires and examinations are easier to justify as the decision has been made to employ subject to certain medical standards being met.

If the medical questionnaire were to state ‘Strictly Confidential’, this would imply to a normal reader that only medically trained personnel will review the form. As such, the employer could be regarded as breaching Principle 1, Schedule 1 of the Data Protection Act 1998, in that data must be obtained lawfully and fairly. Such data is classified as ‘sensitive’ data under s. 2 of the Act and must therefore be obtained with the ‘explicit consent of the individual’, i.e. informed written consent freely given (see Appendix 1).

## How do lay people assess the validity or make sense of answers to medical questions?

The short answer is – with some difficulty. There is a danger that the wrong decisions could be made about a job applicant’s fitness for work, based on a misunderstanding of a question or answer on a medical questionnaire, if assessed by a non-medically qualified person.

A sound procedure would be to have a tear-off form containing the medical questions seen only by Occupational Health, with the other half of the form returned to HR with one of four categories ticked (see Appendix 2).

It is important to obtain the expert advice and assistance of a suitably qualified Occupational Health Physician (OHP) or nurse, to design a pre-Employment Medical Questionnaire tailored for the employer in question.

# MODEL PRE-PLACEMENT HEALTH QUESTIONNAIRE

## Pre-Placement Health Questionnaire

**MEDICAL IN CONFIDENCE** – The information contained on this form will not be disclosed to anyone within the Company other than a medically qualified occupational health physician or nurse unless you give your express i.e. written, informed consent.

### SECTION 1 – TO BE COMPLETED BY HUMAN RESOURCES

Dr/Mr/Mrs/Miss/Ms _____ <i>Delete as appropriate</i>	
Surname _____	
First Name _____	
Home address _____ _____	
Telephone (work) _____	
(home) _____	
(mobile) _____	
Currently working on site? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Position applied for _____	
Proposed start date _____	
Site _____	
Department _____	
Day work?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Shift work?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Night work?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Part time?	<input type="checkbox"/> Yes <input type="checkbox"/> No
If part time, hours worked _____	
Duration of contract? _____	

*continued over...*

**Circle the activities/conditions that apply to the role applied for:**

Heavy manual work: lifting/ bending/ standing
Driving work: chauffeur/ HGV/fork-lift/ crane/ off-loader/ own car/ other
Working at heights/ ladder/ below ground
Exposure to: sewage/ clinical waste/ blood/ body fluids
Exposure to: hazardous chemicals/ skin – respiratory sensitisers
Exposure to: wood dusts/ grain dusts/ fumes/ extremes of temperatures
Working with: moving machinery/ vibrating tools/ grinding
Working in a designated noisy area/ need for hearing protection
Working in a confined space/ outside/ isolation
Required to wear breathing apparatus
Food handling
VDU/ DSE user
Working with the public/ children & parents/ students/ pupils
Requires normal colour vision
Requires other duties: walking/standing/using hands/working with electrical equipment/other

## **SECTION 2 – TO BE COMPLETED BY THE APPLICANT**

Medical information is retained confidentially in the Occupational Health Department, but you should be aware that your contract of employment is issued on the basis of the information contained in this document being a true statement. If any medical information or any answer that you have provided is found to be misleading or untrue, then the Company may decide to terminate your employment with or without notice or pay in lieu.

Date of Birth \_\_\_\_\_

Name, address & telephone number of Doctor \_\_\_\_\_

Height \_\_\_\_\_

Weight \_\_\_\_\_



Please tick the relevant response for each question. If a 'yes' response is given, provide further details below (attach additional sheet if necessary):

1. Have you had any days off work due to illness in the last 2 years?  
☐ Yes ☐ No  
 State the reason and duration of absence for each incidence.  


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2. Have you ever been off work continuously for a period of 4 weeks or more?  
☐ Yes ☐ No  
 State the reason and duration of this absence.  


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3. Have you ever attended hospital as an in-patient or out-patient?  
☐ Yes ☐ No  
 State the reason and dates.  


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4. Do you wear spectacles/contact lenses?  
☐ Yes ☐ No
5. Are you colour blind?  
☐ Yes ☐ No
6. Are you taking any prescribed medication at present?  
☐ Yes ☐ No  
 If yes provide details.  


