Employment and Equal Opportunities Service

Chapter 6: Recruitment

In this chapter we will cover the following topics:

- Equality-smart recruitment
- Unconscious bias
- Job descriptions and person specifications
- Advertising
- Positive action
- Questions about health and Protected Grounds
- Reasonable adjustments in recruitment

The Ordinance requires that all employers must not discriminate against job applicants throughout the whole recruitment process. However, having equality smart recruitment isn't just about complying with the Ordinance around recruitment for the sake of it, it is good for businesses too.

Equality smart recruitment is not solely about "tick box" compliance. It is about ensuring you get the best person for the job based on merit alone and free from any bias in relation to any of the Protected Grounds that are not relevant to the person's ability to do the job.

When employers take this approach, their organisation is more likely to be seen as a fair, positive and progressive place to work by the diverse society that they are part of. Ultimately these businesses are likely to be commercially more successful because they are the ones making the best recruitment decisions.

Whilst most people do not deliberately discriminate against good candidates on the basis of protected grounds, the reality is we all have unconscious biases, and it is important to be aware of the fact and not let them affect behaviour or decisions.

6.1 Equality smart recruitment

Equality smart recruitment considers all elements of the recruitment process. Before considering the recruitment of a new worker or someone to replace a person who is leaving or has left, the employer will be thinking about what the job involves and the skills, qualities and experience a person will need to do it, which then leads to the need for job descriptions and adverts.

Under the Ordinance any job description and advertisement must:

- Avoid direct discrimination – direct discrimination in recruitment generally cannot be justified unless it falls under a specific exemption such as a genuine and determining occupational requirement.

Example

An employer tells a disabled candidate with one arm that they are unsuitable for a tomato picking role because of their impairment. This would amount to direct discrimination.

- Avoid requirements that may place people with a Protected Ground at a disadvantage that cannot be objectively justified

Most roles will require candidate to have some specific skills, qualifications or other requirements for the job in question and sometimes these requirements by the very nature of the job will exclude some people or make it more difficult for them to satisfy those requirements – provided these can be objectively justified this won’t amount to indirect discrimination.

Example

An employer states in a job advert that the role must be done on a full-time basis without having considered whether it might be suitable for part-time work or job-sharing. This requirement could put some people at a disadvantage: a carer who needs flexible hours because of their responsibilities or someone with a disability who needs to rest for a certain amount of time per day. The employer must be able to objectively justify this requirement to work full time, otherwise it might constitute indirect discrimination against a carer or a person with a disability.

An example of where this may be justified is a managerial role where the employee needs to be available to assist their direct reports throughout normal working hours, on a time critical basis, and where it is not possible to appoint another manager to cover the proposed non-working hours.

See Indirect discrimination objective justification Chapter 1.2

6.2 What is unconscious bias?

One of the biggest challenges for employers during recruitment is dealing with unconscious bias (which is also known as implicit bias). Unconscious biases are social stereotypes about certain groups of people that individuals form which are based on/from their own background, culture, context and personal experiences and outside their own conscious awareness.

It is important to recognise we all have unconscious biases. We each have an in-built tendency to organise our social worlds by categorizing people into groups. These biases are very often automatically triggered by our brain making quick judgments and assessments.

Overcoming bias in recruitment

Whilst it is easy to say that all decision making in recruitment must be unbiased, what does this actually mean and how can someone overcome their biases? The starting point is to make sure that everyone involved in recruitment decisions are aware of unconscious bias, and wherever possible have received some form of

training.

Example

There are however a number of practical steps that can be taken to tackle unconscious bias in recruitment – all of which have no cost:

- advertising job vacancies in more than one location or through different methods to reach a wider range of people from different backgrounds;
- having structured interviews which are primarily focused on the ability of the candidate to do the job;
- having more than one person involved at each stage of the process when reviewing applications, interviewing and making decisions as to who gets the job;
- getting recruiting managers to agree to make each other aware if they notice stereotyping and to do this in a no blame environment; and/or
- keeping a written record of why recruitment decisions were made and avoiding generic answers such as “right fit” that aren’t about ability to do the job.

6.3 Job descriptions and person specifications

In order to ensure you are making equality smart recruitment decisions it is good practice to have:

- A job description for a new or existing role which can be used for reference – this document should state what the job is for and what the person doing it needs to do to meet the needs of the role. It is important to note that any job description should only ask for the necessary requirements of the job otherwise indirect discrimination may occur; and
- A person specification that sits alongside the job description and lists the skills, qualities and experience the ideal candidate should have to perform the role. Care must be taken to ensure that the person

specification is clearly linked to requirements for undertaking key criteria of role.

