Recruitment and Selection: The Equality Implications

Introduction

The objective of any recruitment and selection policy is to obtain the right person for the job. Equality legislation should not change this policy in any organisation. Good selection procedures should result in the appointment of the candidate best qualified for and suited to the job. The selection procedure should be based on both the job description and the objective requirements of the job.

Legal Position

The Employment Equality Acts, 1998 and 2004 prohibits discrimination in the pay and non-pay areas for nine distinct groups. In a selection procedure, this means that there can be no bias in recruitment on the grounds of the candidate’s sex, marital or family status, age, disability, religion, sexual orientation, race, or membership of the traveller community. (For further definitions, see SFA Guideline 6 on Employment Equality).

What is Discrimination?

Discrimination occurs where an employer treats a person more or less favourably because of his/her membership of one of the nine groups covered by the Act.

Direct discrimination would occur, for example, where an employer treats a female less favourably than a male, because of her gender. Similarly a person with a certain disability cannot be treated more or less favourably than a person with no disability or with a different disability, or an Irish person cannot be treated more or less favourably, because of his/her nationality and so on.

There is now one definition of indirect discrimination for all nine groups. It is defined as occurring where an apparently neutral provision puts a person, who is a member of one of the nine groups, at a particular disadvantage due to being a member of that group, unless the provision can be objectively justified by a legitimate aim and the means of the aim are appropriate and necessary.

One very important aspect of indirect discrimination which employers should note is that it is effect-driven, not intention-driven. In other words, there need be no intention to discriminate.

The 2004 Act also introduced the idea of Discrimination by Association, where a person is treated less favourably because of their association with another person if similar treatment for that person would amount to discrimination.

Savings and Exclusions

It is not discriminatory to refuse to recruit or retain in employment any person who will not undertake duties attaching to the post or accept conditions under which those duties must be done. The law requires that the person be available to do the work and be fully capable of undertaking that work. This also applies to the provision of employment agency services.

Employment Agencies

The 1998 and 2004 Acts prohibits discrimination by an employment agency in the provision of its services on any of the grounds listed. However there is a provision which does allow an employment agency to provide services exclusively for persons with disabilities. Where an employer chooses to use an employment agency, no discriminatory requirements may be imposed on the agency in its provision of services. The employer would be liable for any discrimination where the agency reasonably relied on a statement made by the
employer concerned, to the effect that its action would not be unlawful because the employer could lawfully refuse to offer the job to the person concerned.

A complainant may take a case against either the agency or the employer or both.

**LIABILITY FOR EMPLOYEES’ BEHAVIOUR**

In general, an employer is held to be responsible for the actions of employees arising out of and in the course of their employment. In relation to recruitment/promotion, this may arise where an employee makes a discriminatory statement or decision on behalf of the employer. An employer may become liable for discriminatory actions by employees, such as receptionists, telephonists and junior administrative staff who deal with enquiries about employment, as well as by the actions of management or supervisory staff who are actively involved in the recruitment and selection procedure.

It is essential, therefore, that all staff who are liable to deal, in however small a way, with job enquiries, are properly briefed as to the employer’s policy.

**STEPS IN THE RECRUITMENT AND SELECTION PROCEDURE**

Besides being legally required, experience shows that providing equal opportunities for all candidates in recruitment and selection gives the widest choice of candidates, helps to overcome skills shortages, improves job satisfaction and lifts employee morale generally. In short, it is good employment practice.

Steps in the Recruitment and Selection Procedure that will be reviewed with equality in mind are as follows:

1. Personal specification
2. Advertising
3. Job application form
4. Short-listing
5. Selection tests
6. The interview
7. Interview assessment
8. Appointment

1 **PERSONAL SPECIFICATION**

This involves identifying the personal attributes which the job holder must possess if he/she is to be able to perform the job competently. Examples of these are:

(a) Physical demands (e.g. muscular energy, travel, hours of work);
(b) Intellectual demands (University Degree, Leaving Certificate, Technical or Professional qualification, or you may simply note that the job requires average intelligence);
(c) Skills (e.g. any mechanical, social or diplomatic skills required);
(d) Experience (e.g. some jobs require considerable experience, know-how or previously held levels of responsibility, control or decision making, where previous experience in certain areas is essential. These should be identified and specified in terms of level and depth rather than numbers of years);
(e) Personality factors (e.g. an ability to work with other people, to provide leadership, to work without close supervision, to possess a degree of extroversion or the kind of temperament to cope with dull, routine work, etc.).