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7. Are you undergoing any medical treatment at present?  
☐ Yes ☐ No  
 If yes provide details.  


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Do you have or have you had any of the following:

- |                                       |                              |                             |
|---------------------------------------|------------------------------|-----------------------------|
| 8. sinus trouble                      | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 9. neck swelling/glands?              | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 10. difficulty in breathing?          | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 11. ear discharge?                    | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 12. asthma/bronchitis?                | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 13. hayfever/other allergy?           | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 14. skin trouble?                     | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 15. tuberculosis?                     | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 16. shortness of breath?              | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 17. coughing or vomiting blood?       | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 18. severe abdominal pain?            | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 19. a stomach ulcer?                  | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 20. recurrent indigestion?            | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 21. jaundice or hepatitis?            | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 22. gall bladder disease?             | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 23. marked changes in bowel movement? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 24. blood in stools (motion)?         | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 25. blood in your urine?              | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 26. painful passage of urine?         | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 27. marked changes in weight?         | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 28. varicose veins?                   | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 29. a lump in your breast/arnpit?     | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 30. cancer?                           | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 31. an abnormal heart beat?           | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 32. high blood pressure?              | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 33. serious chest pain?               | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 34. heart disease?                    | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 35. a stroke?                         | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| 36. rheumatic fever?                  | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

37. blood disease? ☐ Yes ☐ No
38. kidney disease? ☐ Yes ☐ No
39. diabetes? ☐ Yes ☐ No
40. headaches/migraines? ☐ Yes ☐ No
41. dizziness/fainting? ☐ Yes ☐ No
42. epilepsy? ☐ Yes ☐ No
43. joints/spinal trouble? ☐ Yes ☐ No
44. neck, shoulder, arm or hand trouble [inc Repetitive Strain Injury (RSI), otherwise referred to as Work Related Upper Limb Disorder (W.R.U.L.D)]? ☐ Yes ☐ No
45. X-rays or other medical investigations, such as electrocardiograph (E.C.G)? ☐ Yes ☐ No
46. a surgical operation? ☐ Yes ☐ No
47. gynaecological treatment? ☐ Yes ☐ No
48. a serious accident/fracture? ☐ Yes ☐ No
49. a fear of heights? ☐ Yes ☐ No
50. mental condition e.g. depression/anxiety? ☐ Yes ☐ No
51. alcohol or drug abuse or dependency? ☐ Yes ☐ No
52. exposed to toxic substances or excessive noise ☐ Yes ☐ No
53. an illness not listed above? ☐ Yes ☐ No

If a 'yes' response has been given to any of the questions 8-53, please provide further details below (attach additional sheet if necessary):

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54. Have you ever suffered illness or injury as a result of your work?

☐ Yes ☐ No

If yes provide details.

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55. Have you ever had to leave a job for health reasons or been medically retired?

☐ Yes ☐ No

If yes provide details.

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56. Do you currently suffer from or have you ever in the past 10 years suffered from any physical or mental, psychiatric, psychological or emotional condition that has made it necessary for you to have had any time off work or that needed any form of treatment or referral for medical treatment or which could or did affect your ability to provide regular and efficient service to your then employer?

☐ Yes ☐ No

If so please give details and relevant dates.

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57. Have you, during last 6 months, taken any prescribed medication/ treatment?

☐ Yes ☐ No

If yes provide details.

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**FOOD HYGIENE**

Have you ever suffered from any of the following:

58. Dysentery ☐ Yes ☐ No
59. Typhoid or paratyphoid ☐ Yes ☐ No
60. Tuberculosis ☐ Yes ☐ No
61. Parasitic Infections ☐ Yes ☐ No
62. Has anyone living in your household suffered from any of the above? ☐ Yes ☐ No

If a 'yes' response has been given to any of the questions 57-61, please provide details of dates and any treatment below (attach additional sheet if necessary):

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Have you suffered from any of the following in the last 6 months:

63. Food poisoning ☐ Yes ☐ No
64. Diarrhoea or vomiting ☐ Yes ☐ No
65. Skin rash ☐ Yes ☐ No
66. Recurring boils ☐ Yes ☐ No
67. Discharge from ear/eye or nose ☐ Yes ☐ No
68. Any other medical problems that may affect employment for food handling. ☐ Yes ☐ No

If a 'yes' response has been given to any of the questions 62-67, please give details of dates and any treatment below (attach additional sheet if necessary):

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69. Which countries have you travelled to in the last 6 months?

