

101 Tips for Employers

The Briefcase Bible For Employment Questions

SAMPLE

Thank you for taking a look at this sample of 101 Tips For Employers.

In this document, you will find the complete contents pages. These cover all the questions managers ask most often

There is a different chapter for each different aspect of employment. Each chapter has sub headings dealing with specific points so you can find exactly what you want to know quickly and easily.

The sample covers several tips from Chapter 2.

When you are ready to order your book, you will find the relevant information on the last page.

If you have any questions, please contact us at info@russell-personnel.com or call 0845 644 8955.

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Chapter 2

An Introduction To Discrimination

12. Discrimination

“Discrimination” has almost become a dirty word in recent years, but it’s important to keep a sense of perspective. All we mean by “discrimination” is that we make choices, we are discerning. Think about it for a moment. Do you discriminate when you recruit your staff? Yes, you do! We all do and we need to do it to fulfil the requirements of the job. For example, if I want someone to do a driving job, the successful applicant will have to show that he is legally and medically qualified to drive. It is a reasonable and justifiable selection criterion. Not all discrimination is unlawful or even bad practice.

It is when we select or exclude candidates based on unlawful and unjustified criteria that we run into trouble. This is a short introduction to discrimination. Before we look at the various types and forms you should note the following:

- There is no upper compensation limit for discrimination and in at least two cases applicants have been awarded over £1,000,000;
- There is no service qualification for discrimination. In fact, if you include some term in your advertisement which can be interpreted as discriminatory you may be taken to employment tribunal by someone you’ve never even seen (the law on discrimination covers job applicants). For example, if you are advertising a job digging holes in the road, it is likely to be discriminatory to include a requirement that the job-holder must read and write English. Why do you need to be able to read English to dig holes in the road? This sort of requirement would amount to indirect race discrimination;
- Employees, workers (for example casuals and temps) and self-employed contractors all have a statutory right not to suffer unlawful discrimination;
- It is no defence to argue that you did not intend to discriminate. Intention, or lack of it, is not material;
- The Equality Act 2006 establishes the Commission for Equality and Human Rights (CEHR) that will come into being in October 2007. It replaces the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. The CEHR will work to promote equality and tackle discrimination in relation to gender, gender reassignment, disability, sexual orientation, religion or belief, age and human rights from October 2007, and will include Race by April 2009. It will also ensure compliance with the Human Rights Act 1998.

Compensation For Injury To Feelings

One of the reasons that compensation for unlawful discrimination can be high is the award for injury to feelings. The size of awards for injury to feelings can vary enormously depending on the facts of each case and the degree of hurt, distress and humiliation caused to the complainant.

The courts have established the following guidelines:

- Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;
- An award should not be inflated by feelings of indignation at the guilty party's conduct;
- Awards should not be so low as to diminish respect for the policy of the anti-discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed income;
- Awards should bear some broad general similarity to the range of awards in personal injury cases;
- Tribunals should bear in mind the value in everyday life of the sum they have in mind and the need for public respect for the level of the awards made.

In *Vento v Chief Constable of Yorkshire* [2002] the Court of Appeal laid out guidelines for assessing damages for injury to feelings. The court identified three broad bands of compensation for injury to feelings, namely between £15,000 and £25,000 for the most serious cases involving a lengthy campaign of discriminatory harassment, between £5,000 and £15,000 for serious cases not meriting an award in the highest band, and between £500 and £5,000 for less serious cases, such as an isolated or one-off act of discrimination. Within each band a tribunal should have considerable flexibility so as to fix fair, reasonable and just compensation in the particular circumstances of the case, any decision on an award of aggravated damages, and if so in what amount, depending on the particular circumstances of the discrimination.

Example

Ms Hall worked for Broadacres Housing association. She wore a full length prosthetic in place of her right leg. Her disability gave her difficulties in manoeuvring and she made repeated requests to make changes in the layout of her desk so as to eliminate the need for her to turn right, which caused her pain and discomfort. No accommodation was made and Ms Hall made a claim under the Disability Discrimination Act.

The tribunal observed that the adjustments need to accommodate her were minor but because of the "heartless indifference" shown to her, she was made to feel like a pariah.

In the circumstances, the tribunal thought that the injury to feelings should fall into the highest of the three Vento bands and awarded £24,000. Hall v Broadacres Housing Association [2003]

14. Genuine Occupational Qualifications And Genuine Occupational Requirements

In very limited circumstances you can ask for a person of a particular sex, racial type, religious persuasion or age if it is a necessity for the jobholder to belong to that particular group.

