

Employment Legislation

1. Employers' potential liability for discrimination in recruitment

Various anti-discrimination laws apply throughout the entire process of recruitment, including selection interviewing.

Employers are liable in law for any discriminatory actions perpetrated by their staff in the course of their employment. This means that if a manager who is conducting recruitment interviews does or says anything that could be construed as discriminatory, the employer will be potentially liable to pay compensation to the victim if a successful complaint is subsequently made to an employment tribunal.

A job applicant who believes that he or she has experienced discriminatory treatment during the process of recruitment has three calendar months from the date of the discriminatory treatment to lodge a claim with a tribunal.

There is no limit on the amount of compensation that can be awarded by tribunals in discrimination claims.

2. The law

Job applicants enjoy protection against discrimination on the grounds of:

- sex;
- transgender status (ie where a job applicant has had a sex change or is in the process of changing sex);
- pregnancy and maternity leave;
- being married or a civil partner;
- colour, race, nationality, ethnic origins and national origins;
- religion or belief;
- sexual orientation;
- age (unless the job applicant is within six months of the employer's retirement age or over that age);
- disability.

Rejection for employment is also unlawful if it is on the grounds of a candidate's past or present trade union membership or, with some exceptions, on the basis of a 'spent' criminal conviction.

The general principle contained in the UK's anti-discrimination laws is that all job applicants must be treated equally, irrespective of sex, race, etc. The structure of the law on disability is slightly different in that the employer may choose, if it wishes, to treat a disabled candidate more favourably than other candidates. Such preferential treatment is not permitted under the other anti-discrimination laws.

Discrimination can be direct, ie targeted at an individual, or indirect.

Indirect discrimination occurs where the employer unjustifiably imposes a criterion as part of the recruitment process, which, although applied to all job applicants, has or could have a disproportionate adverse effect on certain people. An example could be a requirement for job applicants to speak or write English to a standard of fluency. This criterion would discriminate indirectly against people who come from a country in which English is not the first language. Such a requirement would be racially discriminatory and unlawful unless the employer could show that it was appropriate and necessary for the effective performance of the job, and not excessive in relation to the needs of the job.

3. Avoiding bias

Managers involved in recruitment have a duty to conduct selection interviews fairly and without bias for or against any particular candidate. This is harder than most people think, because all human beings are affected by bias and prejudice, and these often operate at a subconscious level. It is therefore important for managers responsible for recruitment decisions to recognise how bias might influence their thinking.

Do's and don'ts

Do recognise that candidates from different racial backgrounds may have different ways of communicating their achievements at a job interview. For example, candidates from certain ethnic backgrounds may, on account of their racial or cultural background, be relatively reserved as regards their experience and achievements. Another point to be aware of is that in some cultures it is considered impolite to make direct eye contact with a person in authority.

Do guard against the 'halo effect'. This occurs when something about a job applicant creates a favourable first impression on the interviewer with the result that he or she may not be able to view the candidate's suitability for the job objectively or recognise any negative elements in his or her background. The interviewer might, for example, find the applicant's manner, accent or appearance pleasing, or might discover that he or she attended the same school or university as the applicant.

Do recognise your own general personal attitudes, views and likes/dislikes with regard to people, and learn to put these to one side during selection interviews.

Do distinguish between the information that the candidate is presenting and the mode of presentation. Unless presentation skills are relevant to the job in question, a slick and/or confident presentation style will be irrelevant to the person's suitability for the job.

Don't allow the initial impression of a job applicant to influence the selection decision, for example by making negative assumptions about an applicant based on mode of dress, general appearance or accent.

Don't be influenced by stereotypes, for example assuming that older candidates will not be capable of undertaking training in new technology.

4. Avoiding discriminatory questions

Discrimination can take place in the following circumstances:

- A job applicant is subjected to interview questions that have an underlying discriminatory impact, for example questions put to a woman about her children or childcare arrangements.
- A question put to a job applicant implies that the interviewer thinks there may be a problem. An example could be where a question such as 'would you have a problem working on Saturdays?' is asked specifically because the interviewer has deduced (or assumed) that the candidate is Jewish. Such a question could be viewed as directly discriminatory on grounds of religion.
- Negative assumptions are made about the applicant on the basis of the answers given to the above types of questions.
- An applicant who is pregnant is asked questions about plans for maternity leave, childcare, etc.

Candidates should not be asked questions about:

- their marital status or marriage plans;
- childcare arrangements;
- general family commitments and/or domestic arrangements;
- actual or potential pregnancy/maternity leave;
- their partner's occupation and mobility;
- any actual or potential absences from work for family reasons.

Employment tribunals have consistently taken the view that such questions, if asked of a female candidate, indicate an intention to discriminate (whether conscious or not). This is because questions of this type are usually rooted in an assumption that childcare and other family commitments may have a negative impact on a woman's commitment to the job, attendance or availability to work overtime.

