



## Welcome

Welcome to this special edition of our employment law update. It's about recruitment and how to avoid some of the pitfalls.

Workplace laws are not just for employees and workers. Job applicants and even potential job applicants are given some protections, too. It's why employers embarking on a recruitment process should understand and comply with their duties and obligations, not least those under the Equality Act, from the point at which you identify a vacancy all the way through to selecting and employing the successful candidate.

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## Advertising

A job advert should be based on a job description and person specification (two important documents) that have been well-conceived and carefully written. It's important to really think through the essence of the role and to ask yourself questions like: could the job be done on a part-time basis? What skills, qualifications and experience must the successful candidate have, and which would be desirable? And can I objectively justify these tasks and duties as being necessary to the role?

A person should not be given the impression that they are not able or welcome to apply for a job because of a particular protected characteristic (disability, sex, religion or belief, for example). Specifying 'regular Sunday working' when working on a Sunday would only be an occasional requirement, and could amount to indirect discrimination against a Christian who decided not to apply. This is one of the first examples given in the recruitment section of the Equality & Human Rights Commission's Employment Statutory Code of Practice ('the Code'), which employers should follow.

Some other things to avoid:

- 'Salesman', 'waitress', 'shop girl' or 'office boy'. These suggest a predetermined bias towards particular characteristics.
- 'Full-time', when that isn't an actual requirement. It's potential indirect discrimination against women, more of whom work part-time or job share because of childcare duties.
- Requirements relating to physical attributes, health and fitness that cannot be objectively justified. A minimum height requirement, for example, could indirectly discriminate against women, some disabled people, and even people from certain racial groups.

## About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

We will represent you cost effectively in the Employment tribunals and the County Court.

We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

### Contact

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- 'At least 10 years' experience' is potential indirect age discrimination.
- 'At least 10 years' continuous employment' could be indirect discrimination against women, who are more likely than men to have taken time out of the workplace to look after children.
- Skills or knowledge criteria that are unnecessarily restrictive: 'maths A-level', for example. By adding 'or equivalent', you should avoid discriminating against people from countries where exams are not called A-levels.
- Requiring someone who is 'in good health' is potential direct discrimination against disabled people; the requirement is too broad to relate to any specific requirement of the job.
- Requiring a good sickness record. This could be indirect discrimination against disabled people, and you would need to be able to objectively justify the criterion.
- Any suggestion that you are not prepared to make reasonable adjustments.

Where there is an occupational requirement for a person with a particular characteristic (a woman for a female care worker role, for example), then it can be lawful to advertise on that basis. Similarly, it can be lawful to encourage job applications from groups that are under-represented in your workforce (the over 40s, for example).

There are some important formalities that apply to job advertising. These include ensuring that your organisation's name is on the advert itself and on any answerphone messages that invite people to leave details. You should also describe in the advert the purposes for which you may use personal information (eg to market your products and services), if this isn't obvious.

If you use a recruitment agency, you should let them have a copy of your recruitment and equality policies, as well as the details of the role for which you are recruiting. Don't tell the agency that you would prefer to receive applications from certain groups than others, or encourage them to discriminate.

And if you are recruiting internally, make sure you give everyone – including those who may be off sick or on maternity leave – a fair opportunity to find out about the vacancy and to apply.

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## Application Forms

The more standardised you can make the application process, the better; that way it's easier to make objective decisions about the applicants.

One way of doing this is to invite applicants to describe, in a set number of words, the ways in which they meet the job description and the person specification. You can then mark them on each criterion and draw up your shortlist based on those scores. As part of this, it's desirable to make any reasonable adjustments that might be necessary – providing application forms in accessible formats, for example.