These documents will then help you later on in the process, ensuring someone is making good recruitment decisions, based on the ability of candidates and not any unconscious biases they or their colleagues may have.

Larger employers may also consider using an application form as this will help focus on what the role entails and the skills, experience and qualifications that are essential to the job and avoids the provision of additional irrelevant information by a candidate that increases the chance of decisions being influenced by unconscious bias.

Always ensure that any job description or application form is written in simple and plain language.

6.4 Advertisements

Whilst there is no legal requirement to advertise a job, it is often the way in which vacant positions are made known to the general public. It is unlawful to either place or publish a discriminatory advert.

Example

Even if a role has a specific language requirement it would be unlawful to advertise for a “French sales rep” as this would be discriminatory on the grounds of race. However, it would be permissible to advertise for a “French-speaking sales rep” if speaking French is an essential requirement of the role.

Like the writing of the job description, it is important to ensure that before an advert is published alongside a job description for a particular role, care is taken to work out exactly what is required for that position.

Consider not only stating the organisations commitment to equality within any job advert, but also make it clear that reasonable adjustments can be made as part of the recruitment process.

Example

“Please contact us if you need the application form in an alternative format or if you need any adjustments for the interview”.

6.5 What is positive action?

Positive action has a strict legal definition within the Ordinance and can apply differently depending upon the context. However, in the case of recruitment it broadly means steps which are taken with the aim of promoting greater equality of opportunity, in relation to a Protected Ground.

Positive action in employment can only be used to encourage people to apply for a job. It cannot be used to restrict the job opportunity only to someone with a particular Protected Ground or result in an applicant being preferentially appointed under the recruitment process because they have a Protected Ground – which is often referred to as positive discrimination and is unlawful. See Chapter 8- Exceptions

Whilst there is no obligation on employers to take positive action, where steps are taken they can be lawful. If an employer wants to take positive action in this way, the advert should clearly state the employer is seeking applications from everyone but wishes to encourage applications from people with a particular Protected Ground on the basis that they are underrepresented or face disadvantage.

6.6 Questions about health and Protected Grounds

An employer (A) shall not request or require information about a Protected Ground from another person (B) during a recruitment process, which indicates, or might reasonably be understood as indicating, an intention by A to do any act which is or might be prohibited by this Ordinance.

The above does not apply to a request for information if:

- **the intended act would not in fact be prohibited by this Ordinance;**
- **the information is used wholly as part of A's diversity monitoring, is kept confidential, and forms no part of the recruitment process; or**
- **if the request is necessary for the purpose of:**

- **establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with the recruitment process, or**
- **establishing whether B will be able to carry out a function that is intrinsic to the work or work experience concerned.**

See section 15 of the Ordinance

It should be noted this is different from the position in Jersey where there is no such restriction, or in the United Kingdom where the restriction only relates to questions about a disability, rather than all Protected Grounds.

The recruitment process

The term recruitment process is widely defined under the law, right from the point of advertising a post, all the way through to making an offer and even negotiating the terms. A recruitment process is usually considered concluded when a job applicant has accepted the job. Whether in any given case the recruitment process is ongoing is a question of fact, but the latest point this will normally be considered concluded is when a job applicant accepts an offer.

"Recruitment Process" means a process which an employer (A) undertakes because A wishes to employ a person or have the person work for A by way of work experience, and includes, without limitation, the process of advertising for a post, sifting applications, selection of candidates for interview, interviewing, job offers and negotiation of an employment contract.

See section 15 (5) of the Ordinance

Pre-employment questions

Employers may not ask questions about an individual's Protected Ground (including in relation to health and disability) during the recruitment process which indicates an intention to potentially discriminate, except in limited circumstances, which broadly fall into four main categories:

- Not prohibited under the Ordinance;
- Diversity monitoring;
- Reasonable adjustments as part of the recruitment process; and
- Ability to carry out a function that is intrinsic to the work.

The reason why the Ordinance prevents employers asking questions about Protected Grounds is to make sure that all job applicants are considered equally on their ability to carry out the job in question, and not ruled out just because of perceived issues related to, or arising from, a Protected Ground such as disability or carer status.

Where an employer breaches this requirement with respect to requests for information, the Director of the Employment and Equal Opportunities Service may issue a non-discrimination notice and if that notice is not complied with, then a financial penalty may be issued.

