

The majority (54%) of people with minimum wage exemption permits earn less than \$3.00 an hour.

Disclosure of mental health

From the National Conversation about Work

A particularly vexed issue is whether or not to disclose experience of mental illness. People with experience of mental health issues told the Commission that disclosure on application forms or unexplained gaps in CVs meant they were unlikely to be offered a job interview.

However, non-disclosure carried the risk that their needs will not be accommodated should they become unwell, and in extreme cases be dismissed for dishonesty.

Legal considerations include the appropriateness of questions in the application form and the steps taken to avoid discriminatory practices. One participant with experience of mental illness said, “The crux of the argument around disclosure is that there is still a lot of stigma around employability - there’s the myth that if you’ve got a mental illness you’re actually not employable. You can’t handle stress, you’re potentially dangerous to yourself and to others, you are a lot of extra work, you’re unreliable, you will take lots of time off.”

There were risks either way, disclose and risk not being considered for the job, not disclose and risk being unsupported or being dismissed should you become unwell.

A further meeting attempted to tease out what advice the Commission could usefully provide to prospective employers and employees.

The group suggested that the focus should come off disclosing experience of mental health and onto equality for any worker and their employer. Their advice was to not make it about mental health but ensuring the best person for the job by:

- Focussing on what an individual can do, not do but could learn, and what is outside their capability.
- Challenging discriminatory assumptions about ability based on diagnostic labels.
- Having conversations throughout any person’s employment about their needs and support required to do a job well, regardless of labels and assumptions.

Ensuring best fit requires detailed job descriptions and person specifications that are inclusionary.

The Employers’ Disability Network suggests that employers concentrate on what needs to be done rather than how the work should be done, for example it is better to ask, “this job involves working under pressure to tight deadlines. Tell us about situations where you’ve been under pressure and how you ensured you met deadlines” rather than “how will the pressure of tight deadlines affect your disability?”⁷²

Conversations about how to meet people’s needs or to support them to develop their performance at work is good practice for all employees. However, honest engagement requires a safe and supportive work environment. This conversation could include meeting out-of-work needs such as childcare and in-work needs like professional development needs

⁷² See *Manager’s guide A best practice approach to working with disabled employees* Employers Forum on Disability and Workbridge 2007 This guide has been adapted for New Zealand and is available from Workbridge or Employers’ Disability Network.

as well as being responsive to individual needs related to health. The group discussed the mutual obligations inherent in acting in “good faith.” The employee should be able to say, “this is what I’ll do to keep well at work” and the employer needs to be able to say “this is what I can do if concerns arise.” This does not mean the employer takes on a social work role, rather that there is a plan such as someone to contact. The group commented that these discussions should be held after a 90 day trial period to ensure both employer and employee are confident in their ability to do the job and disclosure can be made without fear of prejudice or discrimination.

There is a cost to employers if employees are afraid to disclose. For example, if medication has been identified by the individual as a useful part of their recovery planning, the employee may stop taking this medication if drug screening might reveal a condition that they have not disclosed and which is not accepted by the organisation. Presenteeism and absenteeism may occur if a person does not feel confident to request sick leave to become well. The Commission heard that having experience of mental health issues could not be an excuse for lack of productivity “If you can’t do the job, you can’t do the job. Both parties need to be fair and reasonable”.

Experience of mental health issues is common in New Zealand:⁷³ Almost half (46.6%) of the population are “predicted to meet criteria for a disorder at some time in their lives, with 39.5% having already done so and 20.7% having a disorder in the past 12 months.”⁷⁴

Legislation

Discrimination

Because disability, which includes “mental illness”, is a prohibited ground under the Human Rights Act 1993 an employer should not seek general information about a job applicant’s medical or ACC history. Employers can ask whether or not a job applicant has the abilities needed for the job. This includes establishing whether or not an applicant has any medical conditions or disabilities that might mean the work could not be satisfactorily carried out. A job applicant should first be made aware of the job’s requirements and then asked about any medical conditions or disabilities that might prevent them from carrying out the work satisfactorily.

Without the context of a full job description the following question could be construed as an intention to discriminate:

Do you have, or have you ever had, a medical condition caused by an injury, illness, disability or gradual process that the tasks of the position may aggravate or contribute to, or that may affect your ability to carry out the work of the position applied for?

If confronted with such a question the applicant could answer “No”, if they believe that any medical condition will not affect their work. Alternatively the applicant could say, “On the limited information available to me my answer is ‘No’”. If the answer is “Yes” the applicant could then describe what they will do to keep well at work and what the employer could do.

However, once a full job description is given, questions about a person’s ability to meet specific job requirements are legitimate. In some instances, where a medical condition makes performance of the job unsafe (for example, a driving job when medication causes drowsiness) then the applicant has a responsibility to declare the medical condition.

⁷³ Oakley Browne, M. A., Wells, J. E., & Scotts, K. M. (Eds). (2006). [Te Rau Hinengaro: The New Zealand Mental Health Survey](#). Wellington: Ministry of Health.

⁷⁴ Ibid

A guidebook for job seekers⁷⁵ with experience of mental health issues advised that there are two situations in which a job seeker must disclose:

1. If your disability or health condition would pose a risk to yourself or others in the workplace. (e.g. if you were applying for a job as a truck driver but you were on medication that made you very drowsy making it unsafe for you to drive).
2. If your disability or health condition meant you would not be able to satisfactorily perform the tasks required in the job AND would be unreasonable to accommodate (e.g. if you were applying for a job in sales with lots of customer contact, but you had a social phobia and couldn't talk to strangers.)

The guidebook goes on to say, "if either of these applies, you need to ask yourself: "Is this the right job for me?"

Good faith

Under the Employment Relations Act both employee and employer are required to act in good faith. The Department of Labour explains good faith in the following way:

"Employers and employees are obliged to deal with each other at all times fairly, reasonably and in good faith.