Best practice when it comes to the application form include:

- Putting your organisation's name on the form.
- If you're going to use information from the application form for a purpose other than to recruit for a specific job, or pass it to anyone else, say so.
- Only ask for personal information that is relevant to the recruitment decision to be made.
- Only ask for information about criminal convictions if that can be justified, based on the role and on a person's suitability for that role. Spent convictions normally can't be taken into account; it depends on the job for which the person is being recruited (see more under 'Criminal record checks' below). And if an applicant does not have to disclose spent convictions, spell that out. Also, if you will be requesting criminal record disclosures in the event of a successful application, make that clear at this stage.
- Omit the box that asks for a date of birth. That is only needed when someone is employed, and even then only so that no NI is paid when if they are employed at age 65.
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- Give details of other information you might obtain about the applicant and where that information might come from.
- If you're looking to collect sensitive data, explain why you're doing this.
- Provide a secure method for sending applications – encryption-based software, for example.
- Once electronic applications are received, save these in a directory or drive to which only those involved in the recruitment process have access.
- Ensure that postal applications are given directly to the person processing the applications to store in a locked drawer.
- Make sure that line managers who process applications know how to gather and store applications.

One of the big legal pitfalls is asking an applicant about their disability and health, including past sickness absence. The general rule is that you should not seek this information before offering the applicant the job, or before putting them in a pool of people from which you'll select the successful candidate when you are in a position to do that.

There are some exceptions, which include:

- where you need to establish whether or not the applicant will be able to undergo an assessment, or whether there will be a duty to make reasonable adjustments in respect of the interview process;
- to establish whether or not the applicant will be able to carry out a function that is intrinsic to the job. For example, a scaffolder must be able to climb ladders and scaffolding to a significant height (with any reasonable adjustments in place);
- where there is an occupational requirement that an individual has a particular impairment. For example, a deafblind worker with personal experience of deafblindness;
- to monitor the diversity of job applicants.

Asking a health question when you're not allowed to will not, by itself, be discrimination. But you will be discriminating if you act to the applicant's detriment on the answer you have been given. If they were to bring a claim for direct discrimination, the burden would be on you to show that you didn't discriminate.

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## Shortlisting

The Code has useful guidance in respect of shortlisting candidates. This includes having more than one person involved in shortlisting wherever possible (in order to avoid any bias) and to mark applications individually before agreeing a final score; agreeing a marking system in advance and sticking to it; and selecting on the basis of information provided (application form, CV or formal performance assessment reports).

It's also a good idea to have the same staff, trained in the organisation's equality policy, involved in the selection process for a particular vacancy because that is more likely to lead to consistency and objectivity.

Employers who use psychometric testing as part of their selection process (this shouldn't be the only basis of assessment), must make sure that the test has been well designed, is carried out properly and is professionally validated. The test must relate to the job you're recruiting for; you should be measuring how closely a person's skills and abilities match the person specification.

Be prepared to be flexible in adjusting the test or your testing where necessary by, for example, providing written instructions in an accessible format, or giving a disabled person extra time. Too rigid an approach could well lead to a claim of discrimination if somebody is disabled. But get professional advice on the adjustments that might be needed in individual cases.

# Interviews

Employers should be as flexible as they can be in the arrangements for interview. Think about how particular times of the day, week and year might affect different candidates. Avoid, as far as possible, dates that coincide with religious festivals. And respond reasonably to requests to rearrange. It's also important to have put in place any reasonable adjustments in respect of the interview, and to check on the day to see if anything else is needed.

An interviewer, or interview panel, must objectively assess each person's ability to do the job. But many will worry about what they can, and can't, ask or discuss. Good preparation is key. Interviewers should understand:

- when they may be making stereotypical assumptions;
- how to score objectively;
- how to prepare good, proper questions by using the person specification, job description, and application form;
- which questions are, and are not, relevant to the requirements of the job. For example, questions about childcare arrangements, living arrangements, or plans to get married or to have children are off limits.

If a candidate volunteers information about, say, their hope to start a family within the next few years then that information must be disregarded by the interviewer when assessing the individual's suitability for the job.