Not prohibited under the Ordinance

The Ordinance contains a number of specific exceptions in relation to work, such as where having a Protected Ground is a genuine and determining occupational requirement, or where the employment is for the purposes of an organised religion and there is a requirement for the individual to have that religion. Accordingly, it is permissible to ask questions during a recruitment process that relate to one of these specific exceptions, because this would not constitute discrimination under the Ordinance

Example:

A church is seeking to employ a youth worker, to promote Christianity in the community. A requirement of the role is to be a practising Christian, which is permitted under the specific exemption relating to “Employment for the purposes of an organised religion” and so asking a candidate a question to find out whether they are a Christian during the recruitment process is permitted.

Diversity monitoring

Under the Ordinance it remains permissible for employers to carry out diversity monitoring as part of the recruitment process, provided that the information is:

- used solely for that purpose;
- is kept confidential; and
- forms no part of the recruitment process.

Accordingly, where diversity monitoring does take place, (which is encouraged) it is important to try to keep the responses separate from any information which will be seen by the decision makers in the recruitment process.

Reasonable adjustments as part of the recruitment process

As the duty of reasonable adjustments covers job applicants as well as employees, the Ordinance recognises that employers will need to ask candidates questions about any reasonable adjustments in order to comply with their obligations. Accordingly, it is recommended that employers should ask all job applicants if they need any adjustments for any part of the recruitment process. Where an applicant indicates adjustments are required an employer is entitled to ask follow-up questions to better understand the requirement for the adjustment, although those questions should be limited only to what is necessary for making reasonable adjustments, and the information should be kept confidential.

Example

As part of a recruitment process an employer requires candidates to undertake a written test. Prior to arranging an interview with a candidate, the employer asks the candidate if they require any reasonable adjustments.

The candidate indicates that they have a visual impairment, and so would require some support through the interview and assessment process. In these circumstances the employer is under a duty to consult with them over any reasonable adjustments, and so should ask questions about what support may be required, such as whether they would be able to conduct the written assessment in a larger font or a spoken or braille format.

Ability to carry out a function that is intrinsic to the work

Certain roles will require an employer to make enquiries of a candidate to confirm that the individual is able to carry out a function that is intrinsic to the work or work experience concerned. This exception is intended to be narrowly interpreted as in most roles, an individual's race, sexual orientation, religion or belief or disability is largely irrelevant to their ability to do a job. Where it is this will often fall under a specific exception for example a genuine and determining occupational requirement. See Chapter 8- Exceptions. Physical ability or disability may be more relevant in some circumstances, such as where a role is particularly physically demanding, and this is intrinsic to that role. However, questions should focus on assessing the ability of the individual to undertake that role and all candidates should be assessed on their ability. In addition, consideration should be given to providing reasonable adjustments for a disabled person in line with the reasonable adjustment duty (see Chapter 3) and that person should only be assessed on their ability to undertake the role once any reasonable adjustments have been made.

Example

As part of the recruitment process for new firefighters, candidates are required to undertake fitness tests and complete a medical questionnaire. Whilst this would involve asking questions about a candidate's ability or any disability, the questions relate only to their ability to carry out an intrinsic part of the role, and therefore would be lawful.

Questions after the conclusion of the recruitment process

Once the recruitment process has concluded then it is open to employers to ask any questions relating to a Protected Ground, such as undertaking health screening and making the job conditional upon passing a medical. However, those questions should only be asked to the extent that they are necessary to understand whether the person may have a lack of ability or a disability that would prevent them from performing certain aspects of the job (even if these aspects of the job are not intrinsic to the role) and/or to understand if there are reasonable adjustments that could be required.

6.7 Reasonable adjustments in recruitment

The duty to make reasonable adjustments where an employer is aware, or ought to be aware, that a candidate has a disability applies throughout the recruitment process. Reasonable adjustments in the recruitment process are ultimately about ensuring there is a level playing field for all candidates, so that you get the best person for the job – that is central to the concept of equality smart recruitment. This might include:

- making certain application forms available in alternative formats;
- giving a candidate more time to undertake an assessment; or
- holding an interview in a different location.

More examples of reasonable adjustments can be found in Chapter 3

Example:

When an employer is advertising for a role to work in a building which has two floors which does not have a lift, they must not state that because of this the job would not be suitable “for a disabled person”.

Instead, if they wish to address this issue in the advert, they could point out that the office is on two floors but that they would make reasonable adjustments both at interview and on appointment for applicants with a mobility impairment.

If the interview is with an applicant with a mobility impairment, it would be a reasonable adjustment to hold the interview somewhere with ground floor access. If the successful applicant has a mobility impairment, a reasonable adjustment could potentially be made to allow them to do their role on the ground floor. If necessary, step-free access to the ground floor could be provided through the installation of a ramp (permanent or temporary) if this did not already exist and provided this would be a reasonable adjustment.