Instead, questions that explore the applicant's ability to perform the job should be asked.

| Don't say | Do say |
|---|---|
| Are you planning to get married/have a family in the next few years? | What are your general aims and goals over the next three/five years? |
| Who would look after your children if you were asked to travel away from home on a business trip? | The job would involve travelling away on business trips approximately [x] times a year. To what extent would you be able to comply with this? |
| If we needed you to work late at short notice, how would this affect your childcare arrangements? | The job might occasionally require you to work late at short notice. How would you respond if asked to do this? |
| How would your husband feel if we asked you to relocate to a different branch of the company? | How would you feel if we asked you to relocate to a different branch of the company? |

Ultimately, if a job applicant who is suitable for the job in terms of skills and experience is rejected in favour of someone of the opposite sex or of a different racial group, for example, and that person can show that he or she was materially disadvantaged by the way in which the interview was conducted, he or she will have a strong argument that the selection decision was discriminatory.

5. Interviewing a disabled candidate

There is no duty on job applicants to volunteer to disclose a disability to a prospective employer. It follows that where a disabled applicant is being interviewed the onus will be on the manager conducting the interview to ask appropriate questions to ascertain whether the candidate is capable of performing the job effectively. It will also be necessary for the manager to establish whether any adjustments to working practices or premises would be necessary to support the disabled applicant should he or she be appointed. Such questions are permitted, but it will be important to ask them in a positive way, ie without adopting a negative attitude or making assumptions that there will be a problem.

- Make sure that any questions asked focus on the applicant's ability to perform the job duties, and not on the potential difficulties that he or she might have in the job on account of the disability.
- Ask questions related to the effects of the applicant's disability only where the answers are likely to be relevant to the duties of the job for which the person is being considered.
- Refrain from asking intrusive questions about the candidate's medical condition or disability.
- Frame questions in a positive way so as to avoid the risk of the job applicant perceiving that you are looking for or anticipating problems.
- Avoid drawing negative conclusions about a disabled candidate's capabilities without solid evidence, as such assumptions would amount to disability discrimination.

| Don't say | Do say |
|---|--|
| I see you have a mobility impairment. This would obviously make it difficult for you to ... | I see you have a mobility impairment. Can we discuss how you think this might affect your ability to perform the job and what type of support might be helpful to you. |
| What exactly is the matter with you? | Tell me something about how your condition might impact on your ability to ... |
| You would obviously be unable to do the manual aspects of the job ... | Tell me the extent to which you think you would be able to perform the manual aspects of the job. |
| How do you think other employees might react to a disabled person in the workplace? | This company has a policy of supporting disabled employees. |
| Did your disability cause problems in your last job? | What adjustments did your last employer make that you found helpful? |

6. Avoiding age discrimination

When interviewing, managers should beware of placing too much importance on length of experience. Focussing on length of experience will place younger applicants at a disadvantage because they will be less likely than older candidates to have long experience. Instead, managers should concentrate on interviewees' type and breadth of experience, and their skills, competencies and talents.

7. Interview notes

It is essential for managers conducting recruitment interviews to keep notes of the interview and afterwards to make a record of the rationale behind the selection decision, ie to note the key reasons or reason why the successful candidate was selected and the other shortlisted candidates rejected. There are several key reasons why such records are important.

- Nobody has a perfect memory and if you have interviewed several candidates during the same day you will inevitably be unable to recall accurately who said what, what the key issues were in relation to a particular candidate, and how a particular question was answered.
- If no records are created and one of the rejected candidates subsequently brings a tribunal claim alleging discrimination, you are unlikely to be able to recall the precise matters that were discussed at the interview or the way in which questions were phrased.
- The absence of any records may lead an employment tribunal to conclude that the whole recruitment process was conducted in a random, subjective or haphazard way.
- If records are available this will provide evidence that the recruitment process was approached in a professional manner. It may also provide specific information that will form a defence against the claim, for example a record that the answers that the candidate gave to specific questions indicated that he or she did not have the essential knowledge or skills required for the job.
- Once a tribunal claimant has shown facts that indicate that he or she might have been treated less favourably on one of the prohibited grounds, the burden of proof shifts to the employer to prove, on the balance of probabilities, that it did not discriminate. In recruitment cases, this means persuading the tribunal that the candidate's recollection of events is false or inaccurate, that the questions asked were in fact phrased differently or that what was said was not discriminatory. In practice, this would be impossible to achieve without proper records.

Managers should be aware that any record created about an individual and placed in a structured file (or input to a computer) will give rise to individual rights under the Data Protection Act 1998. Specifically job applicants will have the right, upon written request, to be given a copy of their own file. Interview notes should therefore be compiled with this in mind.