A couple of examples from the Equality & Human Rights Commission guidance on pre-employment health questions:

- An internal applicant has applied for a job. Someone on the interview panel knows that the individual was absent from work for a few months because of a mental health condition. They should not ask whether or not there are any health issues that would affect the individual's ability to cope with the mental pressures of the job, if mental pressure is not an intrinsic function.
- Where an applicant is being interviewed for a job, an intrinsic feature of which is coping with mental pressure, the employer will not breach equality legislation by asking the applicant to give examples of how he has handled a difficult situation or worked to a tight deadline. The applicant is not being asked about his health or disability; rather, it's about his ability to do the job.

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## The job offer

Set out all employment terms in a letter, or issue a separate contract (in which case, mark the offer letter 'subject to contract'). Either way, you will need to provide the written particulars of employment required by section 1 of the Employment Rights Act. It's important that there is certainty about the terms on which the individual will work for you.

It is usually advisable to make an offer conditional on satisfactory checks, which could include:

### References

Where a previous employer has agreed to provide a reference (they are not always obliged to), it's a good idea to give them a copy of the job description and person specification for the role you're focusing on. That will make them better able to comment on the individual's ability to do the job.

Where the reference provided includes something subjective and negative, the individual about whom it was written should have a chance to respond. Bear in mind that there are usually two sides to every story.

### Eligibility to work

A person's right to work in the UK must be confirmed before they start work. It is a criminal offence to knowingly employ someone who is ineligible to work in the UK. And it's a civil offence (attracting a fine of up to £20,000 per employee) to do so negligently.

Employers should allow all candidates to proceed on merit, only checking eligibility in the final stages of selection. And eligibility, or ineligibility, to work must never be assumed based on an individual's race, colour or national origin.

### **Health checks**

Where a job offer is conditional on satisfactory health checks, take care in ensuring that (a) the health enquiries you make are relevant to the job, and (b) that reasonable adjustments are made for disabled applicants. In fact, it is good practice to consider reasonable adjustments even where you are not certain that the applicant is disabled.

It will be direct discrimination to reject an applicant purely because a health check reveals a disability. Remember, too, that health checks will involve handling sensitive personal data.

### **Alcohol and drugs**

Only require a prospective employee to take a drugs or alcohol test where that is justified, necessary and proportionate.

The Information Commissioner is very clear that employers must ensure, before obtaining information through drug or alcohol testing, that the benefits justify any adverse impact – unless the testing is required by law. The collection of information through drug and alcohol testing is unlikely to be justified unless it is for health and safety reasons.

### **Employment restrictions**

If your prospective employee is subject to restrictive covenants relating to his previous job, you need to know about them. Not only might enforceable covenants restrict their freedom to work as you would like them to, but you could face allegations that you induced the individual to breach their contract.

It is always advisable to get hold of a copy of their employment contract and have it checked over by your solicitor.

### **Qualifications and experience**

It's wise to check that what the applicant has told you is accurate – increasingly so where the potential consequences of employing someone who isn't sufficiently qualified or experienced are serious. Check their academic qualifications by getting hold of certificates, for example. Check, too, that they meet any requirements that are specific to your industry.

### **Criminal record checks**

An employer can ask a prospective employee to voluntarily disclose details of their criminal record. Unless the person has applied for a job to which an exception applies (doctor, lawyer, police officer, or someone working with children or vulnerable adults, for example) they don't have to disclose spent convictions.

Employers recruiting for certain roles may be able to carry out an official criminal records check on the person they are looking to appoint, via the Disclosure and Barring Service. You can find details here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/519060/Guide\\_to\\_eligibility\\_v8.1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/519060/Guide_to_eligibility_v8.1.pdf)

How you should deal with the discovery of a criminal conviction will depend largely on the job that has been applied for; any particular regulatory constraints on the person's ability to work for you; whether the conviction is spent or unspent, and (in some cases) your judgment as to whether to take the person on or not.