These are known as genuine occupational qualifications or requirements and are interpreted very narrowly by the courts so if you believe that your vacancy might fall into the GOQ category, it will probably be worth taking advice before inserting the advert.

Examples of GOQs - sex and race discrimination:

- Dramatic or modelling work. Authenticity e.g. female actress to play female role in a play;
- Restaurant. Authenticity e.g. Chinese waiting staff in a Chinese restaurant;
- Personal services. Decency or privacy, e.g. male/female toilet attendants or a male assistant to work in gentlemen's outfitters. Alternatively it may be a situation where for reasons of personal welfare and educational services, it is necessary for the person to have a detailed knowledge of a particular ethnic group, e.g. Bengali social workers working with Bengali children going through the court system;
- Living in. The nature of the establishment makes it impractical for the employee to live in premises other than those provided by the employer and there is no separate accommodation for each sex.
- Single sex establishments. E.g. a single sex hospital.

In the more recent legislation the exceptions have been referred to as genuine occupational requirements (GORs). For example, it may be a genuine occupational requirement for a person to belong to a particular religious faith. Each case will have to be considered on its own facts. It may be justified, for instance, to ask for a teacher in a Catholic faith school to be a practising Catholic because he has to support and contribute to the religious environment. The same cannot be said of the groundsman who has little to do with the pupils and therefore cannot be said to support the religious ethos.

In some cases it will be acceptable to ask for a person of a certain age. For example, some driving licences require the holder to be a minimum age.

Tip: Note that it will not be acceptable to advertise for a young person just because the vacancy is in a trendy clothes shop aimed at teenagers.

17. Harassment And Bullying

Harassment and bullying are worryingly common in the UK. They are destructive, unpleasant and unlawful. Make sure that you have a discrimination, bullying and harassment policy, which says that you will not tolerate unacceptable behaviour and that you will investigate and deal promptly, thoroughly and fairly with incidences of bullying and harassment according to recognised and agreed procedures.

Your policy should include some examples of discrimination, bullying and harassment and state that such behaviour is not acceptable. It should provide a recognised and agreed course of action to be taken should any employee behave in an unacceptable manner.

Matters covered should include language, which includes workplace banter, and conduct.

A policy alone will not protect an organisation. You have to ensure it is properly implemented, followed through and disciplinary action taken where necessary.

Don't wait for a complaint to be made. If you become aware of any potential issues, investigate and take appropriate action to manage it.

Example

One manager told the following story. At his site for several years there was a black employee, known to all as "Sooty". The manager was very uncomfortable with this and he had asked the employee how he felt about being called by this nickname. The employee replied that he was quite happy about it – even his family called him by this name. The manager was still, rightly, very uncomfortable with this. However, this had been going on for years and at present there's no problem. Rather than rock the boat, the company took a pragmatic approach and wrote to him confirming the conversation and pointing out that if at any time he changed his mind, he must advise them and they would address the matter immediately. This will not protect them if "Sooty" does change his mind and claim racial harassment, but it may reduce their risk and liability somewhat.

The moral of the story is don't allow unsuitable nicknames to be used in the workplace. It's much harder to discourage the practice in a company where the use of nicknames has become commonplace, than to stop isolated incidents.

Harassment

There is now a statutory definition of harassment. Harassment is unwanted language or behaviour which has the purpose or effect either of violating an individual's dignity or creating an environment which is offensive, humiliating, degrading or intimidating.

The definition must be considered against the objective test of reasonableness. This means that while the perception of the alleged victim has to be considered, there is an

objective element which considers whether others would reasonably conclude in the same circumstances that harassment has occurred.

You will be vicariously liable for acts of harassment committed by your workers in the course of employment unless you can show that you took reasonable steps to prevent the acts occurring.

Example

Mr Owers was a male firefighter who argued that he was treated less favourably than a female colleague who had previously made complaints about him. After the female employee had made her complaint, the two were separated and restrictions were put in place to avoid contact. Mr Owers complained that his colleague breached those in an attempt to provoke a further incident and manufacture a further complaint. The fire service took no steps to investigate his complaint. He brought a grievance which was not investigated. Mr Owers agreed to mediation as a means of resolving his colleague's complaint but this was not followed up by the employer.

The tribunal concluded that the treatment afforded to Mr Owers was less favourable compared with the comparator complainant. Any complaint by her was investigated, whereas Mr Owers' complaint was not. An inference could be drawn that the less favourable treatment was attributable to gender and the employer did not demonstrate that it had not discriminated against Mr Owers.

