

Myers & Co Solicitors

The slides that follow were shown at our recent employment law seminar. The seminar was titled "Recruitment Risks and Contract Clauses" and was presented in collaboration with the Borough of Congleton Chamber of Commerce and Enterprise. The presentation was to businesses operating in South East Cheshire and concentrated on risks in the recruitment process with particular reference to advertising, application forms, and the interview process. It also dealt with key contract clauses which should be inserted in employment contracts. The presentation was given at the new Enterprise Centre in Sandbach.

Recruitment Risks

Advertising Job Vacancies

Application Forms

The Interview Process

Job Advertisements

Be careful!

Inappropriate wording can give rise to a discrimination claim

Avoid presenting men, women, disabled people or those from particular backgrounds in stereotypical ways

Consider including a statement to the effect that you are, or you are working towards being an equal opportunities employer

Legislation

It is unlawful under:

Section 38 of the Sex Discrimination Act

Section 29 of the Race Relations Act

Section 16B of the Disability Discrimination Act

to publish or cause to be published a
discriminatory advertisement

Example 1

The ability to work long hours/and or travel **X**

This may indirectly discriminate against female candidates with childcare responsibilities.

Example 2

Mature individual required **X**

Avoid using words such as “mature” or “young” as they may give rise to an inference of discrimination on the grounds of age.

Example 3

Applicants must have a minimum of 5 years post qualification experience X

Rather than stipulating the number of years experience required, employers should set out requirements as to the type or level of experience required for the job to avoid discriminating against younger candidates.

Genuine Occupational Requirements (GOR)

The general GOR which applies across the Race Relations Act, the Religion or Belief Regulations and the Sexual Orientation Regulations, allows an employer to discriminate in recruitment, promotion, transfer, training or dismissal if:

The discriminatory characteristic is a genuine and determining requirement of the job.

It is proportionate to apply that requirement in the particular case.

Either the person does not meet the requirement, or the employer is not satisfied (on reasonable grounds) that the person meets it.

This GOR does not apply under the SDA or the DDA

It is for the employer to prove that a GOR applies

Advisable to seek legal advice

Application Forms

Ensure that all applicants compete at an equal level

Consider the ways in which the application form will be provided

Reasonable adjustments may need to be made for disabled candidates (for example providing forms in Braille or larger print)

Application Forms

Keep application forms, and documents relating to each stage of the recruitment process, for 12 months, in case of any complaints about decisions or procedures or requests for information under the Data Protection Act 1998

Equal Opportunities Monitoring Forms

Employers are entitled (and in some circumstances required) to monitor the make up of applicants

Must be contained in a separate anonymised document

Must ensure that equal opportunities monitoring forms are not disclosed to the person conducting the interview

Interview Process

Give consideration to where and when the interview is arranged or conducted

The Disability Discrimination Act imposes a duty on employers to consider making reasonable adjustments in the interview process

Consider in advance where the interview is to take place and if for example the applicant will require wheelchair access

Consider the timing of the interview. For example a candidate who needs to pray at a particular time or needs to be home at certain times for childcare responsibilities

Interview Process

If you require the applicant to take a test, ensure that it relates to the vacancy on offer

Inform candidates in advance if they are required to take a test

Consider reasonable adjustments for disabled candidates

Interview Questions

Ensure all questions relate to the requirements of the job

Put the same questions to all the applicants in the same order

Avoid questions about a applicants personal life or personal circumstances

Do not ask any potentially discriminatory questions (for example, questions asked of a female that would not be asked of a man, such as whether they plan to have children)

Contract Clauses

Section 1 of the Employment Rights Act 1996:

Minimum requirements

Within 2 months of commencement

Remedy for failure (S38 EA 2002)

Probationary Period

Psychological value

Reduced notice period

The right to extend

Flexibility and Mobility

The right to amend the job title and job description

The right to require the undertaking of additional or other duties

The right to change the place of work

Deductions from Pay

For overpayments and losses

For unauthorised absence during notice

The sting in the tail

Other Employment

During hours of work

Outside hours of work

Holiday Arrangements

The Working Time Regulations don't work

Retaining days for specific closures

Rules on termination

Sickness Absence

When, to whom and how often

Payment of SSP requires compliance with procedure

Company Sick Pay – discretionary or not?

Recovering sick pay within third party claims

Medical Reports

At any time during employment

Returning to work

Authority, cost, and copy

Confidentiality and Company Property

The implied obligation is poor protection

Define “confidential information”

During employment and post termination

Removal, deletion and return

Post Termination Restrictions

Non-competition

Non-dealing

Non-solicitation

Non-interruption

Non-enticement of employees

Garden Leave

Avoiding breach of contract

Not limited to notice period

Relationship with restrictive covenants

Recoupment of Training Costs

Failure to attend the training

Failure to complete the training

Leaving after completing the training

Avoiding the "penalty clause" trap

Means of recovery

Disciplinary Options

Must be included in the contract

Demotion

Transfer to another department or job

Percentage reduction in pay for a short period

Suspension without pay for a short period

Notice and Payment in Lieu

Statutory notice often insufficient

Key employees

Avoiding a breach of contract

Miscellaneous

Professional qualifications

Company vehicles, telephones, lap-tops etc

Driving licence

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