When one is drawing up the specification required to perform the job competently, one must ensure that only those specifications that are absolutely essential in order to do the job competently are used.

For example, are certain academic qualifications essential to perform the job, and if not, will such an unnecessary requirement discriminate against females or people of a particular marital status, e.g. require an inessential qualification that may not have been open to females in the past or which few married people possess? Similarly, an upper age requirement of 25 years would be discriminatory on grounds of age; a requirement to possess a driving licence, if driving is not an essential part of the job, would be discrimination against disabled people as they are less likely to have a licence; requiring a Leaving Certificate standard of education which is not essential to be able to perform the job will discriminate against older people or members of the traveller community who are less likely to have such a qualification.
2 ADVERTISING

What is a discriminatory advertisement?
A discriminatory advertisement is one which indicates an intention to discriminate or might reasonably be understood as indicating such an intention.

The Equality Authority can obtain a Court injunction to prevent any appointment being made following the publication or display of what it regards as a discriminatory advertisement.

The term ‘advertisement’ does not refer only to printed advertisement in newspapers. It covers notice boards, television, radio, magazines, word of mouth and so on.

Two factors need to be considered with regard to advertising:
1. How/where to advertise?
2. The contents of the advertisement itself.

(1) How/Where to Advertise?

When making this decision one must ensure that everyone has the same opportunity to find out about a vacancy and apply for that vacancy.

Therefore, employers should not place an advertisement in a publication likely to be read by members of one sex only, e.g. placing an advertisement in a women’s magazine. Another example might be where you advertise only in universities - this could discriminate against older people who will have left college.

As mentioned above, if an employer decides to use an employment agency to help obtain candidates for interview, then no discriminatory requirements may be imposed upon the agency in the provision of its services.

(2) Contents

The advertisement must not indicate (either intentionally or unintentionally) that the organisation is seeking to recruit a member of a particular sex, marital or family status, a particular age category, people of a particular race, people without a disability and so on in relation to the other categories covered by the Acts. The advertisement should:

- Avoid giving the impression that the company is seeking a male or a female, a person of a certain age, a particular race, a person without a disability and so on. A photograph or illustration might give this impression.
- Avoid where possible, using terms like ‘foreman’ or ‘matron’ or ‘secretary’ and so on, (jobs that were in the past associated with members of a particular gender). Also avoid references to years of experience (this could lead to discrimination against younger people).
- Use job titles which do not make reference to gender, e.g. operator, sales representative and so on. Where equivalent male and female jobs exist, then both should be used, e.g. waiter/waitress.
- Ensure that, in any advertisement which contains reference to experience and qualifications required, these are in fact necessary for the candidate to be able to perform the job competently. Otherwise, you could discriminate unintentionally against members of a particular sex, marital or family status, age, race and so on.

3 JOB APPLICATION FORM

If an employer uses application forms in the selection procedure, care should be taken in two respects:

- that all who wish to apply can get an application form, and
- that the form does not contain either questions which are actually discriminatory or which could give rise to an inference of discrimination.

Getting an Application Form

It is essential that all staff likely to deal with requests for application forms should be briefed and informed that, however unsuitable they may think a candidate, they should express no opinion whatsoever as to the likelihood of his or her success and should make available an application form. As mentioned above, the employer is liable for the actions of his/her employees.

However, the Acts state that it shall be a valid defence for an employer if reasonable practical steps have been taken to prevent discrimination by an employee. Thus, if an employee does discriminate, the employer would not be liable where steps have been taken to prevent this discrimination occurring.

Content of the Application Form

The application should contain a wide range of questions, e.g. on education, training, experience and competence.

Questions on marital status, numbers of children, date of birth, age, place of birth and medical history should not be on the job application form.
An employer is entitled to determine the capacity of a potential appointee to attend work on a regular basis. This may not, however, be linked to a candidate’s marital status, numbers of children, age of applicant, disability, and so on. Questions should only relate to a candidate’s capacity to meet the stated hours of attendance.

