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IS IT LEGAL TO USE PSYCHOMETRIC TESTING WHEN DECIDING ON DISMISSALS?

By Nicholas Robertson

Employers are increasingly using psychometric assessment during recruitment - but what legal risks do they face if they dismiss staff following testing?

Whether employers use it for recruitment, performance management or termination, the law has a direct impact on psychometric testing.

Failure to follow best practice in this area is legally risky in itself. An employer that uses psychometric testing will be held responsible in the event of a claim if the test is not completely reputable, or if the testing processes used are not optimal.

Testing may raise issues under discrimination legislation. For example, employers need to consider whether the tests have been checked out for racial bias. The practical reasoning/concepts/behaviours being tested may not manifest themselves in the same way for those from ethnic minorities. And could the test be thought to favour older or younger employees?

Psychometric testing is most commonly used in job selection. In this context, even if an allegation that the psychometric testing was flawed turns out to be true, there may be many other reasons why a job applicant was not selected. It is not straightforward for

individuals who fail to be selected for a job to make a claim and usually any loss they incur is minimal.

Using psychometrics during dismissal carries a higher risk. Individuals with more than 12 months' service can claim unfair dismissal and the compensation for a dismissed employee is likely to be significantly higher than for job applicants. It will be harder for employers to argue that the employee would have been dismissed for a fair and non-discriminatory reason even without the test results. So, discrimination and unfair dismissal claims are a clear danger for employers using psychometrics prior to terminations.

The fundamental question employers should ask is whether it is appropriate to use psychometric testing at all, either in redundancy or performance dismissals, when it is a predictor of future behaviour, broadly speaking.

Any tribunal would ask why a performance predictor would be necessary for an individual who has already worked for an organisation for a number of years.

There are two possible answers to this. Annual performance appraisals can be inconsistent if they have been done by a series of different managers over the years, or they may be relentlessly positive rather than realistic. In a reorganisation, psychometric testing might be able to evaluate individuals' suitability



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where roles are changing significantly. In those circumstances, it may be legitimate to take a predictor of future behaviour into account.

But employers will need safeguards. The processing of any personal data (including the results from psychometric tests) is heavily regulated by the Data Protection Act 1998 and employers have to be sure that any personal information they hold about employees is relevant to the purposes for which it is processed, that it is not kept longer than necessary and is protected against unlawful and unauthorised processing.

It is usually best practice to ensure that employees are aware of what is being tested and are familiar with the procedure before they take the test. An employee cannot be forced to sit a test - employers should listen carefully to any refusals, and evaluate whether there are grounds for this before taking action. But just as employers have to accept that employees might choose not to take the test, employees cannot then complain if the employer relies on other, less scientific material when deciding about their future with the organisation.

Employers would be unwise to rely heavily on psychometric testing, while discounting their own experience of an employee. This would almost certainly lead to unfair dismissal claims. Psychometrics may accelerate decision-making, but dismissals based on them will be understood by few, trusted by fewer, and lose the confidence of the workforce in the longer term.