Owers v. Devon Fire and Rescue Service [2006]

Actions for employers:

- If an allegation is made, deal with it in accordance with your harassment policy and comply with the minimum statutory grievance and/ or discipline procedures;
- Ensure procedures apply to all staff and are followed consistently whatever the gender of the alleged victim or harasser;
- Take allegations seriously and investigate all complaints thoroughly, including complaints made by the alleged harasser;
- Ask the victim what outcome he wants (often an apology is all that's needed);
- Consider disciplinary action if appropriate;
- Support both parties and avoid pre-judging a situation by assuming a man would have carried out the alleged harassment but a woman would not;
- Exercise caution before transferring the victim of the alleged harassment. This can be done but only after consultation and with his agreement (it may otherwise be deemed to be victimisation).

Reasonable Practicable Steps Defence

To establish a defence against harassment you must show that you have taken such steps as are reasonably practicable to prevent the harassment. You need not actually prevent an employee making inappropriate comments to a person of a different race or gender

(which would be very difficult) but must take such steps as are reasonably practicable to that end.

Note that having a policy by itself is not enough. If there is good reason to think that, for example, one of your managers has been harassing a junior employee, you cannot simply rely upon having a policy. More would be needed - for example, providing training for all employees so that they understand what constitutes harassment and what is expected of them; promptly carrying out a thorough investigation and taking appropriate action.

The training and monitoring element is important. It is evidence that you have properly implemented it.

Example

Ms Caspersz was a staff officer to the assistant chief constable, personnel and training, in the Ministry of Defence (MoD) police force. She complained she had been subject to sexual harassment by the assistant chief constable, Mr McDermott.

Ms Caspersz claimed that Mr McDermott had made a comment to her about her "working her way through" male students at the MoD and, in a separate incident, that he suggested to her that she had been able to use some MoD "indulgence" flights as she must have "stepped her way through enough pilots" to enable her to do so.

Her claims for sex and race discrimination were dismissed. The tribunal found that the MoD had done everything reasonably practicable to prevent the harassment taking place and therefore had a defence to the claim. The MoD had a Dignity at Work policy in place, which it took seriously, and had taken all reasonable steps to investigate the complaint as soon as it was made aware of the allegations relating to sexual harassment against Mr McDermott.

Her appeal was dismissed. On the facts, the MoD had satisfied the requirements of statutory defence.

Caspersz v Ministry of Defence [2006]

Bullying

Bullying differs from harassment and discrimination in that the focus is sometimes based on gender, race, or disability etc., but often it is not. The focus is often on competence, or rather the alleged lack of competence of the bullied person. There is no specific legal offence of bullying but if you don't take steps to check bullying it may lead to the risk of constructive dismissal, breach of the health and safety at work legislation or personal injury claims.

Examples of bullying behaviour:

- Spreading malicious rumours, or insulting someone;

- Copying memos that are critical about someone to others who do not need to know;
- Ridiculing or demeaning someone — picking on them or setting them up to fail;
- Exclusion;
- Unfair treatment;
- Overbearing supervision or other misuse of power or position;
- Making threats or comments about job security without foundation;
- Deliberately undermining an employee by overloading and constant criticism;
- Preventing individuals progressing by intentionally blocking promotion or training opportunities;
- Foul and abusive language. This is not automatically unacceptable, but its use can undermine the relationship of trust and confidence between employer and employee.

Example

Mr Horkulak, a senior employee working in a very fast moving and stressful banking environment, was subjected to abusive language from the chief executive of Cantor Fitzgerald over a long period of time. Although the use of such language was common in the workplace, the court found the relationship of trust and confidence between Mr Horkulak and his employer had broken down because of the employer's behaviour. Cantor Fitzgerald argued there was a culture of robust communications and bad language which allowed workers to let off steam. The Court of Appeal rejected that argument and stated that "the frequent use of foul and abusive language did not sanitise its effect".

Mt Horkulak was successful in showing that he was constructively dismissed and was awarded damages of almost £1m plus costs and interest. Horkulak v Cantor Fitzgerald [2005]

Actions for employers:

- Give managers training to help them spot workplace harassment and bullying and intervene to modify inappropriate behaviour;
- Provide clear guidance to your employees about what behaviour is expected and what is unacceptable;
- Monitor rates of employee turnover (it might indicate that bullying is taking place);
- Take any complaint of bullying seriously and deal with it promptly;
- When dealing with performance or conduct issues, use your disciplinary and poor-performance procedures without recourse to abusive or insulting language;
- Train your managers to use appropriate management styles when handling performance and conduct issues. They must understand that their position of seniority does not give them a right to abuse others;
- Make sure that your bullying and harassment policies state that abusive language to others will not be tolerated.

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