



Chapter 1
Recruitment

1.0 Recruitment

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1.1 Introduction

1.1.1 There are both practical and legal issues to consider when recruiting employees. Generally speaking, employers are entitled to employ who they want. However, this general principle is subject to some limitations which are set out below.

1.1.2 Employers should make sure that everyone involved in the recruitment and selection process is aware of good practice, the appropriate procedures to follow and possible legal pitfalls. These issues are dealt with in this chapter which should be read in conjunction with [6.0 Equal opportunities](#).

1.1.3 Employers have a legal responsibility to make sure that they do not discriminate in their recruitment and selection processes. It is unlawful to discriminate in recruitment and selection processes because of:

- › sex;
- › race;
- › disability;
- › age;
- › gender reassignment;
- › marriage and civil partnership;
- › pregnancy and maternity;
- › sexual orientation; and
- › religion or belief.

It is important to note that proposals have been made, amidst pressure from the European Parliament, to introduce 'caste' as a protected characteristic under the 2010 Act. The government has committed to making this change, probably within the next one to two years. A recent court decision has held that while caste is not a protected characteristic in its own right, in certain circumstances it may come within the existing protected characteristic of race.

- 1.1.4 An employer does not discriminate if there is an occupational requirement for recruiting an individual from a specific group in relation to a particular job; for example, there may be occupational requirement for a female to fill the position of a live in care assistant at a home for teenage girls. There is no set list of circumstances in which occupational requirement will exist and employers should be very clear about the necessity for such a requirement before advertising a position. Employers must also consider each position individually as there may be some positions where there is occupational requirement, but this might not be the case for all roles. Where a recruitment decision is challenged, the onus is on the employer to establish that there was an occupational requirement. For more information on occupational requirements, see [6.9 Occupational requirements and other exceptions](#).

1.2 Job description and person specification

- 1.2.1 When recruiting staff, either to fill a vacancy or a newly established role, it is important to take the time to set out a clear definition of the job itself and the skills, knowledge and experience that potential candidates must have. There is no legal requirement on employers to have a job description or a person specification; however these are helpful to both the employer and to potential candidates.

1.2.2 Job description

This helps to clarify the scope of the work that the employer expects the successful candidate to undertake. A job description should include the job title and details of the main duties, tasks and responsibilities involved. It is also useful to outline where the job fits into the employer's organisational structure, including details of the line manager who will oversee the position and whether the employee will be responsible for other members of staff within the organisation.

1.2.3 Person specification

- 1.2.3.1 A person specification outlines the personal qualities and characteristics the employer is looking for. The person specification should include qualifications required and also the kind of knowledge, experience and skills that the employer is looking for. It is sensible to draw a distinction between experience and skills that are essential for the job and those that are desirable.
- 1.2.3.2 The personal qualities or characteristics should be directly related to the job. They must also be applied consistently to all applicants, irrespective of their race, sex etc. If requirements in relation to personal qualities or characteristics are not directly related to the job or are not applied to all groups in the same way, this could leave an employer vulnerable to discrimination claims. For example, in order to avoid any suggestion of discrimination on the grounds of age, words like 'young' or 'mature' should be avoided as should reference to required years of experience for the job.

1.3 Advertising vacancies

1.3.1 There are many different ways in which employers can advertise vacancies. It can be in newspapers, at a national or local level, or via the Internet. Some employers choose to use an employment agency. There are now specific rules governing the rights of employees or workers engaged through an employment agency. For further information see [2.9 Agency workers](#). Vacancies may be advertised in an organisation's internal publication. The method of advertising will depend on the type of potential candidates that the employer wants to reach and the budget available for recruitment.

1.3.2 An advertisement should ideally include:

- › a basic description of the job;
- › the essential and the desirable qualities for job applicants (from the person specification);
- › a description of the organisation and the activities it undertakes;
- › basic details of salary scale and other benefits etc.;
- › job tenure (for example, whether the position involves a fixed term contract, maternity leave cover etc.);
- › details of how applicants should apply and any deadline for applications.

