



Fenn and Co

Chartered Certified Accountants

Principal: Nicholas J. Fenn FCCA MAAT

The Office, 4a Allendale Road, Caister-On-Sea, Great Yarmouth, Norfolk NR30 5ES

Telephone: (01493) 728986 Fax: (01493) 720231 Mobile: 07511 690491

Email: mail@fennandco.com Website: www.fennandco.com

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?

We set out below the main principles involved in the recruitment of employees. We have written this factsheet in an accessible and understandable way but some of the issues may be very complicated.

Professional advice should be sought before any action is taken.

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. Sound recruitment procedures help avoid mistakes, as well as ensure 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 the recruitment process 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
- making 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 whom 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 'injury to feelings'.

What is meant by discrimination?

Employers must not discriminate against candidates for employment because of their sex, gender reassignment, marital status, their ethnic origin or race, religion or belief, sexual orientation, age 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), the Disability Discrimination Act 1995 (DDA), the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Age) Regulations 2006. A further area where discrimination can be claimed is in connection with trade union membership or non-membership.

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Acts of Discrimination are categorised as being either Direct or Indirect Discrimination. Direct Discrimination would involve either establishing different, unjustifiable and therefore discriminatory recruitment criteria or deliberately excluding certain categories, for example, 'men only may apply'. Indirect Discrimination is not as obvious (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 (eg 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 (eg 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, sexual orientation, religion race or age

Whilst direct and indirect discrimination are generally prohibited, the legislation accepts that in some occupations it may be necessary to be of a particular sex, sexual orientation, religion, racial group or age. These limited exceptions are referred to as being Genuine Occupational Reasons (GORs) (there are no such exceptions for disability). None of the Acts actually allow discrimination to be used to maintain a balance between the sexes, the religious or the racial mix.

The Sex Discrimination Act (SDA) includes reference to GORs 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 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 GOR 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 GOR is used by social services and welfare providers

The Religion or Belief Regulations include examples of GORs.

- A hospital wishes to appoint a chaplain to minister the spiritual needs of the patients and staff. The hospital is not a religious organisation but decides a chaplain ought to have a religion or similar belief. The hospital may be able to show that it is a GOR within the context of the job for the postholder to have a religion or similar belief.
- A Christian school may be able to show that being a Christian is a requirement of the teachers whatever subject they teach.

An example of a GOR relating to sexual orientation may be a business advertising an opportunity to work in a middle eastern country. Because gay sex (even between consenting adults) is criminalised in that country, the business may be able to demonstrate it is a GOR for the person taking the job not to be gay, lesbian or bisexual.

An example of a GOR relating to age may be a requirement for a position as an actor for an old or young part.

The Race Relations Act also includes GORs but there are fewer 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 are also dealt with by the SDA above.

The meaning of disability

The Disability Discrimination Act (which now applies to all employers irrespective of the number of employees) insists that employers may not treat a person with a disability less favourably than other persons without justifiable reasons. The Act 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, preventing them from carrying out normal day to day activities and includes for example problems of mobility/speech/hearing/manual dexterity etc.

Notably in December 2005 disability legislation was extended to protect those suffering from conditions such as cancer, multiple sclerosis and aids, notwithstanding these conditions do not necessarily prevent an individual from undertaking their day to day activities.

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 premises, 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, age or religion. 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 (unless this is a genuine requirement of the role) 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 (such as an all male golf club)
- selection methods must be chosen which will enable the appropriate skills and attributes to be assessed 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 (eg 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 (eg 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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