

## **RECRUITMENT PROCEDURES**

Most claims for discrimination in recruitment have no maximum limit.

Can your business afford compensation of perhaps £20,000 because you made a simple mistake?

How do you make sure you don't break the law?

### **GOOD RECRUITMENT PROCEDURES**

Employers recruiting staff can make simple but very expensive mistakes in all sorts of ways when trying to take on new staff. Good sound recruitment procedures help avoid mistakes, as well as ensuring that your recruitment process improves and you take on better staff as well.

### **WHERE CAN THINGS GO WRONG?**

You can easily make mistakes at various stages in recruiting that would probably mean you would lose your case at an Employment Tribunal. These stages include:

- defining the job itself or identifying the person required
- attracting candidates by advertising
- how you assess the candidates you see
- the making of the actual selection decision
- the terms of employment that you offer.

The danger, quite apart from the cost of recruiting the wrong person and then having to get rid of them and recruit again, is that someone who you have turned down at some point in the process may complain to an Employment Tribunal that you discriminated against them. If the Tribunal finds the claim to be valid then compensation can be awarded not just for actual loss but also to compensate for projected future loss and what is known as 'hurt feelings'.

## **WHAT IS MEANT BY DISCRIMINATION?**

Employers must not discriminate against candidates for employment because of their sex (or marital status), their ethnic origin or race or because they suffer from any disability. The relevant pieces of legislation are the Race Relations Act 1976 (RRA), the Sex Discrimination Act 1975 (SDA) and the Disability Discrimination Act 1995 (DDA). A recent addition to the legislation is that it is now also illegal to discriminate against someone on the grounds of gender reassignment. Further areas where discrimination can be claimed are in connection with trade union membership or non-membership and in connection with religion in Northern Ireland.

Acts of Discrimination are categorised as being either Direct or Indirect Discrimination. Direct Discrimination is rare, though not unknown, and would involve either establishing different, unjustifiable and therefore discriminatory recruitment criteria or deliberately excluding certain categories. Indirect Discrimination is rather more common (and indeed employers can find themselves committing indirect discrimination quite unintentionally and innocently).

Examples of indirect discrimination would include:

- setting recruitment criteria which are not actually justified by the job or job description but which have the effect of discriminating against certain groups of people (ie requiring exam qualifications suggesting skills which are not actually needed by the job and which could discriminate against individuals with learning difficulties)
- using assessment tests measuring abilities not required by the job but which could discriminate against groups of people (ie reasoning ability tests for unskilled manual jobs which could discriminate against those without English as a first language)
- setting different tests for different applicants for a job (ie female applicants

cannot be asked to carry out tests of physical strength if male applicants are not asked to do the same)

- asking questions of some applicants and not of others (the classic and very common example being that of asking a female applicant when she intends starting a family).

In considering whether an act of indirect discrimination has occurred or not, an Employment Tribunal can draw reasonable inferences from an employer's normal practices in addition to looking at the facts of the particular case. The Tribunal members might for example, in the case of a claim for racial discrimination, look at the ethnic makeup of the existing workforce and compare this with the ethnic makeup of the local community. A significant difference between these proportions could suggest to the Tribunal that discrimination is more likely to have happened.

#### ***Possible but strictly limited exceptions where applicants can be chosen on grounds of sex or race***

Whilst direct and indirect discrimination are generally prohibited, both the Sex Discrimination Act and the Race Relations Act accept that in some occupations it may be necessary to be of a particular sex or racial group. These limited exceptions are referred to as being Genuine Occupational Qualifications (GOQs) (there are no such exceptions for disability). Neither of the Acts actually allow discrimination to be used to maintain a balance between the sexes or the racial mix.

The Sex Discrimination Act includes reference to GOQs of:

- physiology - for example in modelling
- decency or privacy - where there is likely to be physical contact between the job holder and persons of the opposite sex to which the latter might object such as lavatory attendants - care needs to be taken here if there are a number of posts meaning that such contact would not necessarily happen
- single sex establishments - such as prisons
- working outside the UK
- where a married couple hold two posts
- where a job involves living in and the premises which are available do not allow

for appropriate privacy or decency - again care needs to be taken as the GOQ will not be upheld if the employer could reasonably be expected to make suitable facilities available

- personal services such as welfare/ personal/ educational where these can best be provided by a man or woman - this GOQ is used by social services and welfare providers.