1.3.3 Misrepresentation

When advertising a vacancy, it is very important that the post is not misrepresented. Employers must take care when describing the job in order to avoid any subsequent disputes about the role once the successful candidate starts. The British Code of Advertising provides guidance on the form and content of advertisements. These should be 'legal, decent, honest and truthful'.

1.3.4 Job adverts and discrimination

An inappropriately worded job advertisement can result in an employer being liable for an act of discrimination. This can happen in two ways. Firstly, if for example a job advert specifically seeks a female or young applicant, then that advert potentially discriminates directly against males and older applicants, unless it can be shown that the employer has an occupational requirement for seeking female or young applicants. For further information on occupational requirements, please see [paragraph 1.1.4](#).

A job advert can also discriminate even though it does not specifically seek to include or exclude certain types of applicant. There have been cases where it was found to be discriminatory because of age for an advert to contain the words 'dynamic' and 'energetic'. The court decided that this was a poorly-disguised attempt to seek applications from young people. The converse would also be true if, for example, an advert sought 'mature' or 'seasoned' candidates.

Employers often use recruitment agencies and it is unlawful for an employer to instruct such an agency to discriminate when advertising for candidates.

A full explanation of discrimination rules is beyond the scope of this chapter. For further guidance in relation to avoiding acts of discrimination, see [Chapter 6](#).

The Equality and Human Rights Commission (EHRC) can take proceedings against those responsible for publishing discriminatory advertisements and seek a declaration that the advertisement was unlawful. It is also open to candidates to take legal action against an employer if the language used in an advertisement is discriminatory.

If particular groups are under-represented in a particular employer's organisation, then it can be lawful but not mandatory for that employer to encourage applications from candidates from those particular groups. In those circumstances, the employer can lawfully include wording that positively encourages candidates from the under-represented groups to apply. Employers should take care before drafting adverts in this way to ensure that there is clear evidence of under-representation of the particular groups in the workforce.

1.3.5 Since 8 May 2016 there has been a ban on recruitment agencies and businesses from recruiting solely from other EEA countries without advertising in Great Britain.

1.3.6 Union membership

Employers are prohibited from refusing to offer employment to a candidate on the basis that the candidate is a member of a trade union, is unwilling to join or leave a trade union, or is unwilling to make payment in lieu of union subscriptions. If a job advert makes reference to such matters, then it is assumed that any unsuccessful candidate who cannot meet the requirement was refused the job for that reason. It is sensible then for employers not to mention union membership in job adverts.

1.4 Job application forms

1.4.1 Many employers choose to ask candidates to complete a job application form. The advantage of doing so is that the employer can decide what information candidates must provide and the information provided will be in a consistent format. This makes it easier to compare candidates' responses and to carry out an objective assessment of the candidates' suitability for the position.

1.4.2 All applications should be treated confidentially and circulated only to those who are involved in the recruitment process. To do otherwise would risk breaching the Data Protection Act (see [1.8 Data protection](#) and [9.0 Data protection](#) for further information on the Data Protection Act).

1.4.3 There are a number of issues that employers should consider when composing application forms.

1.4.4 Age

Employers should consider whether it is necessary to ask the applicant's age as doing so might lead to a suggestion of age discrimination.

1.4.5 Health

Except in the specific circumstances set out below, it is unlawful for employers to ask any job applicant about his or her 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 prohibition includes questions on application forms, pre-employment health questionnaires and also questions during an interview or subsequent selection process. Questions relating to previous sickness absence are likely to be regarded as questions that relate to disability or health.

The six situations where it is lawful for an employer to ask questions related to disability or health are:

- › where reasonable adjustments are needed for the recruitment process;
- › for the purposes of equal opportunities monitoring;
- › implementation of positive action measures;
- › where there is an occupational requirement for a person to have a particular protected characteristics for a job;
- › national security;
- › where the question enables an employer to identify whether a job applicant can carry out functions that are intrinsic to that job, with reasonable adjustments in place, as required.