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**IMMUNISATIONS**

If you have ever had any of the following immunisations, please indicate which year in the relevant box:

Polio	Tetanus	Hepatitis A	Hepatitis B	Rubella

**LIFESTYLE**

State approximate quantities of cigarettes/tobacco smoked per day.	
State approximate units of alcohol consumed per week (1 unit = 1 small glass of wine, or 1 measure of spirits, or ½ pint of ordinary strength beer).	
Give details of any regular weekly exercise undertaken.	
What are your hobbies/interests?	

**DISABILITY**

Do you feel that you have any disability that may affect your ability to do this job? i.e. speech, co-ordination, disfigurement, learning abilities, physical strength, stamina, mobility, mental illness, etc?

NO/YES Delete as appropriate. If yes, please describe:

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The information will help us comply with the provisions of the Disability Discrimination Act and is consistent with our Equal Opportunities Policy. This information will be used only to assist us in accommodating any special needs that you may have. Depending upon any answer given, you may be asked to attend an Occupational Health assessment so that we can be properly advised as to any reasonable adjustments that may be required.

**PREVIOUS EMPLOYMENT**

Please provide details of occupations in the last 10 years (the Occupational Health Department does not have access to your application form).

Name of employer	Type of employment	Start date	End date	Specific hazards

**DECLARATION**

I declare these statements to be true to the best of my knowledge and belief. I am willing to undergo a medical examination and provide specimens if appropriate, in order that the Company may receive a report on my fitness for the position applied for.

I am aware that the results of this medical questionnaire in general terms i.e. whether I am fit for the post, fit with adjustments or modifications or unfit for the post, maybe revealed to the Company if required and the details to my own doctor if this is considered necessary by the Occupational Health Adviser. However, the medical information on this form will not be disclosed to anyone without my express (i.e. written informed) consent.

I understand that any false or untrue answers or statement or material omissions may lead to my summary dismissal and if relevant repayment of any or all sick pay received if there have been any misrepresentations made.

Signature \_\_\_\_\_

Date \_\_\_\_\_

Print Name \_\_\_\_\_

The completed form should be returned in the envelope provide, direct to:  
Occupational Health Department ADDRESS.

## What is confidential?

“Medical in confidence” is the normal heading on pre-employment medical questionnaires. It means that without the express informed consent of the individual, nothing of a medically confidential nature will be disclosed, save in exceptional cases, e.g. where an Order for Disclosure has been made by a Court or Employment Tribunal.

Even a request to divulge whether a candidate disclosed a particular medical condition could not be accommodated unless the individual concerned gave the doctor or nurse their informed consent to disclose this information.

A common way around this is for an Occupational Health Physician or Nurse to respond that if, for example, the candidate had failed to disclose they had uncontrolled epilepsy grand mal and fainted during the day and had they disclosed such a condition, they would not have been declared fit for e.g. shift work, working off shore.

## What do managers need to know?

Managers only need to know whether a job candidate is fit for the job or fit with certain modifications to the job, or fit for another type of job, or unfit for any job within the Organisation. In some cases it may be helpful that the manager knows about the condition so that they can be aware of any consequences (such as epileptic fits) or any special needs (such as frequent breaks or regular periods of time off for treatment) but unless the individual expressly consents to confidential information being disclosed, details of the medical condition (other than for example, what is written on a Fit Note) must remain confidential.

## Disability Discrimination – the impact of the Equality Act 2010

The Equality Act 2010 (“the 2010 Act”), the employment provisions of which are coming into force in October 2010, has repealed the Disability Discrimination Act 1995 but has strengthened the protections in the 1995 Act and has added certain protections.



Discrimination now occurs on the grounds of a “protected characteristic”, disability being one. It can be direct, indirect, harassment, victimisation, failure to make reasonable adjustments, for reasons relating to the disability, by association or by perception.

