

## **PRE-EMPLOYMENT MATTERS**

### **Interview and Job Offer**

Certain legal issues can arise at the interview and pre-employment stage. There are obligations under equality legislation to make sure that employment candidates are not excluded from employment because of gender, appearance, ethnicity, name, religion, accent etc.

An unsuccessful job applicant can make an application to an Employment Tribunal under anti-discrimination legislation. There is no cap on the compensation that the Tribunal may award, if it finds that there has been unlawful discrimination.

The employment offer letter should be equivalent to an employment contract. It should provide details of the title, responsibilities, conditions of employment, probationary period and any pre-conditions required by a candidate e.g. references, employment permits etc.

### **Conditional Offers**

A conditional offer of employment will often be appropriate. It may, for example, be desirable to make an offer subject to conditions such as the following:-

- passing a medical examination relevant to the employment; this must not discriminate against disabled people;
- passing a criminal records check;
- providing documents to prove they have the right to live and work in the United Kingdom;
- providing suitable references;

- completing a probationary period

If an offer is made subject to conditions it is essential that the conditions are processed as soon as possible. If the offer is withdrawn, there is a risk that the conditions could be taken to be waived.

### **References and Medical Reports**

There is no obligation on a current employer or previous employer to give a job reference. Employees generally do not have a right to see any job reference that may be given. However, employees may be able to obtain access to the reference if they take legal action or after they start to work with the new employer, through the Information Commissioners Office.

Requests for written references are best limited to specific information such as terms of employment, duties, number of sick days, whether they were subject to disciplinary action, whether they were reliable, honest, hardworking and whether there are any reasons they should not be employed.

Health checks may raise issues under discrimination and data protection legislation. Health checks should only be requested, when they are necessary.

If a medical report is required it is usual for the employer to pay. The candidate's written consent is needed and he must be informed that he has a right to refuse. The candidate has a right to see the report before or after it is supplied, withhold consent to it being shown to the employer and request amendments. The doctor must keep it for 21 days before sending to the employer.

### **Verifying qualifications**

A qualifications check can be made by consulting records of the relevant professional body or asking the candidate to bring certificates. A service for checking higher education qualifications is available from Expiron at their website. The Qualifications and

Curriculum Authority (QCA) has a database setting out a wide range of qualifications. Vocational qualifications can be checked with the National Vocational Qualifications. Overseas academic qualifications can be checked and examined at the UK National Academic Recognition Information Centre (UKNARIC).

### **Criminal Records**

Employers offering jobs involving regular contact with children or vulnerable adults, may wish to verify the candidate's criminal records. This can be done by the Criminal Records Bureau Disclosure Service (CRB). CRB offers employers who are registered with it either standard or enhanced disclosure.

Standard disclosure will list any spent or unspent convictions, cautions, warnings and reprimands at national level. It can be made in connection with jobs involving working with children or vulnerable adults as well as some legal and financial jobs. A check will also show, if requested, whether someone working in a childcare position is on either of the two Government lists of persons considered unfit for such work. If a person appearing on such list is applying for a childcare position, the police must be notified.

Enhanced disclosure also includes certain further relevant information. It will include acquittals. It can only be used for those whose work involves regularly caring for children or vulnerable adults.

There is legislation in England and Wales relating to spent convictions. Someone convicted of a criminal offence who does not receive any further convictions during the rehabilitation period, becomes rehabilitated and their conviction is spent after a certain period of time. They must be treated as if the conviction had not happened. In this case it is not possible to insist upon being told about a criminal offence that is spent. A conviction involving prison sentence of 30 months or more can never be spent.

A person must disclose all convictions, including spent ones, if offered jobs in the following categories:-

work with children or vulnerable adults;

accountants and barristers;  
police;  
posts relating to administration of justice or financial regulation.

It is possible to withdraw a job offer or indeed to terminate a probation period where, a pre-condition regarding criminal references etc. has not been complied with. However, the possibility of a breach of contract needs to be carefully considered. As in Ireland, very limited Unfair Dismissal rights apply during the first year.

### **Data Protection**

The Data Protection Act provides that pre-employment checks can only be carried out where they are necessary and there is an objective point to the process. They should only be carried out in relation to the successful applicant and the applicant must know what checks are being made and how they will be carried out.

The checks must be made from an objective source and must use sources that will reveal relevant information. They must not rely on sources they do not trust. If the check reveals information that is not favourable, the applicant must be given a chance to explain it. If a third party is involved (e.g. a previous employer not listed as a referee) the applicant must be let know.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.