In broad terms, this means that both employers and employees must:

- act honestly, openly, and without hidden or ulterior motives
- raise issues in a fair and timely way
- be constructive and cooperative
- be proactive in providing each other with relevant information and consider all information provided
- respond promptly and thoroughly to reasonable requests and concerns
- keep an open mind, listen to each other and be prepared to change opinion about a particular situation or behaviour, and
- treat each other respectfully.

Good faith generally involves using practical common sense. Acting in good faith reduces the risk of conflict and problems. It is also a minimum requirement of the Employment Relations Act 2000."⁷⁶

Legal cases

In 2002 the Employment Court ruled that a question on a pre-employment form – *Do you have any medical problems of any kind?* – was unlawful in light of s. 23 of the Human Rights Act which prohibits questions that indicate or could reasonably be understood as indicating an intention to unlawfully discriminate against an applicant for employment. The question would enable an employer to reject an applicant on the basis of a condition which would have minimal or no impact on work performance.

In this case the employee answered "yes" to the question and gave details of one condition; but she did not mention several other medical conditions. After time off work because of illnesses the employer ascertained that she suffered from several medical conditions which she had not disclosed. The employer dismissed her because of her failure to disclose her full

⁷⁵ *Taking the first step A guidebook for job seekers with experience of mental health issues* LEAP Like Minds Employment Advocacy Project 2005

⁷⁶ <http://dol.govt.nz/er/solvingproblems/keyprinciples/goodfaith.asp>

medical situation. The court decided that she was not obliged to disclose all her medical conditions.⁷⁷

In 2009 the Employment Relations Authority considered a situation where an employee had not disclosed her bi-polar condition on two separate occasions when her failure to do so provided an inaccurate answer. The employer subsequently failed to accommodate her condition. The applicant was able to establish that her condition was one that her employer needed to reasonably accommodate but had failed to do so. The Authority deducted 25% from the damages as the employee's failure to disclose contributed to the discrimination grievance arising.⁷⁸

In 2010 the Authority upheld a decision by an employer to dismiss an employee who failed to disclose on a pre-employment questionnaire that he had a pre-existing mental health condition. Of critical importance to the Authority's decision was the employer's practice in assessing the information about physical and mental health provided by applicants. The information is considered by a different person to that who assesses work history and standard CV-type information. The employer considers in detail an applicant's medical history before making a decision whether to employ or arrange a suitable programme to facilitate employment.

The Authority concluded that the separate consideration of the detailed medical information from other aspects of the recruitment process indicated that the medical information was requested for the purposes of assessing an applicant's physical and mental fitness to perform the role and duties, it was part of assessing whether the person was qualified for the job. The Authority did not accept that the form could reasonably be taken as indicating an intention to unlawfully discriminate.

The employee said that such questions should only be asked after the initial assessment had determined that an applicant was otherwise suitable for employment. Otherwise there is a risk that a suitable applicant, who is entitled to reasonable accommodation, might be discriminated against.

The Authority said that employer was entitled to assess its legal obligations. It can only do that by asking appropriate questions to elicit the necessary information from the applicant and, if necessary, seeking expert reports. The Authority noted that there was evidence of the employer continuing to employ people who suffer from mental illness and the employer does not discriminate against people with a mental illness. The evidence supported the employer's claim that it needs to know about the nature of a person's illness in order to assess whether it can reasonably and safely be accommodated so as to continue or permit the person's employment.

The Authority commented on the employee's evidence that he had been advised by an advocate to say that his false answers resulted from miscalculation rather than a deliberate decision to withhold information because of his fear of discrimination:

"The statutory obligation is for those in an employment relationship to deal with one another in good faith which includes not misleading one another. Acting on advice, [the employee] breached that obligation ... That leads on to a point made by counsel about the stigma attached to mental illness. It might be understandable that a young man such as ... would think he should hide his mental health history to avoid any risk of discrimination. There will be differing views on that. In doing so, however, [the employee] exposed himself to the risk of adverse consequences should his employer later discover

⁷⁷ *Imperial Enterprises Ltd v. Attwood* [2002] 2 ERNZ 740.

⁷⁸ *Atley v Southland District Health Board* (2009) 8 HRNZ 888; (2010) 9 NZELC 93,427.

his falsehood. His other option was to properly answer the questions asked and rely on the anti-discrimination provisions in the Human Rights Act, and the remedies available for a proven breach of that Act if necessary.”⁷⁹

Future action

- Urgent action is required in the state sector, led by SSC which includes:
 - Adequate data capture so that progress can be monitored and is transparent
 - Special measures (affirmative action programmes) with targets to increase the numbers of disabled people into decent employment in the public service.
 - Target setting for major public service departments to improve the employment of disabled people. This is required by Article 27 (1) (g) by the CRPD that New Zealand has ratified which reads, *Employ persons with disabilities in the public sector*.
- Promote inclusive employment practice in the private sector through organisations such as the newly-formed Employers’ Disability Network.
- Amend the Employment Relations Act 2000 to include a positive duty to be a good employer to the private sector in addition to the public sector.
- Review the implementation of the minimum wage exemption legislation in consultation with the disability community and make transparent its current operation through annual disclosures by the Department of Labour. The review should include: assessment of eligibility and rate; numbers of exemptions; pay rates determined; Human Rights implications of the policy and its implementation; the extent to which employment in open settings is being supported and; employers issues.
- Provide guidance on the disclosure of mental health issues to employers, employees and job seekers through the Commission’s widely-distributed *Getting a job: An A to Z for employers and employees, Pre-employment guidelines*.

⁷⁹ Lidiard v New Zealand Fire Service Commission ERA Christchurch CA51/10, 8 March 2010.