Indirect disability discrimination is now expressly covered in the 2010 Act.

The consequences of a House of Lords case *LB of Lewisham v Malcolm* [2008] IRLR 700, which made it virtually impossible to show disability-related discrimination has been remedied in the Act. Now disability-related discrimination can be shown where, a person (A) discriminates against a disabled person (B) if A treats B unfavourably ‘because of something arising in consequence of B’s disability’, and A cannot objectively justify the treatment. A has a defence under s.15(2) if he did not know, and could not reasonably have been expected to know, that B had the disability.

The Act makes it clear that the concept of constructive knowledge applies. In other words, once an Occupational Health Physician or nurse knows about a condition, the employer is deemed to know even where the employer has no actual knowledge.

In *HJ Heinz v Kenrick* [2000] IRLR 144, the Employment Appeal Tribunal held that if exact knowledge of the medical condition including its medical name were required then this could “lead in many cases to hair-splitting medical evidence”.

It may, therefore, be important for an employer after having obtained the informed consent of the applicant, to ask the Occupational Health Physician for a more detailed report in any case where rejection for the post is a possibility, in order that the employer is aware of any conditions that could fall within the ambit of the disability discrimination provisions of the 2010 Act.

This could be done in some cases without the Occupational Health Physician disclosing any medically confidential information but in others this may be important but can only be done with the informed consent of the job applicant.

Examples from the Disability Discrimination Act 1995, Code of Practice 2004:

- A job applicant declares to the Occupational Health Physician that she has Polycystic Ovary Syndrome. This may mean nothing to a lay person but such a condition may have to be explained to personnel and/or the line manager, in terms of the symptoms and time off work needed, in order that the employer can make a rational decision as to what reasonable adjustments can be made to accommodate that individual.

In such a case, the job applicant will need to give her informed consent for such disclosure.

- A job applicant discloses that they have had spells of clinical depression. This may need to be disclosed to the line manager in order that a proper risk assessment can be carried out in terms of any risks to others and/or to the individual. In a case, where that individual would be recruited as a social worker to deal with sexually abused children, a proper risk assessment both in terms of risks to the 'clients' and any risks to the prospective employee may have to be carried out. In such a case it may be appropriate to seek the individual's informed consent for the nature of their condition and medical history to be disclosed for this purpose (see *London Borough of Hammersmith & Fulham v Farnsworth* [2000] IRLR 691).
- A job applicant seeking the job of PA to the Chief Executive of a major investment Bank declares to the Occupational Health Physician that two years ago she had a 'nervous breakdown' as a result of a traumatic break-up of a relationship with a long-term boyfriend, was off sick for five weeks, treated with anti-depressants for six months and has recovered, although she advises that when under stress at work, she does not cope as well as she did before her breakdown. She receives a glowing reference from her current employer who is a very busy City law firm.

The Occupational Health Physician recommends her for employment but the nurse discloses the medical history to the Chief Executive and he refuses to accept her for his PA.

Apart from the unlawful breach of confidential information, the refusal to recruit following a favourable medical assessment is unlawful discrimination. If the disability came under the definition of disability for the purposes of the former Disability Discrimination Act 1995 (now The Equality Act 2010), then this refusal to recruit would be unlawful discrimination under the Act and could not be justified – see Chapter 6 on Disability Discrimination.

## ‘Lying’ about medical conditions

Given that s.60 of the 2010 Act requires certain conditions to be applicable in order to justify asking a job candidate about health questions before offering the job, employers must be cautious and must be able to fall into one of the exceptions set out in s.60.

One case has highlighted the difference between lying and telling the truth and answering the question asked and asking the right question.

*Cheltenham Borough Council v Laird* [2009] IRLR 621 is a timely lesson in asking the right question.

Mrs Laird was employed as Chief Executive. She completed a medical questionnaire after she had been offered the post, subject to medical clearance. After an acrimonious dispute between her and the Leader and a significant amount of time off due to stress-related illness, she was retired on an ill health pension. The essence of the High Court claim brought by the Council for recovery of the sick pay (the claim was for fraudulent misrepresentation) was that the medical questionnaire which Mrs Laird had completed in January 2002 after she was offered the post did not mention any history of depression, stress-related illness, or any anti-depression medication.

