

# Briefing

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## Disability management and the medical adviser

Abridged content for sample purposes

**This briefing is not an authoritative statement of the law. While we have made every effort to ensure that the information we have provided is correct, Business Disability Forum cannot accept any responsibility or liability.**

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# Introduction

## Disability management and the medical adviser

This is one of a series of briefings, published by Business Disability Forum, which provide practical guidance for employers on specific topics relating to the employment of disabled people. It will be particularly useful for personnel or human resources managers, occupational health advisers, line managers and employment agencies.

This briefing will help employers use medical advice to best effect when managing disability in the workplace.

All organisations, irrespective of size, will at some point require the expert advice that medical officers can provide to help them respond effectively to employee requirements.

This briefing will refer to the support that medical advisers can offer to help employers to effectively manage disability in the workplace.

# Who are medical advisers?

For the purposes of this briefing, the term 'medical adviser' means a medical expert from whom an opinion is sought to help assess risk, make recommendations for reasonable adjustments and respond to individual employee problems. Such advice can be provided by a number of sources including, occupational health advisers (internal and external), general practitioners (GPs), consultants and specialists, ergonomists etc.

An organisation which responds appropriately to medical advice will benefit from:

- A workforce able to work to their full potential.
- Reduced sickness absence and staff turnover.
- Increased efficiency and productivity.
- Reduced risk of litigation and loss of reputation.
- Increased staff morale.

# When to seek medical advice

Employment decisions are a managerial not a medical responsibility. A medical adviser's role is to assess risks, to make recommendations and to present the findings clearly. The employer must then decide on the acceptability of those recommendations in accordance with the Equality Act 2010, health and safety legislation and other legal obligations.

Just because an employee has told an employer about a disability, has had time away from work, or the need for reasonable adjustments has been identified, does not automatically mean that medical advice will be needed. Often conversations between a manager and the individual can identify reasons for absence or reasonable adjustments that when implemented will ensure the individual is able to work safely and to the best of their ability.

A disabled person may know exactly the adjustments they need. A question such as: "Is there anything that we can do that would make it easier to do the job?" is a good place to start.

Circumstances when you may want to call an expert:

- Suitable adjustments are difficult to identify or hard to provide.
- A person is newly disabled or has a fluctuating/progressive condition, and is not sure about the impact this may have and what would help them to do the job.
- You need to establish whether an underlying medical condition is the cause of workplace problems.
- The return to work options for an employee who is absent need to be assessed.
- A medical opinion is required to ensure a safe and healthy work environment.

Whether or not you use a medical adviser, you must remember that you, as the employer, are responsible for making the necessary reasonable adjustments. What you do with medical advice is as important as the quality of that advice.

Employers must not accept medical advice at face value.

## Legal case study – Sandy v Hampshire Constabulary

Mr Sandy had a back problem and partial hearing loss. While working for a year in a temporary post as a police station inquiry officer, he had five days absence, including four days for an ear operation.

Mr Sandy applied for an equivalent post with Hampshire Constabulary, on a permanent basis. The force medical officer said Mr Sandy was unfit for this post because his back injury would give rise to an unacceptable level of sickness. On this basis Hampshire Constabulary withdrew a conditional offer of employment.

The medical officer had not examined Mr Sandy, nor obtained his attendance record. Sight of the record did lead to a revised opinion, but only after an alternative candidate had been appointed.

Mr Sandy challenged the decision but Hampshire Constabulary sought to defend it on the basis that the force had acted on medical advice, in good faith, and that the medical adviser's decision was justified because, although mistaken, it was based on genuine belief.

The tribunal found the decision arbitrary and speculative. While the personnel officer was right

to take careful account of the medical officer's report, the employment tribunal said it was also incumbent upon him to apply his own analysis and judgement. The personnel officer should have reflected that the applicant had successfully fulfilled his duties in the temporary post. Management was responsible for the decision, and had breached the law.

Although this case was decided under the Disability Discrimination Act 1995 (DDA) the principles are still relevant and a similar decision is likely to be reached by the tribunals under the Equality Act 2010.

# How to use medical advice – GPs and occupational health

## General practitioners

GP's are able to:

- Provide a 'Statement of fitness to work'.
- Identify a medical condition which is causing difficulties at work.
- Refer people for specialist advice/treatment.
- Describe the effects of any medication/ treatment.
- Offer limited advice about potential adjustments.

Historically, doctors tend to:

- Underestimate the skills and capacity of disabled people.
- Underestimate what can be achieved through adjustments at work.
- Overestimate the risks for the employer and the disabled person, regarded as a 'patient'.
- Have views based on someone's medical history and make general assumptions about an impairment, rather than assess the impact of a particular impairment on the particular person in the particular job and in the light of all the circumstances.

