

CREATING A JUST CULTURE

Questioning the Questions

BY **VALERIE BLAND**

I HAVE *QUESTIONS* ABOUT JOB APPLICATION health *questions*.

But first, let me clarify that even though I recently attended my first employment law conference, I do not have delusions of grandeur about my employment law expertise – I am not a specialist employment lawyer. However, I am a new employer of lawyers. I am also drafting employment policies and strategies for my new law firm at a time described – by one of the senior practitioners speaking at the Employment Law Conference 2018 – as the most exciting (and tough) time in his career to be involved in employment law matters. And I am concerned about how we can attract and retain lawyers as employees for our law firms and organisations in the potentially even tougher future.

An action point for me from having recently drafted Extra Law's Gender Equality and Diversity strategy, is to look at recruitment processes from a fresh and inclusive perspective. The following question in job applications immediately jarred with me:

> "Have you an injury or medical condition caused by gradual process, disease or infection, such as repetitive strain injury, which the tasks of this job may aggravate or contribute to?"

The above question is regularly a 'required question' in the initial online application process for job applicants. It is mentioned in job application articles and commentary as being the health question wording that "the Human Rights Commission recommends". It is included in online job applications for roles in government departments who are statutorily required to operate a personnel policy that complies with the principle of being a good employer. However, I think we, as employers of lawyers, should take a fresh look at how it is used to recruit employees.

A red flag

The timing of asking the health question – at the first stage of the application process – is immediately a red flag. I anticipate



that many people would expect that when a prospective employer has a metaphorical pile of online applications, it would be an easy and automatic screening process to reject applications where "yes" was answered to health questions. This likelihood is recognised in the UK, where the Equality Act 2010 brought in new provisions which prevent employers asking job applicants questions about health or disability during early stages of the recruitment process:

> "In the past, some employers asked questions about health or disability in the initial stages of recruitment. Disabled applicants were being rejected before interview and before being given the opportunity to have their suitability, skills and experience for the work considered by the employer. This resulted in unfair discrimination. (*Equality Act 2010: What do I need to know? A quick start guide to the ban on questions about health and disability during recruitment*, published by the UK Government Equalities Office.)

In New Zealand, the Human Rights Act 1993 does not specifically refer to discrimination relating to just the timing of job application health questions (although maybe it should follow the UK example?). Under the Act, lawful discrimination can only occur where:

a the position is such that the potential employee could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or

b the environment in which the duties of the position are to be performed, or the nature of those duties, or of some of them, is such that the potential employee could perform those duties only with a risk of harm to that person or to others, and it is not reasonable to take that risk.

Are the answers to the job application health questions (like the example question above), asked at the first stage of the application process, useful to assess whether either of these situations applies? That is, for example, do employers understand what getting a "no" answer to one of these health questions in an application may mean? Most health questions invite the job applicant to make an assessment about the existence of a condition which could affect their performance in the role, or which the role might aggravate.

In making the decision to apply for the advertised legal role, the applicant has assessed that their CV plausibly evidences their performance in roles which they consider are credibly similar to the advertised role, based on the information supplied in the job advert. If they have had that same health condition throughout their career to date, such an applicant may subjectively and reasonably answer "no" to the job application health questions. However, if employers waited instead to ask relevant and targeted health questions at a stage where the potential employee and employer know more about (1) each other, (2) the role requirements, (3) the health conditions that could impact on the role, and (4) the reasonableness or otherwise of providing special services and facilities, then more useful answers are likely to eventuate leading to a better assessment by the employer.

Role requirements

A key starting point for an employer's assessment of compliance with the Act when seeking employees for roles as lawyers, should be to know the requirements of the lawyer's role

and be confident that they are, in fact, necessary (ie, not assume things can only be done in the way they have always been done).

Lawyer's roles have similar physical functional requirements: office/desk/meeting time; communication skills; with the brain as biggest 'muscle' being taxed. To apply for a first job as a practising lawyer, an applicant needs to have completed a law degree and requisite training – and completing these steps whilst managing a physical health disability should arguably make an applicant an inspirational hire, rather than an automatically screened "no thanks".

Statistics used by the Human Rights Commission estimate that up to 11% of the working population have a disability. I would consider office-dominated jobs (like a lawyer's role) well positioned to utilise the skills of this group of the population. There are technological support aids for physical constraints such as speech difficulties, vision impairment, repetitive strain injuries, etc that are increasingly more readily available. If an existing lawyer in a law firm had an accident and was, say, confined to a wheelchair temporarily, it is now more reasonable and realistic to think that a back-to-work plan to accommodate their physical needs could be considered and implemented.

One employment specialist I spoke to after a health and safety seminar agreed that physical disabilities should not be a barrier to a successful career as a lawyer. This specialist suggested, however, that employers of lawyers are justified in asking health questions at the first stage of the application process in order to uncover mental health issues such as depression. It was his view that an applicant may mislead the employer if they don't answer "yes" to these online job application health questions if they suffer or have suffered from a mental illness.

The Human Rights Commission notes in its guidance ["Getting a job: An A-Z for employers and employees"] that job applicants who have experienced mental illness often do not disclose that fact because they fear discrimination. Other job applicants may also answer "no" to the health questions in online job applications because, as above, they subjectively and reasonably assess that they have managed their mental illness at previous times in their legal career, whilst performing satisfactorily in the similar roles noted in their CVs.

Rationale

The rationale given to justify an employer of lawyers enquiring into a potential employee's mental health conditions, like depression, is frequently based on health and safety issues involving the potential employee's ability to cope with the inherently stressful nature of lawyer roles. It was recently reported in New Zealand that nine large UK law firms have signed up to a mental health charter – and (we may hope) New Zealand may consider similar initiatives. This UK charter for employers aims to counter stigma and discrimination for people experiencing mental health issues and one of the five stated commitments is to:

> "Not make assumptions that a person with a mental health condition will be more vulnerable to workplace stress or take more time off than any other employee or job applicant."

An applicant for a lawyer role may well expect stress in that type of role. However, it should be reasonable for that expectation to be about healthy creative stress which is actively managed by the employer, with appropriate support, in accordance with health and safety processes. It is, hopefully, becoming more difficult for an employer in the future to demand that its employees accept, and be unaffected by, unhealthy stress caused or made worse by poor management practises, or by incidents of bullying and harassment that are not appropriately dealt with. In the legal industry, we do not have to also worry about such things as chainsaws, heavy machinery or working from heights, so we surely have ample capacity to give appropriate consideration to what is likely to be the biggest risk to the health and safety of our staff.

Anecdotally, law firms and organisations are expressing concern about securing the best talent to be the lawyers, legal advisers, partners or legal managers of the future. I suggest that, amongst other things, employers should consider what benefit is gained by asking these health questions at the first stage of job applications as against the message that applicants may inadvertently be receiving about your firm or organisation.

So, I'm no expert in employment law, but I am going to put this question, about job application health questions, to those who are recruiting modern lawyers: "maybe you're doing it wrong?" ■

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