This last exception gives employers some scope to ask health related questions at the recruitment stage. In practice, employers must assess whether there are any functions of a job which are so important and fundamental to be able to justify asking any such questions. For example, an employer may advertise a warehouse position which involves a great deal of manual handling. In these circumstances, certain questions relating to an applicant's physical mobility may be lawfully asked. However an employer should be careful about how any requirement is phrased.

1.4.6 Right to work in the UK

Employers have a legal duty under the Immigration, Asylum and Nationality Act 2006 to check whether a prospective employee requires permission to work in the UK.

All British citizens have full employment rights in the UK, as do their spouses, civil partners and dependent children. This is the same for any individual who has UK residency rights or indefinite leave to remain in the UK. Some Commonwealth citizens have what is known as the "right to abode" in the UK which means they have rights to the same treatment as British citizens (but cannot hold a British passport). Commonwealth nationals without a right to abode will need permission to enter and stay in the UK on account of their UK ancestry, and will typically have unrestricted rights to take up employment.

With the UK having now formally left the European Union by virtue of the EU-UK Trade and Cooperation Agreement (TCA), the position for European Economic Area (EEA) nationals, Swiss nationals and European Union nationals has changed. If they currently do not have indefinite leave to remain in the UK, and they wish to continue to live and work in the UK beyond 30 June 2021, then such nationals must apply for settled status under the EU Settlement Scheme in order to be able to retain their right to live and work in the UK.

The scheme was opened on 30 March 2019, with deadline for applications being 30 June 2021. To be eligible, an applicant must:

- › • be an EU national, or a family member of a EU national;
- › • have started living in the UK by 31 December 2020; and
- › • have lived in the UK for a continuous 5-year period, albeit with some exceptions for absences by reason of, for example, childbirth or compulsory military service.

If EU nationals have less than 5 years' continuous residence when they apply then they may receive "pre-settled status" instead, which will allow the national to stay in the UK for a further 5 years from the date that they obtained pre-settled status. Once they have 5 years' continuous residency they can apply for settled status.

For more detailed information on employment rights changes following Brexit, see section [] below.

Croatian nationals and the extended family members of EEA nationals may also have permission to work in the UK subject to certain restrictions. However, non-EEA nationals not already mentioned will be unable to work in the UK without Home Office permission. The majority of these individuals who have permission to work in the UK will have achieved this through the Home Office's UK Visas and Immigration points based system. Licensed employers may be able to sponsor a work visa for non-EEA nationals through this system.

Individuals who have come to the UK fleeing persecution and seeking asylum (“asylum seekers”) normally do not have the right to work in the UK until their application has been accepted by the Home Office (if they have been granted the right to work this will be stated on their Home Office documentation). Once their claim has been accepted asylum seekers will gain “refugee status”. Refugees have full rights to work. If asylum seekers do not receive refugee status, the Home Office may still grant them “humanitarian protection”, which will also entitle full rights to work. Refugees or those with humanitarian protection do not require sponsorship under the points based system.

Employers are liable to civil and criminal penalties (in extreme cases possibly imprisonment), if they employ someone who does not have permission to work in the UK. Fines of up to £20,000 per illegal worker can be imposed. Provided an employer has carried out the necessary document checks, and repeated checks where applicable, it will have a defence if it subsequently discovers that it has employed an illegal migrant worker. An employer will not, however, be protected from civil and/or criminal sanctions in such circumstances where they have carried out the required document checks but have knowingly employed someone who is an illegal worker. Please see the updated Home Office Guidance on Working in the UK (Updated 5 September 2016) for further information and guidance on how to conduct checks.

It is important that employers avoid discrimination when carrying out the necessary checks on employees. The best way for employers to make sure that they do not discriminate is to treat all job applicants in the same way at each stage of their recruitment process. However, direct discrimination does not arise if an employer is found to be mistreating someone due to vulnerable immigration status, nor is it indirect discrimination because it is not about an employer’s provision, criterion or practice.