Remember, the GP's primary duty is to their patient and their actions are governed by this and medical ethics. Therefore GPs are not always able to be as objective as an employer would like.

When commissioning a GP as an adviser, consider offering to pay locum expenses to ensure the GP has the necessary time. It could make all the difference to the quality of the advice.



## Statement of Fitness for Work or 'Fit notes'

'Statements of Fitness for Work' or 'fit notes' were introduced in April 2010 to replace sick notes issued by doctors.

The 'fit note' is intended to benefit employees and employers by helping people back to work as soon as possible, through the provision of more information about the person's condition and what they need in order to return to work. It is essential that line managers who receive these 'fit notes' know what to do, including how to contact a team member who is off sick, and how to implement adjustments needed to enable them to return to work.

## A note of caution for employers

Employers should note that this guidance assumes that the employee being signed off does not have a disability, and so talks in terms of 'support' or 'workplace adaptations' that the employee might need to enable them to return to work. Employers are reminded that the 'fit note' does

not affect their obligations under the Equality Act 2010 and you should be aware that the recommended 'support' or 'workplace adaptations' could also be adjustments in law.

As 'fit notes' will only be provided to employees who are off sick for more than seven days, employers would be well advised to treat anyone with such a note as though they have a disability and consider the need for reasonable adjustments in every case. A doctor cannot tell you if someone meets the definition of disability in the Equality Act 2010, as it is a legal and not a medical definition. The legal definition of disability is also extremely wide and covers conditions that you and indeed, your employee and their doctor might not consider to be a disability, e.g. muscular skeletal problems, heart disease, diabetes, asthma, migraines and depression and anxiety.

The 'fit note' allows a doctor to tick boxes recommending the following adjustments (although they are called 'support' not adjustments):

- A phased return to work.
- Altered hours.
- Amended duties.
- Workplace adaptations.
- Space for further comments/other adjustments.

Doctors only have a short time in which to see their patient and will only know what the patient tells them about the working environment and practices. The doctor cannot know what is possible or reasonable in your organisation. It is up to employers to train managers who receive the 'fit note' to be proactive in discussing with the employee how their condition affects them at work and to think about reasonable adjustments that would enable them to return to work to do their job or be redeployed to another suitable job. Managers need to know where to go for help in making such adjustments and in deciding on what is reasonable.

For more information on reasonable adjustments see the 'reasonable adjustments – line manager guide' and the 'adjustments in employment' briefing.

## Frequently asked questions

### **Is the Statement of Fitness to Work or 'fit note' binding on the employer?**

No. The purpose of the fit note is to provide employers with more information than the current 'sick note' and to facilitate a conversation with the employee about what they can and cannot do. As an employer it is for you to decide what to do with the information provided by the doctor, e.g. seek further advice from an occupational health adviser, make the suggested or alternative adjustments or decide that it is not reasonably possible for the employee to return to work yet, e.g. there may be industry standards or regulations that the doctor does not understand that means the person cannot work. In this case you should explain your reasons to the employee and treat the Statement as if the doctor had advised that they were 'not fit for work'. The employee does not need to go back to their doctor for a new Statement or 'sick note' to confirm this.

## **Will we still be covered by our Employers' Liability Compulsory Insurance (ELCI)?**

Your liability insurance should not prevent employees who 'may be fit for work' from returning or remaining at work. Employees do not need to be 100% fit in order to return to work. You do, however, need to carry out risk assessments as usual to ensure that it is safe for the person to be at work and to provide a safe working environment, which is often done by making reasonable adjustments. If you have any concerns you should contact your insurer.

## **How long do any amended duties or workplace adaptations/ adjustments have to last for?**

On the statement the doctor will state the period of time their advice is for. When agreeing a return to work plan you should specify when any adaptations or adjustments are to be reviewed. In some cases the changes will be temporary, e.g. to accommodate someone who has broken a leg. In other cases the person's condition may be long term or permanent in which case they might need long-term adjustments, but these should be reviewed regularly to ensure that they are working well.

## **What should we do if an employee wants to return to work before the end of a 'not fit for work' statement?**

Sometimes an employee will be able to return to work before the doctor has said that they will be fit. This could be because they have recovered faster than expected or because the doctor didn't know what the employer could do to enable the individual to return to work sooner. In this case you do not have to wait for the end of the statement period and the person can return to work if you both agree that they can work.

