

Claims histories, injuries and medical conditions existing during the recruitment process

What this fact sheet is about

This fact sheet is about the rights and responsibilities of people applying for work and prospective employers in relation to pre-existing injuries and medical conditions, as well as claims histories. It explains how the *Anti-Discrimination Act 1991* and the *Workers' Compensation and Rehabilitation Act 2003* work together in these matters.

Queensland legislation

Unless there is a valid exemption under the *Anti-Discrimination Act 1991*, it is unlawful to make recruitment decisions based on a person's impairment, perceived impairment or their previous or current injuries or medical conditions.

Relevant exemptions (discussed in detail later in this factsheet) are:

- a worker not being able to perform the genuine occupational requirements for a position;
- an employer fixing reasonable terms for a person with restricted capacity;
- an employer being exposed to unjustifiable hardship in making adjustments or providing special services or facilities to enable a worker to perform the job; and
- an employer making reasonable decisions to protect the health and safety of people at a place of work.

Generally, it is unlawful for an employer or recruitment agent to ask for information on which unlawful discrimination might be based.

However, under the *Workers' Compensation and Rehabilitation Act 2003*, during recruitment the employer can make a written request to a job applicant to disclose any pre-existing injury or medical condition that might be aggravated by performing the duties of the job.



Using this information about an applicant in the recruitment process must be done in compliance with the *Anti-Discrimination Act*. A valid exemption must apply in order to reject an applicant from consideration based on this information.

An applicant who has been wrongly rejected from consideration because of an injury or medical condition has a right to make a complaint of discrimination under the *Anti-Discrimination Act*.

The definition of prospective employer is wide enough to include a recruitment agent.

Pre-existing injury or medical condition

Pre-existing injury or medical condition means:

- an injury or medical condition **that exists during the period of the recruitment process;**
that
- a person suspects, or should suspect, would be aggravated by performing the duties of the job.

Requests to disclose

A request to disclose must be in writing and set out:

- the duties of the job; and
- a warning that if the applicant knowingly makes a false or misleading disclosure, the applicant (or other claimant) will not be entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition.

A comprehensive description of the job duties and the environments in which the duties are to be performed, will better assist an applicant to assess the likelihood of aggravating a pre-existing injury or medical condition.

The applicant must be given a reasonable time to comply with the request. There is no obligation for the applicant to make a disclosure if they are engaged before having a reasonable opportunity to comply with a request.

Disclosures

Disclosures should be made in writing, and the applicant and the employer should keep a copy of both the request and the disclosure for their own records.

Non-disclosures

Non-compliance could result in the applicant being excluded from the recruitment process.

Where a valid request has been made, an applicant must disclose any pre-existing injury or medical condition.

In some circumstances, not disclosing a pre-existing injury or medical condition that would be aggravated by the duties of the job might constitute a false or misleading disclosure.

False or misleading disclosures

A false or misleading disclosure is doing or saying anything that would lead a prospective employer to reasonably believe that the duties of the job would not aggravate the applicant's pre-existing injury or medical condition.

If the job applicant knowingly gives a false or misleading disclosure, the applicant (or other claimant) will not be entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition.

Meaning of compensation and damages

Compensation is the amounts for earnings and medical expenses payable by WorkCover Qld (or other insurer) for injuries sustained by a worker.

Damages is compensation for injury to a worker arising out of any other liability of an employer (e.g. negligence, breach of contract).

Claims histories

A claims history summary is a document issued by the Workers' Compensation Regulator that states:

- the number of applications for compensation made by the person;
- the number of claims for damages made by a person; and
- the nature of the applications and claims.

An employer can **no longer** obtain a person's claims history summary. This change took effect on 24 September 2015.

For claims history summaries obtained before then, the strict limitations on the use and disclosure of the information continue to apply. The employer must not:

- disclose the contents or information to anyone else;
- give access to the document to anyone else; or
- use the contents or information for any purpose other than the purpose of the recruitment process.

It is an offence for a person to obtain or use (or attempt to obtain or use) a workers' compensation document for a purpose relating to the employment of a worker.

Using information in a disclosure

The *Anti-Discrimination Act* provides specific exemptions for discrimination in the area of work. Disclosures of injury or medical conditions, and claims history information (lawfully obtained before 24 September 2015) may only be used to consider :

- whether an applicant is able to do the genuine occupational requirements of the job;
- whether adjustments can reasonably be made to accommodate an applicant's impairment;
- whether special terms are appropriate for the person to do the work; and
- any reasonable work health and safety issues.