Individuals are still protected from discrimination on grounds of their race so it is best practice to adopt a fair recruitment policy, whereby checks are conducted on all applicants.

The Home Office has produced both comprehensive and summary guidance for employers on preventing illegal working, the most recent document being “An Employer’s Guide To Right To Work Checks” and this is available from their website. The guidance outlines a 3 step process designed to assist employers in verifying whether or not an employee has the right to work in the UK and in discharging their obligations more easily. The 3 steps are:

- › Obtain original documents from the approved Home Office List, e.g. passport, national identity card etc;
- › Check the documents are genuine, belong to the applicant and that dates are accurate and/or have not expired, etc; and
- › Copy all documents presented, which must be retained for the duration of employment and a period of 2 years after.

An employer can alternatively perform an online check by using the online service entitled ‘View a job applicant’s right to work details’ on GOV.UK. The online check is only currently available for certain migrants, such as those holding a biometric residence permit or card, those who have obtained status under the EU Settlement Scheme and those issued a visa under the points-based system. An employer using the online service must check the online details, any photograph on the online system and retain a copy of the online check.

1.4.7 Criminal convictions

Employers should only ask for information about criminal convictions if the type of job they are recruiting for justifies seeking this information. The Rehabilitation of Offenders Act 1974 allows individuals who have been convicted of certain offences to treat these as spent after specified periods of time. Refusing to employ someone because they have a spent criminal conviction is a criminal offence. Application forms should make it clear that applicants do not need to provide details of convictions that are spent under the 1974 Act, unless the job is covered by the Exceptions Order to the 1974 Act.

1.4.8 Disabled applicants

Depending on the nature of the disability, it may be necessary for an employer to make provisions to accept applications by alternative means; for example, allowing blind candidates to submit applications via audiotape or CD disc. Such a step may be regarded as a reasonable adjustment by a prospective employer to facilitate applications from disabled candidates. For further information, see [6.4.10 Duty to make reasonable adjustments](#).

1.5 Interviews

1.5.1 After considering the applications, employers normally draw up a list of candidates they wish to interview. It is important when drawing up a list of candidates not to discriminate against applicants on any of the grounds listed in [paragraph 1.1.3](#). Where possible, it is good practice to have more than one person involved in compiling the list of candidates in order to avoid the possibility of bias and to make sure that the short list is drawn up fairly, although in smaller businesses this is not always possible.

1.5.2 Conducting the interview

Employers should give thought in advance to the structure and content of the interview. It can be useful to make up a list of questions that are to be asked of the candidates. It is sensible to take detailed notes of what is said at interviews and to keep these. It is important to remember that, if a candidate later claims that he or she has been discriminated against, he or she could ask for disclosure of copies of notes that were taken during the interview. Legible and detailed interview notes can be of great assistance to an employer in defending a discrimination claim.

As part of its defence the employer may be called upon to show that the reason for the rejection of the candidate was for a reason other than protected characteristics such as age, gender, religion, etc. Detailed notes which record an analysis of the applicant's skills, qualifications and responses to the interview questions can be very important in persuading a tribunal that the reasons for refusal were not discriminatory.

The considerations that must be taken into account in relation to advertisements (see [1.3 Advertising vacancies](#)) have to be borne in mind during the interview process. It is important to make sure that staff who are responsible for conducting interviews understand the requirements of the job, qualifications and characteristics that are sought. This should enable them to reach decisions on the basis of the merits and suitability of the candidate, thus avoiding discrimination claims.

1.5.3 False information provided by applicant

If a successful job applicant provides information to the prospective employer during the recruitment and selection process, either in writing or orally, that the applicant knows to be false, that may entitle the employer to dismiss that individual at a later stage as and when that false information comes to light. A distinction is however drawn between circumstances where a candidate may have exaggerated abilities or experience from situations where deliberately dishonest and misleading responses have been given to the employer either on the application form, CV or at interview. For example, where a successful candidate falsely states that he or she has a particular qualification (which is an essential part or is important for the job role) then the employer is likely to be justified in dismissing that successful candidate. On the other hand, if an applicant has exaggerated the amount of experience he or she has in a particular process, task or skill that is not a material component of the job, then that is unlikely to justify dismissal if the employer subsequently discovers that the employee is less skilled in that area than he or she had made out during the recruitment process.