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## Other things to think about

### **Withdrawing an offer**

It can be perfectly legitimate to withdraw an offer. Circumstances change. And provided there is nothing unlawful about the decision (nothing discriminatory, for example), it is possible to escape from a job offer unscathed.

The ease with which an employer can do this depends firstly on whether the offer was made subject to certain conditions (verification of qualifications, for example) that were not met. Secondly, whether you are withdrawing the offer before or

after the individual has accepted it. If you can show that withdrawal was pre-acceptance, you shouldn't face any contractual liability. But once a job offer has been accepted, there is a binding contract. And not taking that person on would be a breach of contract, for which they would usually be entitled to be paid the value of their earnings and benefits for the notice period (initially, at least, this is usually a very short period).

While unfair dismissal won't usually be an option because of a lack of qualifying service, automatically unfair dismissal might be. Similarly, discrimination is a common allegation for disgruntled individuals to make. So it's important that in any situation like this you make and keep clear, contemporaneous notes of your decisions and actions, and of the thought-processes that led to them.

### **Giving feedback to unsuccessful candidates**

If a shortlisted candidate asks for feedback, it's good practice to give it, and to do so promptly.

Respond by explaining how they fell short of what you were looking for. Refer specifically to the requirements of the role and the person specification. And be aware that the feedback you provide could well be held against you, if the individual were to bring a claim.

Where the individual asks for information about the recruitment process, it's imperative to take account of data protection. It's also necessary to think about whether a refusal to give access to information could lead to an assumption that there had been some sort of discrimination. It's something to get good legal advice on, if the issue presents itself.

### **The probationary period**

Most roles lend themselves to a probationary period. If successful, you can be confident that your recruitment decision was the right one. If unsuccessful, you may be able to terminate the employment on less notice than if no probationary period had been put in place.

It is really important that the employee is told, and understands, what is expected of them during their probation. If there are particular targets that they should hit, certain levels to attain, and skills and attributes to demonstrate, they need to know that. Keeping a close eye on the employee's performance as the probationary period goes on is key. They should be given ongoing feedback (and notes should be kept) on what they're doing right and where they are going wrong. Give them a good chance to improve, with whatever support you can provide.

Where an employee fails their probationary period, the question of procedure usually arises: does the employer need to follow a dismissal procedure? This really comes down to the risk of a claim. If that risk is low (they don't qualify for unfair dismissal rights, and you cannot see a basis for any other claim such as automatically unfair dismissal or discrimination), you may decide to simply let them go – subject to complying with any contractual process that you might have in place.

The safer option will always be to follow some sort of procedure during which you will at least explain to the employee why they're not being kept on, and give them a chance to have their say in response.

### **Recruitment records**

Recruitment generates a significant amount of paperwork and electronic data. Among this will be the notes made at each stage of the process, documenting the thought-processes and decisions (vital if a claim were to be brought), together with copies of the job adverts, job descriptions, information provided by the candidates, and details of their assessments.

But once you've recruited your new employee, what then? The Information Commissioner's guidance on this includes the following:

- Assess who in your organisation retains recruitment records.
- Don't keep recruitment records for longer than the statutory period for bringing a claim arising from the recruitment process, unless you have a clear business reason for going beyond that timeframe. And think about anonymising recruitment information that you'll be holding for any extended period.
- Destroy (shred or permanently delete) information obtained via a vetting exercise as soon as possible, or in any case within six months. You can keep a record of the vetting verification – the fact that vetting was carried out, the result and the recruitment decision – however.

- Think very carefully about which information on a candidate's application form should be transferred to their employment record. Only keep information that has a bearing on the on-going employment relationship.
- Delete information about criminal convictions once it has been verified unless the information is relevant to the on-going employment relationship. Simply record whether the check yielded a satisfactory or an unsatisfactory result.
- If you usually tell unsuccessful applicants that you will keep their names on file for future vacancies, give them the opportunity to have their details removed.
- Securely store (locked filing cabinets and password-protected electronic files are recommended) or destroy personal information gathered during the recruitment process.



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