

# Prove it: Discrimination by the Backdoor

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EmployAbility is using its platform on International Day of Persons with Disabilities, to draw attention to the common practice of employers requesting that neurodiverse candidates provide medical evidence of their condition, before being provided with adjustments in the recruitment process. Our aims are threefold. First, to explain why we believe this

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## Background The Equality Act Section 60

Section 60 of the Equality Act 2010 contains a prohibition on asking pre-employment questions about disability or health. It is our understanding that this prohibition was intended to do two things: reduce discrimination (resulting from recruiters making decisions about a person's ability to perform a role based on their own assumptions); and address disabled applicants' reluctance to apply for jobs (knowing they would be asked intrusive questions). There are some necessary exceptions to the prohibition. For example, it is permissible to ask whether reasonable adjustments are required for any stage of the recruitment process.

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## Why We Don't Believe This Practice is Permitted by Law

The section 60 prohibition on asking disability or health-related questions, was included in the legislation to avoid discrimination in the form of wrong judgements about a candidate's ability to do the role itself, and to encourage disabled candidates to apply for roles without fear of having to divulge highly personal information. Asking for medical reports undermines both objectives. Moreover, the prohibition extends to questions about the adjustments that would be required in the workplace, yet demanding and having access to a person's medical records, provides exactly this information. Had it been Parliament's intention to allow employers to request evidence of this sort, we would expect the legislation to say so explicitly, particularly given that the right to ask for evidence of a disability is expressly provided for when the job in question requires its holder to have a specific disability.

More often than not, employers ask to see an educational psychologist's report, describing the person's condition and confirming the amount of extra time they need for university exams. And yet there is no reason why an identical adjustment would be appropriate for the sorts of assessments a candidate will come across during the recruitment process, such as psychometric tests. These tests are so different in nature to academic ones, that asking about the adjustments provided for one cannot legitimately inform what should be provided for the other. Demanding a report containing highly sensitive information about a person's disability, in order to draw a conclusion about which adjustments should be given for tests of a completely different nature, is both misguided, and possibly disproportionate under both the Equality Act and GDPR.

We also find this practice to be discriminatory in practice. We are not aware of a single case where a person with a physical or sensory impairment was asked to provide proof that the adjustment they requested was needed. The vast majority of candidates who are being asked to hand over their medical records or psychologists' reports, are those with a neurodiverse condition. Individuals with a hidden condition which requires adjustments similar to those which neurodiverse candidates need, are also being asked to provide proof. There cannot be different rules depending on the type of disability.

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## Why Employers Should Refrain from Requesting Evidence

Asking a prohibited question during the recruitment process, or failing to provide an adjustment because a candidate chooses not to share a medical report, could constitute unlawful disability discrimination.

Legal risks aside, employers have no reason to take this approach. There is a negligible chance that a candidate is being untruthful in asking for an adjustment. Disabled people tend to be extremely concerned about discrimination, and avoid asking for adjustments which would provide them with a level playing field. There's