Even in the clear-cut cases where employees have misled or lied to the prospective employer, the employer is still required to follow a fair and reasonable dismissal process if it is to avoid liability for unfair dismissal if the employee meets the qualifying requirements to bring such a claim. For further information and guidance on disciplinary procedures and unfair dismissal rules, please see [11.0 Disciplinary and grievance](#) and [12.0 Dismissal - fair or unfair](#).

1.5.4 Reasonable adjustments for disabled candidates

There are a wide range of reasonable adjustments that an employer may be required to make to allow a disabled applicant to attend an interview or other type of selection event, for example:

- › using accessible premises;
- › providing a reader or interpreter;
- › changing procedures for tests or assessments;
- › allowing the candidate to be accompanied by someone who can support him or her at the interview.

For a fuller explanation of the obligation to make reasonable adjustments under the Equality Act, see [6.4.10 Duty to make reasonable adjustments](#).

1.5.5 Other methods of selection

As well as interviews, employers sometimes use other ways of selecting candidates. These might include practical tests if the position involves manual skills. Psychometric tests are used to assess aspects of personality and intelligence, for example problem solving, decision-making and confidence. Employers should decide whether this sort of testing is really relevant to the vacancy they want to fill and should also consider the cost of carrying out and analysing these tests weighed against the possible benefits.

1.6 Offer of employment

1.6.1 Once an employer has made its decision, it is important that a written offer of employment is made to the successful candidate without delay. Where the employer requires to convey the offer urgently in order to secure that particular candidate it may be appropriate to make the offer of employment verbally by telephone. If an employer makes an offer by telephone it should ensure that all relevant parts of the offer are conveyed to the successful candidate. It is sensible for an employer making such an offer to make a note of the content of the telephone conversation and follow up the call with a written offer as soon as possible. The successful candidate will in all probability have to serve out a period of notice of termination of employment with his or her current employer which inevitably delays the commencement of the new employment. Employees tend to be understandably reluctant to give notice to their existing employer before they have a firm written offer of employment.

1.6.2 Sometimes an employee is available to start right away. When an employer's need is such that it wishes to accept the employee's offer of an immediate start, that employer should nevertheless make it clear to the employee that ongoing employment will be conditional upon satisfactory references being obtained and terms and conditions of employment being agreed.

1.6.3 Make up of job offer

Employers should write to a successful candidate setting out the fact that he or she has been successful, together with the main terms and conditions on which the employment offer is made. It is common for employers to set out job role, start date, salary, other benefits, holidays and notice period in the body of the offer letter. It is also best practice for the employer to attach to the offer letter a statement of terms and conditions of employment which the employee will be expected to agree to (see [2.2.1 Introduction](#)).

The offer letter should also refer to any other documents or policies which will form part of the contract of employment, and ideally copies of such documents should be attached to the offer letter. The offer letter should request that the employee signs and dates the terms and conditions of employment and returns those prior to the commencement of the employment. The offer letter should make it clear that the employment is subject to satisfactory references being obtained.

Where possible, the offer letter should stipulate the intended start date. This is not always possible due to uncertainty about whether or not the prospective employee will be asked to work his or her notice with the current employer, and if so for what period.

A clear and complete job offer, together with accompanying contractual documents, helps avoid dispute between employee and employer in relation to contractual terms once the relationship has begun. It is better for both parties that the applicable contractual terms are clarified before the relationship begins.

1.6.4 Conditions of employment

It is sensible for employers to make offers of employment conditional upon satisfactory references and other matters such as security clearance or proof of the right to work in the UK. If an offer of employment is made subject to such conditions, then the offer must make that clear.