4 Shortlisting
This is the stage at which one decides which candidates should be called for interview. Again, when choosing candidates for interview it is important to make sure that one does not use criteria that could lead to discrimination on any of the grounds set out in the Act. It is important that each application is dealt with on its merits.

5 Selection Test
Where these are used in conjunction with an interview they should be specifically related to the job requirements and should measure an individual’s actual or inherent ability to do or train for the particular duties involved.

Tests should be checked regularly to make sure that they remain relevant and free from bias in content or scoring mechanism. Selection tests should be validated to make sure that they are related to the job’s requirements. That is, an individual’s test marks must reflect his/her ability to do or train for the job in question.

6 The Interview
This is the stage of the recruitment process where most claims alleging discrimination are likely to arise. That is, that discriminatory questions were asked or discriminatory comments were made at interview, or a decision on whom to appoint was based on discriminatory grounds.

Experience of case-law demonstrates that complainants have found it difficult to prove that they would have got the job if they had not been discriminated against, but they have got compensation in several cases for the stress allegedly suffered as a result of discriminatory questions asked/statements made, by members of the interview panel. To avoid this problem each person involved in interviewing in an organisation should be trained so that they are aware of this whole area of equality.

Employers should also note that a number of decisions by Equality Officers and the Labour Court in recent years have highlighted the need to ensure gender balance where possible on all interview boards.

Types of Questions or Statements to Avoid
The following are examples of the types of questions/statements to avoid at interview:

- Asking someone how they would have their children looked after if they were appointed. Such a question can be seen as discriminatory on grounds of both gender and marital status. This question places an additional hurdle which a married woman with a young family must cross to be considered for a vacancy - something that usually neither a man nor a single woman would be required to prove. This may happen particularly where the hours of work will be outside ‘normal’ working hours.

- Asking ‘what does your husband/wife think about you applying for this job?’ ‘How committed are you to your career?’ (especially of a married woman) can be interpreted as being discriminatory because such questions would not be asked of an unmarried candidate. Equality Officers see such questions as placing an onus on the married candidate to prove that there are no difficulties because of their married status to perform the job - such an onus is not placed on an unmarried candidate.

- Asking a question of a male as to how he would feel working with females in a predominantly female environment or asking a female how she would feel working with males in a predominantly male environment can again be interpreted as discrimination. A barrier is placed in front of candidates of a particular gender before they will be considered for a job.

- Asking ‘how as a young person would you feel taking disciplinary action against someone old enough to be one of your parents’ would be discriminatory on age grounds. Such a question would not be asked of older candidates and places a higher burden of proof on younger interviewees to prove that they are suitable for the job.

- Asking a disabled person has their disability ever prevented them from performing certain aspects of their job in the past would also be discriminatory. Such a question would not be asked of a person without a disability and again places a higher burden of proof on a disabled person than would be placed on a person with no disability.
How to avoid discriminatory questions
To do this one should:

- Open the interview by informing every candidate that the organisation is an equal opportunities employer.
- Ask the same questions of all candidates. If a particular question on personal circumstances cannot be asked of all candidates, then do not ask it of any of them.
- Emphasise the demands of the job. For example, a requirement to work overtime at short notice, requirement to work shift at short notice, liability of shift hours changing, the fact that the job may entail travel and involve staying away over night and so on, rather than asking questions about how children will be looked after if the claimant gets the job, where the job involves working irregular hours.
- Ensure that all members of the interview panel are aware of the requirements of equality legislation and its implications.

7 THE INTERVIEW ASSESSMENT
At the end of the interview each member of the interview board should compare the attributes of the candidate against specific criteria laid down in the personal specification. This type of analysis helps ensure objectivity and enables the reason for non-selection to be identified. Fair and proper procedures should be followed, i.e. marks should be awarded first and their outcome discussed afterwards.

It is essential that comprehensive records of the interview be kept. Where cases are referred to an Equality Officer there is often conflict in the evidence presented by each side.

The experience of case-law demonstrates that Equality Officers will look at:

- The consistency of each side's record of events, and
- The detail of each side's record of events, to determine which side is more believable.