The medical questionnaire, by which Mrs Laird declared that the statements “are true and given to the fullest of my ability and knowledge”, imposed on her a duty to take reasonable care in making the statement.

The High Court held that the medical questionnaire was to be construed objectively, as a reasonable person in the position of Mrs Laird would have done, taking into account that she was a lay rather than a medical person. On that basis, the judge finds that the representations made by Mrs Laird in answer to the medical questionnaire were not false, nor, given the terms of the questions asked, were they misleading.

In the period from May 1997 to January 2002, when she was appointed, Mrs Laird had three episodes of depression with associated anxiety. These were all associated with periods of stress and were work-related. Her answer “Yes” in response to the question “Do you normally enjoy good health” was a correct answer because although when she was depressed, she did not enjoy good health that was not her “normal” state of health. For the great majority of the time, she was not depressed and therefore a reasonable person in her position would regard herself as normally enjoying good health. She also correctly answered

“No” in response to the question “do you have either a physical and/or mental impairment?”

This case highlights the importance of careful drafting of medical questionnaires. The Judge agreed that the Council’s questionnaire “was poorly drafted” and the Council’s own Occupational Health Physician stated that the Questionnaire was “very poorly drafted” and “quite inadequate”.

The Judge remarked that, “A better question would have been to ask about an ongoing condition that “would” affect her employment – “i.e. a condition that is going to do so, not one that might do so or even is likely to do so.”

There should always be a “sweeping up” question calling for disclosure outside the questions asked, such as:

***‘Is there anything else in your history or circumstances which might affect our decision to offer you employment or affect your ability to perform your duties or affect your ability to render regular and efficient service?’***

As we have noted since s.60 of the 2010 Act in terms prevents the employer from asking about health questions at the recruitment stage, unless there are exceptional cases, health questionnaires should now be completed at the pre-placement stage i.e. when a conditional job offer is made.

In general, any material lie about a health condition could give an employer a fair reason for dismissal as long as there is a serious health and safety risk or other material reason that renders the mis-information sufficiently serious. Employers must investigate the matter thoroughly and determine whether the lie was so material as to justify dismissal. This can sometimes be a considerable period of time thereafter despite excellent service from the employee.

### **Warning to job applicant**

It is essential to explain on the Health Questionnaire that any false information given may render the individual liable to summary dismissal.

A clear warning should be placed on the front of the form and at the very least this should be pointed out before asking the individual to complete the questionnaire.

### How does an employer know about the lie?

If an employer discovers through some means or other that an employee has lied on their pre-employment health questionnaire, it is often impossible to obtain the documentary evidence as the individual may refuse to give consent to disclosure of those records.

One Occupational Health Physician is quoted as saying that when told that a job applicant (an off-shore oil worker) had lied about a material medical condition (drug addiction) at the pre-employment medical, the Occupational Health Physician replied:

*“If I had known then what I know now, if true, I would not have recommended him fit for work.”*

That told the employer all they needed to know.

### When is a medical examination necessary?

Apart from statutory requirements for medical examinations, e.g. CAA requirements for airline pilots, a fuller medical assessment will be necessary when an Occupational Health Physician or nurse recommends that this should take place.

## The purpose of pre-placement medical assessments

The main areas where health advice is needed are where:

- The person's condition may limit, reduce or prevent them from performing the job effectively (e.g. back problems which limit mobility);
- The person's condition may be made worse by the job (e.g. excessive physical exertion for persons with cardio-respiratory problems; exposure to isocyanates such as TDI);
- The person's condition is likely to make it unsafe for him to do the job (e.g. liability to sudden unconsciousness in hazardous situations);
- The person's condition is likely to make it unsafe both for him and others, whether fellow workers and/or the community (e.g. road or rail drivers who may be liable to sudden unconsciousness or to behave abnormally);

- The person's condition might make it unsafe for the community (e.g. consumers of a product if a food handler transmits infection).

There is now greater awareness for the need of a full pre-employment medical check including past medical records for hospital staff, particularly medical and nursing staff, since the Beverley Allitt case and the subsequent Clothier Report.

