EXPERT GUIDE

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Discrimination Law & Equality 2014

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Disability Discrimination and the Duty to make Reasonable Adjustments... Should you ditch the Competitive Interview Process?

By Hina Belitz & Remziye Ozcan

The law on discrimination applies to all employers, no matter how big or small and whatever sectors you are in. Protection from discrimination applies regardless of how long someone has worked for you. The definition of 'employee' under discrimination legislation is wide and includes contract workers too. There is no need to be in employment to bring a claim of discrimination, so the law also protects job applicants and former employees.

Of critical importance is the fact that there is unlimited compensation available to a successful claimant in a discrimination claim. This is made up of financial loss and an award for injury to feelings. In some circumstances an individual may be compensated for personal injury caused by the discrimination and in exceptional circumstances a tribunal may award aggravated damages and punitive damages.

What is Disability Discrimination?

There are various types of discrimination - direct, indirect, harassment, victimisation and (for those job applicants/employees who are disabled) discrimination arising from disability and a failure to make reasonable adjustments.

To succeed in a claim for disability discrimination, an individual needs to show that they are disabled. They need to show that they have:

- a physical or mental impairment;
- which is long term (meaning it has lasted or likely to last for at least 12 months or for the rest of that person's life); and
- that it has a substantial adverse effect on that person's ability to carry out day to day activities.

Where an individual is treated unfavourably because of something arising in consequence of his disability there will be discrimination unless:

- the employer can show that the treatment is a proportionate means of achieving a legitimate aim; or
- they can show they did not know and could not reasonably be expected to know that the claimant is disabled.

You can't say that you didn't know that the individual was disabled if you could reasonably be expected to know. As an employer, you should investigate the reasons behind an employee's behaviour and sensitively explore whether there are any underlying reasons.

The duty to Make Reasonable Adjustments

Equality Act 2010 (EqA 2010) imposes a duty on employers to make reasonable adjustments to help disabled job applicants, employees and former employees in certain circumstances. Failure to comply with the duty amounts to discrimination. The duty applies to all employers, irrespective of their size.

What is the extent of this duty and what happened in a recent case?

A recent case, *London Borough of Southwark v Charles*[1], raises a difficult issue for employers: when should a requirement for competitive interviews be disapplied or modified for disabled job candidates?

Mr Charles originally worked as an Environmental Enforcement Officer at the London Borough of Southwark. He was diagnosed with a disability called '*sleep paralysis agitans*'. This meant that he awoke at night, paralysed and unable to go back to sleep. In time this led to him suffering from depression. As a result of his disability, an Occupational Health report found that Mr Charles was unfit to attend *"administrative meetings"* which later on an Employment Tribunal found also included and meant competitive interviews.

When Mr Charles' job was later put at risk of redundancy, he was invited to express an interest in attending job interviews for alternative positions, a common step in a redundancy consultation process.

HR and Occupational Health made attempts to contact Mr Charles and

to assess his (apparently limited) interest in certain alternative roles. They also contemplated making adjustments for him after the interview process itself. Importantly, however, they didn't dispense with (or adjust) the need for an interview itself.

After his appeal against dismissal was unsuccessful, Mr Charles brought claims for unfair dismissal and disability discrimination.

The tribunal held that Mr Charles had been dismissed for redundancy and that his dismissal had been fair (there had been adequate consultation and he had been offered the opportunity to apply for other jobs). However, he succeeded in his disability discrimination claims.

The EAT upheld the tribunal decision. Mr Charles' disability meant that he was unable to attend administrative meetings, which the tribunal held included interviews. The tribunal found that the employer failed to consider alternative ways of assessing his suitability for roles into which he might have been redeployed as an alternative to redundancy.

However, as the EAT went on to note, the requirement to adjust attending an interview for a role does not lead automatically to the conclusion that the employee would have been appointed.

So should disabled employees be automatically selected without interviews?

In a word, no. There is a positive duty on employers to make reasonable adjustments for disabled job candidates. The key code of practice in this area helpfully sets out that adjustments can include *"modifying procedures for testing or assessment"* or *"transferring the worker to fill an existing vacancy"*.

In the past the House of Lords has said that disapplying a competitive interview process, even for a higher graded position, might be a reasonable adjustment.

On the other hand, however, it is clear from a case involving Sheffield Hallam University that an employer doesn't have to water down the core competencies of a role or to appoint someone they have no faith in.

It is fair to say that each case will depend on its facts; for Mr Charles there were a number of factors which appear to have made it reasonable to consider adjusting the interview requirement:

- the alternative role Mr Charles could have been selected for was two grades below his old one – he wasn't being promoted beyond his abilities;
- because his situation concerned redundancy there was the option to ask his managers for an assessment of his abilities instead of insisting on an interview;
- other options were potentially available, such as interviewing Mr Charles at home, having a less formal interview and/or requiring information in advance.

