

Equality and Inclusion in Recruitment

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The recruitment of staff is frequently a headache for employers. The need to get the 'right person for the job' is often central to a successful working environment. The recruitment process takes time, uses up resources, and ultimately involves difficult decisions. Throughout this employers must ensure that the process is operated in a non-discriminatory way. This requires compliance with the Equality Act 2010 which sets out the framework of anti-discrimination legislation in the UK.

**When recruiting**

The Act applies to all employers and to all aspects of the recruitment process from advertisement to offer, the terms on which employment is offered, and any decision to reject a particular candidate.

Particular care will be needed when preparing job descriptions and person specifications, drafting advertisements, asking questions about a candidate's health and disabilities, and interviewing candidates.

**What does the Act cover?**

An employer must not discriminate against any person because of their age; disability; gender re-assignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. These are known as 'protected characteristics'.

- *Direct Discrimination* - which occurs when, because of their 'protected characteristic', a person is treated less favourably than someone who does not share that 'protected characteristic'. This would cover, for example, a decision to recruit a white man in preference to a black man because of the latter's race.
- *Indirect Discrimination* - this focuses on the effect of a 'provision, criterion or practice' (PCP). A PCP will generally include any rule or way of doing things that is adopted and applied in the recruitment process. If the effect of that rule or way of doing things places those with a

particular 'protected characteristic' at a disadvantage when compared with those who do not share that 'protected characteristic', it may be indirectly discriminatory.

It may be possible to avoid this being discriminatory if the PCP can be justified as a proportionate way of achieving a legitimate aim.

- *Harassment* – this form of discrimination occurs when someone is subjected to unwanted behaviour related to a 'protected characteristic' which has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- *Victimisation* - it is also unlawful to treat someone less favourably because they have taken action related to rights under the Act, or because they are suspected of having taken or planning to take such action.
- *Discrimination arising from disability* - this arises when a disabled person is treated less favourably than a non-disabled person for a reason relating to their disability.
- *Failing to make reasonable adjustments for disabled persons* - where a disabled person would otherwise be placed at a disadvantage, the Act imposes on employers a duty to make reasonable adjustments for them.

### **What should I be doing?**

#### **Job descriptions, person specifications and advertisements**

It is sensible to prepare job descriptions and candidate specifications for all posts for which you recruit. They will help to explain why a particular candidate has or has not been recruited and so should be carefully drafted. Similarly, advertisements should be clear and concise - especially as they will be made public. The requirements for applicants contained in these documents should be limited to those that are necessary for the proper performance of the role.

It is sometimes possible to require an applicant to have a particular protected characteristic if it is necessary because of the nature of the job. An example would be a minister of religion, who will necessarily need to be of the religion he or she preaches. Whether in other situations this would be acceptable would depend on a number of factors, including whether there is a less discriminatory way of achieving the stated intention.

### **Questions about health and disability**

Prospective employers should only ask questions about the health or disability of job applicants in limited circumstances. Questions could be asked to see whether it may be necessary to make adjustments for an applicant to carry out the position being recruited; or to establish whether the applicant will be able to do something that is intrinsic to the job.

### **Interviewing**

Interviewers should prepare carefully for interviews and an employer should ensure that interviewers are aware of their responsibility to avoid discrimination. Consideration should be given to preparing an equality policy on which interviewers receive training before carrying out the interview process.

It would also be sensible for agreed lists of questions to be prepared in advance which can be asked to each applicant. Those questions, and any others which may be asked during the interview, should be balanced and fair and should, broadly speaking, be applied to all applicants. It would be sensible to keep a written note of the interview.

### **Can I positively discriminate?**

An employer should always appoint the most qualified and suitable candidate, regardless of their sex, race, disability etc. However, where there are two applicants equally well suited and qualified for a particular position, it is permissible to base the decision to employ one over the other on the fact that people of their particular sex, race, disability etc. are otherwise disadvantaged or are underrepresented in the business.

This is an area fraught with difficulty, and can open an employer to allegations of discrimination from an applicant who is not recruited as a result. These decisions will in practice be rare and should be taken with real caution.

### **What happens if I get it wrong?**

If a person can show that they have been subjected to discrimination they may bring a claim in the Employment Tribunal.

A successful claimant can receive compensation for the financial loss they suffer as a result of the discrimination (for which there is no upper limit). A decision not to recruit a particular candidate can have serious financial implications for them and so awards of compensation for discrimination in recruitment have the potential to be significant.

Successful claimants will also be made an award for 'injury to feelings', which is a sum ranging from £500 to £30,000 reflecting the seriousness of the discrimination.

### **Case Study: an illustrative example**

Work First Limited runs a clothes shop. They are recruiting for a new shop manager. They draft an advertisement stating that the successful applicant will be between 25-45 years of age, be able to work between the hours of 8am to 7pm and be able to assist with heavy lifting on occasions.

Work First receives three applications: from Mr Ahmed, Mrs Barnet and Miss Caller. Mr Davies considers applying, but decides not to, as he is 50 years old. All have the necessary experience and qualifications for the role.

Mrs Barnet explains in her application that she has two young children and so would require some flexibility in the hours of work so that she can take them to school in the mornings. Work First decide not to proceed Mrs Barnet's application because of this.

At interview Mr Ahmed informs the interviewer that he has a long-standing back injury (a disability for the purpose of the Act) that means that he needs to avoid heavy lifting. Miss Caller is eventually offered the job.

What are some of the potential claims that Work First has left itself open to?

- Mr Ahmed may be able to bring a claim for discrimination arising from disability if the reason he was turned down for the job was because he revealed that he could not do heavy lifting.
- Mrs Barnet could claim that the rejection of her application was because of her childcare commitments, and therefore indirectly discriminatory on the ground of her sex as more women than men tend to have childcare commitments.
- Mr Davies might say that limiting applications to those between the ages of 25 and 45 is direct age discrimination.

Whether any of these claims would be successful would depend on a number of factors, including whether the requirements imposed by Work First could be justified, but it serves as an example of some potential pitfalls and the need to be alert to discrimination issues during the recruitment process.

**Practical tips**

As we have seen above, the consequence of a finding of discrimination can be very significant, both financial and for an employer's reputation. However, if appropriate procedures are followed and safeguards put in place, the risks to employers can be mitigated. Below are some practical tips which may assist:

1. Keep written records - create a paper trail that you can refer back to showing why a successful applicant was chosen, and why others were not.
2. Draft job descriptions, personal specifications and advertisements carefully. Ensure that they do not directly or indirectly discriminate against any potential applicant, and ensure that they are actively applied when considering candidates.
3. Avoid asking questions during the recruitment process about a person's health or disability unless it is necessary to help decide whether they can do something intrinsic to the job, or to establish what changes might need to be made to facilitate them doing the job.
4. Consider preparing and implementing an equality policy for those who are involved in the recruitment process, particularly interviewers, to operate.

The recruitment process is rarely straightforward. Balancing business needs and compliance with legal obligations is often difficult. However, having clear parameters, adopting a fair and balanced decision-making process and keeping a good written record of the recruitment procedure should help to avoid falling foul of the Act - and hopefully get the right person for the job.

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