In most cases where there is a conflict of evidence, complainants have the advantage over interviewers as Equality Officers tend to accept that interviewees have a better recall of the interview than the interviewer. This is because the interview is likely to have taken place at least six months prior to the Equality Officer hearing. Interviewees have only done one interview. Managers have interviewed many people. In many cases Managers will not even remember interviewing the complaint, not to mention what was actually said at the interview.

As a result, where there is conflict in the evidence of each side and the complainant’s evidence is reasonably detailed and consistent, then the experience to date shows that the complainant tends to be believed.

All records in relation to the recruitment process should be kept on file for at least 12 months before being discarded. The reason for this is that a person can bring a claim alleging discrimination for up to six months after the date of the alleged act of discrimination and an extension of six months is allowed where there is a good cause for not referring a claim within this six month time period.

8 APPOINTMENT
If a pre-employment medical forms part of the recruitment and selection process, best practice suggests that candidates should complete their medical prior to the job offer been made. It is important that the employer does not use a condition which can only affect females as a means of preventing them taking up a vacancy to which they would otherwise be appointed, e.g. pregnancy.

Candidates who, because of pregnancy or maternity leave cannot start work at the required starting date should not normally be treated less favourably for this reason.

Similarly, if following a medical examination, it is discovered that a person has a disability, then the job offer cannot be withdrawn unless there is evidence that a person with such a disability could not do the job. For example, if it is discovered that the person offered a job is a diabetic or an epileptic, a job offer cannot be withdrawn unless the medical advice demonstrates that the individual concerned could not do the job, e.g. for health and safety reasons.

The Acts state that in relation to the disabled the employer must do all that is reasonable to accommodate the needs of a person with a disability so long as it does not place a disproportionate burden on the employer (see SFA Guideline 6 on Employment Equality).

Once satisfactory medical and reference checks have been completed, a written offer of employment is made to the successful candidate and if accepted a starting date is then agreed.
**RIGHT TO INFORMATION**

Whilst there is a right under the Acts for any person who considers that they have been discriminated against to request material information to assist them in making a decision on whether or not to refer a matter under the Acts, there is no requirement to disclose confidential information.

Employers cannot be required to furnish references or reports relating to the character or suitability for employment of any person, or other confidential information which relates to a particular individual and to which that individual does not agree with disclosing.

If the employer refuses to provide information requested or provides misleading information then an Equality Officer, the Labour Court or Circuit Court can draw such inferences as seem appropriate.

**DISPUTE RESOLVING MECHANISM**

When a case is received by the Equality Tribunal, and it appears that the case is one that could be resolved by mediation then it can be referred to an Equality Officer for mediation. Where the case is resolved by mediation then the settlement terms will be recorded and signed by both parties. If the case cannot be resolved through mediation then this fact will be recorded. This can be seen as a good way to resolve issues quickly, and most importantly the details of the case remain confidential to the parties.

Where mediation is not appropriate or is unsuccessful, the case is heard by an Equality Officer. Appeals from decisions of Equality Officers must be made to the Labour Court within 42 days of the date of the Equality Officer’s decision.

Equality officer hearings are held in private. Labour Court hearings are only open to the public if one party to the case requests it. However, in the case of a public hearing, confidential aspects of the case are held in private. It is important to note however, that all decisions of the Equality Officers and the Labour Court are made public.

Claims under the Acts must be referred within 6 months of the last occurrence of the discriminatory act. However, in exceptional circumstances this period may be extended to 12 months.

Equality Officers and the Labour Court can require the production of information which it is believed contains information relevant to the case. Equality Officers and the Labour Court can also require an individual to attend a hearing if that individual is believed to have information relevant to a case.

The provision of such information will not give rise to any liability on the part of the person providing it. Nor will such information be disclosed in any written decision of an Equality Officer or Labour Court without the consent of both the person furnishing it and any person to whom the information may relate. In fact, it will be an offence for any person to disclose such information.

**REDRESS**

Under the Employment Equality Acts, non-employees can receive up to €12,697 compensation. However, employers should also be aware of equality legislation when recruiting and selecting internally. In such a case, the individual involved would be considered an employee and the levels of compensation can be greater.

In non-pay cases, employees can receive up to two years remuneration.

Decisions of Equality Officers and the Labour Court which are not implemented and not appealed are enforceable by the Circuit Court. The Circuit Court can order that interest be paid on monies awarded.