Summary

There is no requirement to abandon interviews for disabled candidates. Any adjustments must be reasonable and eliminate a disadvantage suffered. As such, the situation depends on the disability in question and the disadvantage the candidate suffers as a result.

There has to be evidence (whether the candidate is a new recruit or redeployed) that modifying or waiving the interview would be an essentially "reasonable" step that would make a difference to the outcome.

What does this mean?

Although employers may have a legitimate aim in holding an interview process to select employees for jobs, the Borough's requirement for a formal interview was not a proportionate means of achieving that aim in relation to a disabled person.

What should we do?

Employers should be flexible when considering how they hire and also dismiss people with a disability. This case highlights that traditional methods will not always be appropriate.

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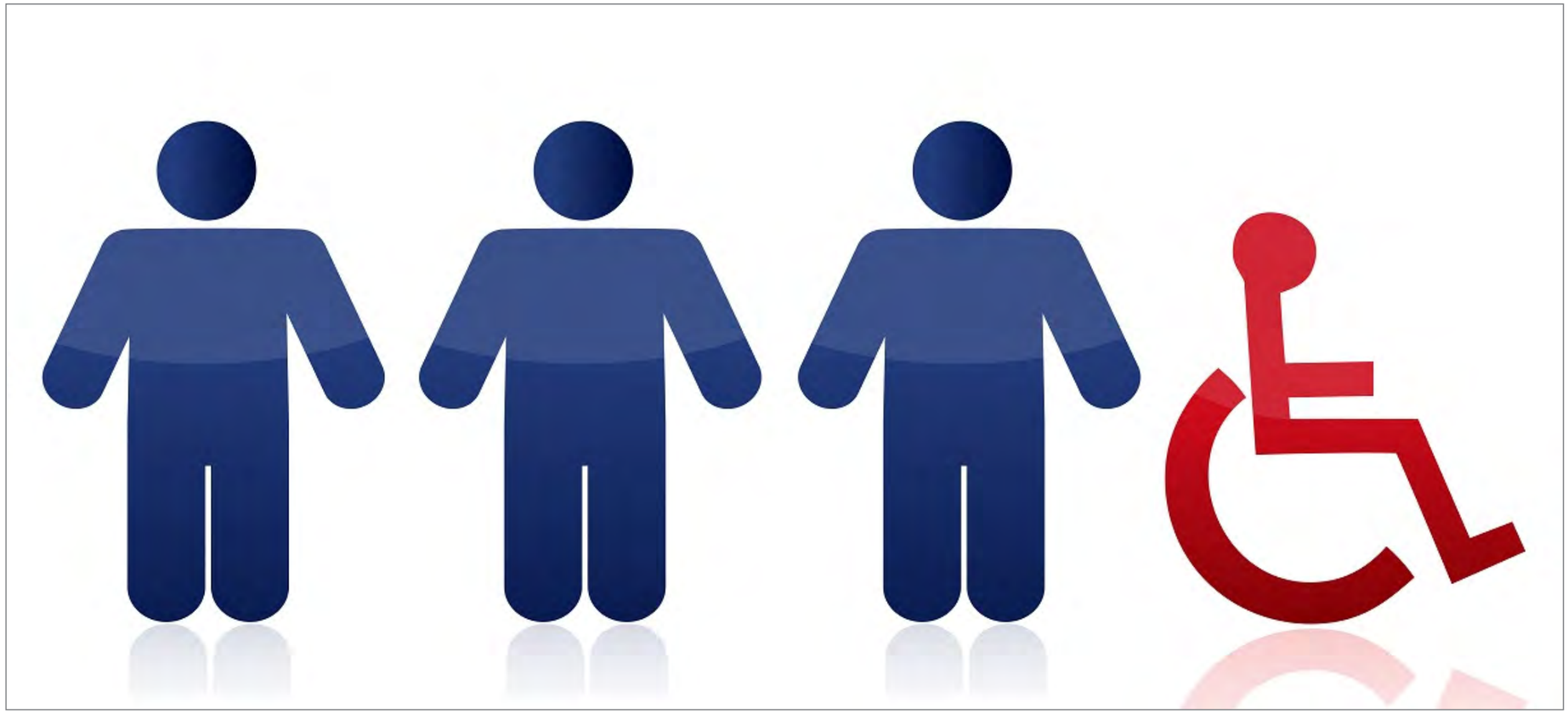

1.London Borough of Southwark v Charles UKEAT/0008/14