1.7 References

- 1.7.1 It is important in the recruitment process for employers to take up references from candidates' previous employers. Many employers seek a reference not only from the previous employer but from another employer or other person who can speak to the character of the applicant.
- 1.7.2 Some prospective employers issue pro forma reference requests which pose a number of specific questions in relation to the prospective employee's ability, absence record and conduct. It should be noted, however, that former employers cannot be compelled to provide any form of reference for a former employee, let alone complete a pro forma reference request. Increasingly, employers restrict references to basic statements of employment dates, job title and reason for leaving, rather than making any qualitative comment on the former employee.
- 1.7.3 If an employer chooses to give a reference for a former employee then it must bear in mind that in drafting the reference it owes a duty of care to the recipient of the reference to ensure that the reference is factually true and accurate and not in any way misleading. The employer owes a similar duty of care to the subject of the reference.

1.7.4 Job offer subject to references

It is common for employers to make offers of employment to prospective employees subject to obtaining satisfactory references. If an employer decides to withdraw a job offer on the basis of a reference, that employer should ensure that in doing so it does not contravene the discrimination rules. For example, if a reference discloses that a prospective employee has a history of poor attendance as a result of depression and the prospective employer withdraws the offer on that basis, it may be open to the prospective employee to raise a claim under the Equality Act.

1.8 Data protection

Chapter 9 covers Data Protection obligations in detail. The Data Protection Act 1998 applies to information collected by an employer in the course of the recruitment and selection process. The Information Commissioner has published the Employment Practices Data Protection Code to encourage good practice in the storage and processing of data obtained during recruitment and selection. There is also a Quick Guide to the Code and both are available on the Information Commissioner's Office website. Applicants must be made aware of what information relating to them the employer collects or retains and what this will be used for.

Employers should:

- › ensure that all staff involved in recruitment and selection are aware that Data Protection rules apply and that they must handle personal information appropriately;
- › make sure that they do not collect more personal information than is necessary. It is a breach of Data Protection rules to collect personal information that is irrelevant or excessive;
- › keep all personal information obtained secure and not disclose this to third parties without the applicant's consent;
- › make it clear to the applicant if it intends to check the information that has been provided. The applicant should be told how this will be done and what information will be checked; and
- › only keep information obtained during the recruitment process for as long as there is a clear business need to do so. For example the employer may have been impressed by the candidate but did not have enough vacancies to make an offer of employment. The employer may wish to keep this applicant's details on file in case another suitable vacancy arises.

1.9 Induction

- 1.9.1 An effective induction programme helps the employee to settle quickly and become an effective member of staff as soon as possible. Some employers send induction information to new employees before they take up their new role. This means that they can take time to consider this information before starting work.
- 1.9.2 The format of induction programmes varies from employer to employer and will depend on the size of the organisation and the nature of the job but there are some basic points that all employers should cover:
- › health and safety procedures in relation to the job and, if necessary, training in this area should be provided at the induction stage. New employees should be made aware of any particular health and safety requirements, for example, the need to wear protective clothing;
 - › new employees should be given the opportunity to meet the staff they will be working with, as well as their line manager, or any other member of staff to whom they will be expected to report;
 - › new employees should be shown round their place of work so that they know where all the facilities are; and
 - › there should be an explanation of the new employee's terms and conditions and the requirements of the job; and
 - › equal opportunities training.

1.10 Recruitment complaints

A recruitment and selection policy should include a procedure for handling complaints. Notes should always be kept during the recruitment process, especially about decisions that have been made and the reasons behind those decisions. These notes are likely to be important if there is an allegation that there has been discrimination during the recruitment procedure.

1.11 Useful websites

Business Gateway

bgateway.com

ACAS

acas.org.uk

CIPD

cipd.co.uk

Home Office UK Visas and Immigration

gov.uk/government/organisations/uk-visas-and-immigration

Equality and Human Rights Commission

equalityhumanrights.com

Information Commissioner's Office

ico.gov.uk

itspublicknowledge.info/home/ScottishInformationCommissioner.aspx

emplaw.co.uk

GOV.UK – right to work checks guide

gov.uk/government/publications/right-to-work-checks-employers-guide