Each of these considerations is explained below.

Genuine occupational requirements

A genuine occupation requirement is an aspect that is essential to the position.

The issue of what is an occupational requirement and whether it is genuine is a wholly factual question.

To determine whether a requirement is essential to the position, it is necessary to look at the factual circumstances and consider whether or not the position would be effectively the same without the requirement.

It is not enough to simply label aspects of the job as genuine occupational requirements. Take care in differentiating between the requirement and the means of performing the task (e.g. imposing an eye sight standard when the task can be safely performed using glasses or contact lenses).

Reasonable adjustment

Consider whether any adjustment or changes can be made to enable the worker do the job. This might include:

- physical aids or adjustments to the work environment;

- changes to the hours of work or number of hours worked;
- incorporating breaks;
- changes to the duties to be performed.

Adjustments should be made to accommodate an impairment unless it would amount to an unjustifiable hardship on the employer.

Unjustifiable hardship

Whether there is unjustifiable hardship depends on the circumstances of the particular case. What might be unjustifiable hardship for one person might not necessarily be unjustifiable hardship for another.

Some of the things to consider include:

- the nature of the special services or facilities required to accommodate the impairment;
- the cost of supplying any special services or facilities, and the number of people who would benefit or be disadvantaged;
- the financial circumstances of the employer;
- any disruption that making the adjustment might cause;
- the nature of any benefit or detriment to all of the people in the particular case.

Special terms for a job

If a worker has restricted capacity to do work genuinely and reasonably required for the position, or requires special conditions in order to be able to do the work, the employer may fix reasonable terms for that worker.

For example, the employer might restrict the duties the worker can perform or limit the number of hours to be worked. Any special terms must be reasonable, taking into consideration the nature of the impairment and the work that the position entails.

Work Health & Safety

An employer has a responsibility to safeguard its employees from unreasonable risks. It is permissible to do an act that is reasonably necessary to protect the health and safety of people at a place of work.

For this exemption to apply there must be an unacceptable risk and the action must relate to that risk. The act must be something a reasonable person would do to protect the health and safety of people at a place of work.

An employer needs to investigate whether there are risks, and assess the level of any risks. Any action taken must be reasonable in relation to the risk. It is not enough to simply follow an organisation's policy such as a health assessment guideline or standards.

Case examples

These examples are from decided cases and other published information. It is important to remember that each case must be dealt with on its own facts.

- Physical work was not an inherent part of a Business Development Manager's job with a building materials company, and the company unlawfully discriminated against an applicant by withdrawing the job offer when a long-term shoulder injury was disclosed. Minor adjustments could have been made to avoid the applicant having to perform physically demanding work.¹
- It was unlawful discrimination to withdraw an offer of employment based on a history of back pain disclosed in a pre-employment general medical assessment, when the applicant could safely perform the duties of an occupational nurse at a mine site.²
- Behaving to a professional standard and following reasonable directions were inherent requirements of the job of an Australian Federal Police officer. Providing constant and intensive supervision of an officer would cause undue hardship, and it was not unlawful to terminate the officer who had developed a personality disorder which caused behavioural problems after suffering a head injury.³

- Being able to see colours was an inherent requirement of a fire-fighter.⁴ However, a train driver who could not see the colour red could safely drive a train because the safety issue also involved the position of warning signals.⁵
- Where it was not possible to organise the work of an animal refuge to ensure a pregnant worker did not come into contact with cats or cat faeces and the whole of the refuge was a high risk for toxoplasmosis infection, work at the refuge would pose an unacceptable health hazard for the pregnant worker and her unborn child.⁶
- It was not a genuine occupational requirement that each and every police officer be able to drive a motor vehicle at all times. In the particular case where epilepsy was well managed, the risk of seizure was low and the likely consequence of a seizure was that the officer would have physical warning beforehand, it was found that the officer would not jeopardise the safety of others.⁷

Endnotes

1. Enforceable undertaking given by James Hardie Australia Pty Ltd to the Fair Work Ombudsman on 17 May 2012
2. *Gehrig v McArthur River Mining Pty Ltd* [1996] NTADComm 4
3. *Gibbons v Commonwealth of Australia* [2010] FMCA 115
4. *Van der Kooij v Fire & Emergency Services of WA* [2009] WASAT 221
5. *MacDonald & Ors v Queensland Rail* [1998] QADT 8
6. *Parker v North Queensland Animal Refuge* [1998] QADT 4
7. *Stevens v Queensland Police Service* [1998] QADT 6

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