## **What if the employee disagrees with the doctor's assessment that they are fit to return to work**

If you believe from the advice from the doctor and your knowledge of the workplace and the possible adjustments that the employee could return to work, but they disagree, the first step is always to discuss the issue with the employee. You may need to arrange for transport for them to attend a meeting or go to see them at home. During your discussions you may find that there is an aspect of their condition or their workplace that hasn't been considered, which means that they cannot return to work. In other cases it may be necessary to refer the employee to an occupational health adviser in order to find out whether the person can return with adjustments.

## **Occupational health**

An occupational health service can provide the following services and it will be for you to decide which of these meet the demands of your organisation:

- Medical assessments after a candidate has been offered a job (only to be used if appropriate for the role).
- Health promotion and monitoring.
- Preventative initiatives (training programmes, online advice etc).
- Risk assessments.
- Identifying reasonable adjustments and assessing them in operation.
- Employee support.
- Advice on sickness absence management.
- Explanations about the impact of a medical condition or medication on the ability to do the job.
- Treatment (usually for only minor problems).
- Occupational rehabilitation.
- Liaising with the employee's own GP, physiotherapist, occupational therapist or consultant when specialist information is required.
- Advice about the suitability of medical retirement.

Before deciding what you want from either an internal or external occupational health provider it is vital that you establish what your business requirements are and how an occupational health service can help you to achieve these.

The most effective occupational health adviser will have a thorough knowledge of your organisation's objectives and the value that is placed on being a responsive and flexible employer.

Once you have decided on the role of your occupational health service it is very important that this is communicated to all staff and that the entire workforce is aware of their impartial positioning in the organisation.

Qualifications to look for, usually held by full-time specialists, include: Associate, the Diploma of Occupational Medicine (DOccMed), Member or Fellow of the Faculty of Occupational Medicine of the Royal College of Physicians (AFOM, MFOM and FFOM). An occupational health adviser is usually a nurse (RGN, BSc/BA/DOHN/OHND). A large company may have its own occupational health unit, or engage an occupational health specialist on a retainer basis.

There are by no means enough occupational health specialists to meet demand, but a growing number of GPs have the Diploma of Occupational Medicine (DOccMed) which constitutes a very basic training in occupational health.

Ensure that whoever is providing your occupational health advice has the necessary expertise and has a thorough understanding of the Equality Act 2010 and other regulations.

It is vital to have systems in place whereby the occupational health practitioner can communicate to you the need to make reasonable adjustments for an employee where necessary.

Remember, an employee may not consent to an occupational health adviser passing on a diagnosis or information about a disability and yet it is possible to discriminate against a disabled employee even if you did not know the nature of their disability. It is therefore essential that your occupational health adviser understands that their primary responsibility is to provide useful information to you on how to make reasonable adjustments. Once these are recommended they should be implemented irrespective of the missing diagnosis.

## Pre-employment medical questions

The Equality Act 2010 makes it unlawful for employers to ask applicants general questions about their health, medical history or disability prior to making an offer of employment.

Employers cannot ask applicants for general information about their health or a disability including mental health problems: for example, in a standardised medical questionnaire that asks questions about past and current illnesses, injuries, treatment or medication.

Employers who ask questions about past sickness absence on application forms or in references from previous employers requested prior to a job offer may also be acting unlawfully as this could be interpreted as asking questions about health or disability.

### What is still lawful?

Employers can ask applicants if they need any reasonable adjustments for the application process or interview.

Employers can ask applicants how they will carry out any intrinsic elements of the job and if there are any limitations on them carrying out such duties. For example, employers can ask applicants for a job as a driver if there are any health restrictions on their ability to drive.

Employers can ask successful candidates health related questions so that any necessary reasonable adjustments can be made.

Employers can ask questions about disability for equal opportunities monitoring purposes and in order to take positive action, for example, the two ticks symbol under which interviews are guaranteed to disabled applicants who meet the essential criteria for a post.

Instead of asking pre-employment medical questions, employers should:

1. Identify whether there are any roles that require certain standards of physical fitness or have health requirements for health and safety reasons or in order to comply with other regulations, e.g. in order to drive a public service vehicle.
2. Ensure that job descriptions for these roles clearly state the physical requirements of the role: e.g. some lifting of patients required for which training will be provided. For these roles, all candidates should be advised in advance that they will need to undergo a medical assessment if they are successful at interview and only candidates to whom job offers are made should have medical assessments. Employers should, however, beware of general medical questionnaires that applicants are asked to complete at this stage too. An assessment should be conducted by an occupational health adviser who asks questions that relate specifically to the job the person has been offered. Job offers can be conditional upon the outcome of the medical assessment.
3. If the medical assessment identifies any potential problems you should conduct a risk assessment to see if reasonable adjustments can remove any risk identified or reduce it to acceptable levels. If no reasonable adjustments can be made to enable the candidate to perform the role you should be able to withdraw the offer.

