

Recruitment: top tips

Create and retain a paper trail....

Employers should keep records that allow them to justify decisions taken during recruitment and to demonstrate that they have followed a robust process. An Employment Tribunal could draw an adverse inference of discrimination if there is no paper trail to back up an employer's recruitment decisions.

The paper trail should demonstrate that selection decisions were based on objective evidence of the candidate's ability to do the job satisfactorily and not on discriminatory assumptions or prejudices. The Equality and Human Rights Commission Code of Practice on Recruitment recommends that the paper trail should include: any job advert, job description or person specification used in the recruitment process; the application forms or CVs and any supporting documentation from every candidate applying for the job; records of discussions and decisions by an interviewer or members of the selection panel; notes taken by the interviewer or the panel; each interviewer's marks; and all correspondence with the candidates.

Bear in mind that documents created through the recruitment process may have to be disclosed in the event of a data subject access request or litigation so care should be taken in deciding what to document.

...but bear in mind data protection issues

In deciding exactly how long to keep records after a recruitment exercise, employers must balance their need to keep such records to justify decisions with their data protection obligations to keep data for no longer than is necessary.

The Information Commissioner recommends retaining recruitment records for a relatively short period, perhaps 6 months after notifying unsuccessful candidates (or longer, if there is a clearly communicated policy to keep candidates CVs for future reference). Application forms should give applicants the opportunity to object to their details being retained. If a candidate is successful,

employers should give careful consideration to what information from the recruitment process should be transferred to the personnel file; information which has no bearing on the on-going recruitment relationship should not be retained.

Consider diversity monitoring at the recruitment stage

Whilst not mandatory in the private sector, the Code recommends that employers carry out diversity monitoring at the recruitment stage. This can help to identify short and long-term trends in the employer's recruitment process and to ensure that recruitment campaigns are targeted at as wide a pool of potential candidates as possible. Diversity monitoring can also be used to provide statistics and data in the event of a discrimination questionnaire or Tribunal claim. Provided that the data gathered from diversity monitoring does not directly or indirectly identify individuals, there should be no data protection issues in keeping and using this data.

Provide training for employees involved in the recruitment process

Employers can reduce the possibility of unlawful discrimination by ensuring that employees involved in the recruitment process have had equality training. The Code recommends specific training for interviews, to help those involved in the recruitment process: recognise when they are making stereotypical assumptions about people; apply a scoring method objectively; prepare questions based on the person specification and job description; and avoid questions that are not relevant to the requirements of the job. Training should be given on an ongoing basis to ensure that participants in the recruitment process are reminded of their responsibilities and kept up to date with the employer's policy on equality. It is helpful to retain training attendance records so that there is evidence of who has been trained and when.

Take care with instructions to third parties involved in the recruitment process

Employers can be vicariously liable for the acts of third parties working on the employer's authority in the recruitment process (e.g. recruitment agencies or consultants), even if the third party is acting without the employer's knowledge or approval. Employers will not generally be liable for unlawful discrimination carried out by a third party if the third party is acting in contravention of an express instruction not to discriminate. It is therefore crucial to ensure that express and non-discriminatory instructions are given to third parties working for an employer in the recruitment process.

The importance of adverts and an employer's response to candidate enquiries

An employer must not discriminate in its arrangements for advertising jobs or in the content of the job advert. Care also needs to be taken when responding to enquiries from potential applicants to ensure that any response is objective and non-discriminatory. If an applicant is deterred from applying for a role due to a discriminatory advert or response to enquiry, they could bring Tribunal proceedings.

Employers should ensure that adverts and any response to enquiries refer to the real (as opposed to the perceived) requirements of the job. Wording or statements which suggest a bias for or against applicants with a particular protected characteristic should be avoided and if criteria relating to knowledge or skills are included in an advert they should not be unnecessarily restrictive, e.g. if GCSEs are required for the role, the employer should make clear that it would also accept alternative qualifications which are equivalent to GCSEs. This will ensure it is not discriminating against older or overseas candidates who did not have the opportunity to take GCSEs.

Getting the arrangements for recruitment right

Employers must not discriminate against or victimise a person in the arrangements they make for deciding to whom they will offer employment. The concept of "arrangements" is widely construed and can include almost any aspect of the recruitment process, e.g. the format and content of application forms, location and timing of interview and the job and person specifications.

In terms of disabled applicants, an employer is not required to make changes in anticipation of applications from disabled people in general. It is only if the employer knows or could be reasonably expected to know that a particular disabled person is (or may be) applying, and that the person is likely to be substantially disadvantaged by the employer's premises or arrangements, that the employer must make reasonable adjustments. Employers therefore need to ensure that they are aware of the risks involved in the arrangements they put in place for recruitment and are flexible with those arrangements where possible.

Watch out for inappropriate questions at the interview stage

Interviews are potentially the riskiest part of the recruitment process for employers as it is the stage at which it is easiest to make judgments about an applicant based on instant, subjective and sometimes irrelevant impressions. This could lead to unlawful discrimination. Wherever possible, interviews should be conducted on the basis of the application form or job description with objective criteria being set so that each candidate is assessed solely on the basis of their ability to do the job satisfactorily.

Except in certain specific circumstances, it is unlawful to ask applicants about their disability or health until the applicant has been offered a job or has been included in a pool of successful candidates to be offered a job when a position becomes available. This includes questions about previous sickness absence.

The limited circumstances where “health related questions” may be asked before an offer has been made include: for the purposes of diversity monitoring (on an anonymous basis), in order to help an employer comply with its duty to make reasonable adjustments and where the question relates to a person’s ability to carry out a function that is intrinsic to that job.

Giving feedback

The Code recommends that, having secured the preferred candidate, it is good practice to offer feedback to unsuccessful candidates if requested. Failure to give feedback following a request by an unsuccessful candidate could give rise to an implication that the reason for rejection is a discriminatory one. Feedback can be written or oral and should be provided in a sensitive manner. Any negative comments or criticism should relate directly to the applicant’s failure to meet the requirements of the role or the person specification. A feedback response could prove to be a critical document in an employment tribunal claim so feedback should also be capable of being supported objectively.

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