The Race Relations Act also includes GOQs but there are less of them. They are:

- dramatic performance where an individual of a particular ethnic background is required
- authenticity such as the requirements for a particular modelling assignment
- ambience - such as an ethnic restaurant
- personal services as also dealt with by the SDA above.

#### **THE MEANING OF DISABILITY**

The Disability Discrimination Act (which does not apply to workplaces with fewer than 15 employees) insists that employers may not treat a person with a disability less favourably than other persons without justifiable reasons and requires employers to make 'reasonable adjustments' to the workplace where these would overcome the practical effects of an individual's disability. If an applicant for a position believes that he/she has been discriminated against they may make a complaint to an Employment Tribunal.

The definition of disability is very wide and covers anyone with a physical or mental impairment which is long term or recurring and includes for example problems of mobility/speech/hearing/manual dexterity etc.

#### **WHAT ARE 'REASONABLE ADJUSTMENTS'?**

In this context the word reasonable means whether or not such steps would be practicable and would actually have an effect, and are reasonable given the resources of the employer. For example the local branch of Marks & Spencer would probably be expected to have more resources than would a small local retailer.

Reasonable adjustments to the workplace that employers might be expected to make include:

- transferring the individual to fill another vacancy or to a different place of work
- altering working hours
- allowing them time during working hours for rehabilitation or treatment
- allocating some duties to another person
- arranging for special training
- acquiring or modifying equipment, instructions or manuals
- providing readers or supervision.

### **CLAIMS AGAINST EMPLOYERS FOR DISCRIMINATION**

Applications can be made to an Employment Tribunal from someone who was not selected for an initial interview, for a final short-list or offered the job, and who believes it was because of sex, marital status, colour or ethnic origin, trade union membership or lack of such membership, disability or religion (in Northern Ireland only). The application must be made within three months of the alleged discrimination and the Tribunal will take into account reasonable inferences from the actual employment practices of the employer as well as from the particular facts of the individual case.

### **GOOD SOUND RECRUITMENT PROCEDURES**

In order to avoid the danger of discriminating in some way, particularly unconsciously, employers must take care to develop and use recruitment procedures which will avoid the risk. Using sensible procedures will also inevitably improve recruitment decisions and the quality of the people, taken on. Sensible procedures would include the following:

- always produce clear job descriptions which identify both the essential activities of the job and the skills and attributes needed by candidates. It should be possible to see from this whether a disabled candidate would be able to deal with those essential activities. Avoid gender references such as he or she and only refer to qualifications and/or experience which are clearly required by the job. The danger is that any such attributes which cannot be shown to be essential could be inferred as being there to deter women, candidates from ethnic minorities or those with a disability

- in seeking candidates ensure that any wording used does not imply that some category (such as men or women) are favoured candidates, and be careful with words like energetic which might deter candidates with disabilities. The process for seeking candidates must also be non-discriminatory and not restricted in a way which could be seen to be discriminatory. An obvious error would be to put an advertisement in a place where it would only be seen by for example males (an all male golf club?)
- selection methods must be chosen which will enable the appropriate skills and attributes to be dealt with but should avoid anything which would in effect be discriminatory. An example could be written tests involving English comprehension for a basic cleaning job where the skills assessed by the test would be irrelevant. Where tests are used all candidates need to be given the same tests to avoid any suggestion of discrimination
- be careful to avoid discriminatory questions at interview (ie when do you expect to have a family?) and generally try to ensure that all candidates are asked the same questions
- consider modifying the workplace to make it suitable for candidates with disabilities - the code refers to a reasonable cost as being what the extra costs involved in recruiting a non-disabled person might be. You should also look critically at the physical arrangements for recruitment to assist candidates with disabilities to apply more easily (ie wheelchair ramps) and consider whether changes may need to be made to application forms. These should not ask questions which do not impact on the suitability of the candidate for the particular job and should not ask if a candidate is registered disabled
- it is essential that good records are kept for an appropriate period of time about applications, reasons for rejection and performance in any assessments and at interviews, and that these complement the job description and the skill requirements for the job. Obviously such processes help with selection anyway but these records may be essential if anything goes to an Employment Tribunal.

## HOW WE CAN HELP

We will be more than happy to provide you with assistance or any additional information required.

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