## Enforcement

The Equality and Human Rights Commission (EHRC) can take enforcement action against any employer who does ask questions about health or disability prior to the offer of a job. Employers found guilty of discrimination will be required to draw up an action plan, overseen by the EHRC. Failure to comply could result in a £5,000 fine.

In addition, a job applicant who believes that they suffered a detriment for example by not being appointed because of questions they were asked about their health or medical history may use the questions asked as evidence of disability discrimination in a tribunal claim. It will then be for the employer to prove that the answers to these questions did not influence the decision not to appoint the applicant.

## Legal case study – Cheltenham Borough Council v Laird

In the case of Cheltenham Borough Council v Laird, Cheltenham Borough Council sued their former Director, Christine Laird for fraudulent or negligent misrepresentation for failing to tell them about a history of depression in a pre-employment medical questionnaire.

Mrs Laird was employed as a Managing Director for the Council in 2002. Mrs. Laird's answered a number of questions on the pre-employment questionnaire including:

- Do you normally enjoy good health? She answered "Yes".
- Do you have either a physical and/or mental impairment? She answered "No".
- Have you any ongoing condition that would affect your employment? She answered "No - but I get occasional migraine but this does not affect my ability to work or usually require time off from work".

After starting work she was involved in a number of disputes in particular with the Council leader which eventually led to her going off sick from June 2004 until 2005 when she took early ill-

health retirement. The Council later discovered that Mrs Laird had had periods of depression dating back to 1997. It brought proceedings against her in the High Court for fraudulent or negligent misrepresentation on the grounds that she had concealed her medical history during the recruitment process and it claimed nearly one million pounds in damages.

The Council was unsuccessful because the High Court held that even if Mrs Laird's answers were false they were not made fraudulently or negligently. The Court said that it must ask itself how a reasonable person in Mrs Laird's position would construe the questions rather than how a medical professional would interpret them.

In relation to the first question the Court accepted that a reasonable person in Mrs Laird's position was likely to say that she normally enjoyed good health. Mrs Laird had depression only for limited periods prior to 2002 and this was not her 'normal' state of health. She had not been depressed for the majority of the time and had only had about three months of depression-related absences during her working life.

The Court decided that a reasonable person would interpret the second question as referring to an ongoing physical or mental condition. At the time when she completed the questionnaire it was reasonable for Mrs Laird to consider herself as not having such a condition. The third question was more difficult. The Court found that she had a vulnerability to depression and that it was this vulnerability that was ongoing, not the depression itself and she was not depressed when she completed the questionnaire. It concluded that a reasonable person might not have regarded this as an 'ongoing' medical condition that would affect her employment.

Mrs Laird's answers in the medical questionnaire were not therefore false and that she had not 'wilfully' meaning deliberately or at least recklessly withheld information from the Council.



## **Disability management and the medical adviser**

This case highlights the pitfalls of using pre-employment medical questionnaires. These questionnaires rarely elicit useful information and often put talented people off applying to an employer who they fear will use the information to discriminate against them. Ill health, disability or even sickness absences in the past are not necessarily an indicator of future health or attendance. It is for this reason that the Equality Act 2010 makes it unlawful for employers to ask general questions about an applicant's health history prior to employment.

The aim is to help employers concentrate on the person's actual abilities rather than making assumptions based on past ill health. Questions must be limited to the applicant's ability to do the job for which they are applying and any reasonable adjustments they might need.

# Communicating with the medical adviser and the employee

Often the information that is received from medical advisers offers little practical guidance. To get the most from medical advice it is important that you communicate in a way that best promotes an effective response. When you refer someone to a medical adviser you should supply objective and quantitative information about the job. A thorough job profile and briefing will help determine the quality of the final report.

Use the following principles to provide a comprehensive brief:

- Ensure that the medical adviser understands the Equality Act 2010 and your positive attitude to making reasonable adjustments.
- Describe the job role and any aspects that the person is having difficulties in fulfilling, in particular:
  1. Specify the hours to be worked, whether flexible hours are possible and whether working from home is possible.
  2. State whether the employee is required to travel.
  3. Indicate physical requirements of the job, including strength and stamina.
  4. Describe the working environment including temperature, lighting and any other unusual or significant features of the environment. Medical advisers should be encouraged to visit the site and observe work in practice where possible.
  5. Note intellectual and emotional demands, including stress factors.
  6. Outline your expectations – the key outputs required for the job and what would qualify the employee for promotion.
  7. Provide a record of sickness absences to date.

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for sample purposes. Pages  
19 to 50 are available in the  
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