



The Bigger Picture

we need to talk about...

Recruitment and how to avoid discrimination claims

Recent research has shown that recruitment processes are often heavily skewed by unconscious bias from those carrying out job interviews - and many tend to hire people who share similar traits to their own. Olivia Fitzer, a solicitor in the Employment team at Bath law firm Withy King, explains why this poses a risk to employers.

A recent report by the HR professionals' body, the CIPD, entitled "A Head for Hiring: The Behavioural Science of Recruitment", shows that employers often use their first impressions of a job candidate to assess whether they are likely to be a good fit. It also shows that they are more likely to select people whose experience, skill set, personality and even hobbies, closely mirror their own.

Recruiting the right people is fundamental to the success of many businesses which is why it is so important to get it right. It is worrying to think that a significant proportion of recruitment decisions are based on gut instinct rather than more scientific methods.

Identifying the right person for the role, the team and the business can be difficult for seasoned HR professionals let alone managers and directors who may not have had much training in this area.

This latest report from the CIPD is worrying because it shows that many businesses' recruitment practices are leaving them exposed - and they may not even end up with the best person for the job.

Recruitment from a legal perspective can be quite challenging particularly because there is no one piece of legislation specifically about recruitment processes. There is, however, a significant amount of employment legislation, particularly in relation to discrimination, which is relevant to the recruitment process, from how to word your advertisements and application forms to selection and assessment criteria and interviewing procedures, so businesses can't really afford to wing it.

Whichever recruitment practices your business uses, it is imperative that you comply with the anti-discrimination laws (set out in the Equality Act) which prohibit discrimination on grounds of age, disability, gender reassignment, marital status, pregnancy and maternity, race, religious beliefs, sex, and sexual orientation.

It is important to understand that employers are vicariously liable for any discriminatory behaviour of their employees in recruitment practices unless



the 'reasonable steps defence' is established.

This defence will at least require a business to have a well-established Equal Opportunities Policy. Thankfully, recruitment discrimination claims continue to be a rarity. However, a job applicant alleging discrimination in an Employment Tribunal claim may be able to obtain copies of the documents relating to a recruitment process including anonymised information about other candidates.

As far as discriminatory recruitment claims are concerned, the most litigious issue is disability discrimination. Although questions about the health of job applicants are not permitted before the conditional job offer is made, it is permissible to send the applicant a health questionnaire and invite the applicant to a medical after the conditional job offer has been made. The

legal difficulty is that if the questionnaire or medical identify serious health issues affecting the suitability of the candidate then there is a risk of a disability discrimination claim if the job offer is then withdrawn.

The definition of disability is quite wide and includes a number of medical conditions that you would not automatically consider to be defined as a disability. Specifically the definition is all those who have now (or have had in the past) a physical or mental condition having a long term (more than 12

months) and substantial effect on their ability to carry out day to day activities, disregarding the effect of medication. If the candidate is a disabled person then the employer has a duty to make 'reasonable adjustments' to the working environment to enable the applicant to do the job. If the job offer to a disabled applicant is withdrawn unreasonably or if the employer withdraws the job offer when reasonable adjustments could have been made then the applicant is likely to succeed in a discrimination claim at the Employment Tribunal.



Olivia Fitzer is a solicitor in Withy King's busy Employment team. For advice on any employment issue or information about Withy King's forthcoming employment law seminars, please contact Olivia on 01225 730100 or email olivia.fitzer@withyking.co.uk

THE FIVE THINGS YOU SHOULD THINK ABOUT IF...

you're recruiting

Do your policies and practices protect the business from potential discrimination claims?

Make sure that you have the right policies and practices in place to protect the business from the possibility of a discrimination claim before you start recruiting. Your Equal Opportunities policy should make it clear to all staff, including managers with hiring responsibilities, that decisions will not be made based on any of the protected characteristics (set out left).

Provide training

All managers should be trained on preventing discrimination in the workplace generally. When it comes to the recruitment process, you should also give the managers making the decisions some guidance on how to carry out an appropriate interview, including avoiding potentially discriminatory questions.

Involve more than one person in the decision-making process

Wherever possible, have more than one person involved in recruitment decisions. This can help to reduce the chance of one individual's bias prejudicing an applicant's chances of being selected. For example, you could have each interviewer assess the applicant separately, before agreeing on a joint mark.

Keep a record

You may choose not to recruit the applicant who looks the best on paper. That's fine - but make sure that you can justify your decisions. This will be important if you do need to defend a discrimination claim from an unsuccessful applicant. You should keep all information relating to the recruitment process, such as interviewing and shortlisting notes, so that you can provide evidence to support the decisions if you need to.

Make sure employment contracts are up-to-date

Once you've found the ideal candidate and have offered them the job, you will need to issue them with an employment contract. You should get your standard contracts reviewed regularly, to ensure that they are up-to-date with the frequent changes in employment law and that they offer the best protection for the business.