## Assessing fitness for work

1. Level of skill, physical and mental capacity sensory acuity etc. is needed;
2. Any possible adverse health effects of the work or environment;
3. Any possible health and safety implications of any medical condition – there may be an emergency component in the job and higher standards of fitness may be required on some occasions, e.g. fire-fighting on an oil platform.

## Medical standards

There may be statutory requirements for certain standards such as eyesight, no colour blindness, acute hearing, no heart conditions etc. In services such as the Fire Service, the transport industry and pilots, food handlers etc. the law sets the standards.

## Legal duty of care

The common law may deem employers negligent if they do not assess and impose reasonable standards of health and fitness, mental as well as physical. For example, a student nurse may be turned down for training if she has a history of anorexia, deemed to be a significant risk to her or to patients.

In *Kapfunde v Abbey National plc and Dr Daniels* [1998] IRLR 583, the Court of Appeal held that an independent OHP did not owe a duty of care to a job applicant when carrying out a pre-employment medical assessment of fitness for work, even if it was reasonably foreseeable that the job applicant would suffer financial loss if a negligent medical assessment was carried out. This was because

there was not sufficient proximity, i.e. closeness in relationship, between the independent Occupational Health Physician and the job candidate.

“The existence of a duty of care not to make a negligent mis-statement and the identity of the persons to whom that duty is owed depends upon the circumstances. A duty of care will generally be owed to the person to whom the statement is made and who relies on the report. In the case of a medical report this is normally the person who commissions the report, not the subject of it.”

The Court of Appeal held that the Occupational Health Physician is in much the same position as psychiatrists and social workers retained by a local authority to give advice on whether a child should be taken into care. No duty of care was owed to the child even where the tendering of that advice involved interviewing and examining the child.

## Breach of human rights?

The right to respect for privacy, family life and correspondence, as guaranteed by Article 8 of the European Convention on Human Rights (and now the Human Rights Act 1998), is one of the fundamental rights protected by the legal order of the Community directly enforceable only against public sector employers. This includes, in particular, a person’s right to keep his state of health secret, although this may lead to rejection for a particular post. He/she also had a right to be fully informed of any medical tests that were proposed to be performed in order to be able to give ‘informed’ consent.

The ECJ, *Mr X v European Commission* [1995] IRLR 320, held that the right to respect for private life, embodied in Article 8 included a person’s right to keep his state of health secret.

Although the pre-employment medical examination serves a legitimate interest of the Community Institutions and if the person concerned, after being properly informed, withholds his consent to a test which the medical officer considers necessary in order to evaluate his suitability for the post for which he has applied, the institutions cannot be obliged to take the risk of recruiting him, nevertheless that interest does not justify the carrying out of a test against the will of the person concerned.

The right to respect for private life requires that a person's refusal to undergo a test be respected in its entirety.

In the present case, since the appellant expressly refused to undergo an AIDS screening test, that right precluded the administration from carrying out any test liable to point to or establish the existence of that illness in respect of which he had refused disclosure."

## Summary

1. A contract is formed once an offer is made and the individual accepts the job – this can be oral and not necessarily evidenced in writing (but proof may then become an issue).
2. Lying during the recruitment process may give an employer grounds for dismissal or refusing to recruit the individual, but the lie must be material. Care must be taken not to offend the disability discrimination provisions of the 2010 Act.
3. Failing to disclose information rather than lying about it when asked is materially different and does not constitute 'lying'. Answering in the affirmative to a question about current state of health may not be a misrepresentation when that individual has had a history of mental health problems but at the time of completing the question is not ill.
4. There are important ethical issues concerning informed consent and confidential medical information which cannot be disclosed without the informed consent of the individual.
5. The data subject rights in force under the Data Protection Act 1998 and the right to respect to privacy and family life under Article 8 of the Human Rights Convention (Human Rights Act 1998), further prescribe employers' conduct during recruitment. The Employment Practices Code of Practice published by the Information Commissioner includes a section on medical records in Part 4.
6. Occupational Health Physicians owe a duty of care not to give negligent statements about the fitness or otherwise of an individual to the client/employer but not, in law at least, to the subject of the medical examination.