

## OBJECTIVES OF THIS CHAPTER:

- to understand the main issues relating to recruitment and diversity
- to examine the use of Genuine Occupational Requirements and Genuine Occupational Qualifications
- to understand the use and limitations of positive action
- to consider how indirect discrimination can occur in the recruitment process.

## INTRODUCTION TO RECRUITMENT

In the first five chapters of this book, we have looked at the psychological, practical and legal factors relating to diversity, equality and discrimination. In the next five chapters, we are going to apply that learning to particular issues that occur in people management. In this chapter we start with the issue of recruitment.

Effective recruitment requires an objective, systematic and planned approach if unlawful discrimination is to be avoided. Both short-listing and selection should be on the basis of candidates' relevant experience, skills, qualifications, knowledge and talent, and should be based on factual evidence. Our examination of legislation has shown that it is unlawful to use factors such as gender, marital status, race, religion and sexual orientation to make decisions in the recruitment process (except where a genuine occupational requirement exists – see section 'Genuine occupational requirements and qualifications' on p. 114).

In applying this legislation, there is also a need to think about the team that is being created through the process of recruitment. For example, we have studied research that shows that no diversity in a team results in poor creativity and decision making, whereas too much diversity can also hinder creativity and decision making. However, this does not mean that we can refuse to recruit any more people of a particular gender, race, etc. in order to achieve the best levels of creativity and decision making – because that would be unlawful discrimination. What it does mean is that people need to be educated and trained in order to work together most effectively.

It is advisable for all organisations to devise and implement recruitment procedures and guidelines for all staff involved in the process of recruitment, and to ensure that these incorporate the principles of the organisation's equal opportunities policy. It is also imperative that all those involved in recruitment and selection should be properly educated and trained in recruitment procedures and the principles of equality.

The laws prohibiting discrimination on grounds of sex, race, disability, sexual orientation and religion expressly outlaw discrimination in the process of recruitment and selection. Specifically, it is unlawful to discriminate:

- in the arrangements made for deciding who should be offered employment
- in the terms on which employment is offered
- in refusing or deliberately omitting to offer employment.

The word 'arrangements' in the context of recruitment incorporates all aspects of the recruitment process, including the design of job advertisements, the procedures used for short-listing, interview arrangements, the questions asked at interviews, any psychometric testing used as part of the selection process and the final decision as to whom to appoint.

It is important to consider ways in which discrimination can be avoided in the recruitment process. Examples are:

- ensuring that criteria being used for assessment are as objective as possible, to avoid any unintentional discrimination occurring
- avoiding the use of age limits in recruitment (this has been promoted by the CIPD as best practice for a number of years – but from 1 October 2006 it will be unlawful to use age as a criterion in the recruitment process).

It is interesting to note how the use of an age limit could result in indirect sex discrimination. For example, if an organisation specified that they needed someone with at least 10 years' experience and aged under 35 years, there will be significantly fewer women who will have had the opportunity to gain the 10 years' experience while under the age of 35 years because more women than men take career breaks for childcare reasons. Applying such criteria could, therefore, be indirect sex discrimination.

- avoiding the use of language that implies a bias (such as 'storeman' rather than 'stores assistant')
- having a well-thought-out person specification that is free of any bias – because that is the definition that has been written describing the best person for the job
- only gathering information about nationality and ethnic group for monitoring purposes (although it will also be necessary to check whether the candidate eventually selected has the right to work in the UK and, if they are of foreign nationality, whether a work permit is required); it is best to have this information supplied on a separate form, or a tear-off form – which is not shown to those who make the decisions on whom to invite for an interview
- ensuring that any selection techniques, such as psychometric assessment, are free of any cultural bias – and do not require language skills that are not needed in the job; the issue of psychometric assessment will be considered in more detail in Chapter 7
- using a structured interviewing process that does not include any intrusive personal questions
- having a clear aim of recruiting the person who best fits the person specification
- keeping clear records that show the reasons for the recruitment decisions.

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## CASE STUDY

A woman applied for a job of store operator. Before the actual interview, she was given a tour around the stores, and noticed that all the employees were male.

Her interview was conducted by the Store Manager. Throughout the interview he referred to the post of 'Storeman'. She had relevant experience, and was able to answer all the questions fully – but her application was turned down.

She then contacted the General Manager of the organisation to complain that she had been discriminated against, because the language of the interviewer had made it clear that the intention was to recruit a man. This was strongly denied, and it was argued that the old term had always been 'Storeman', and this was simply a slip of the tongue.

She refused to accept this and said she would be making a claim to the Employment Tribunal. In response to this, the organisation offered her a trial period in the job which she accepted.

## GENUINE OCCUPATIONAL REQUIREMENTS AND QUALIFICATIONS

There are limited exceptions to the general principles that it is unlawful to use gender, race, religion or sexual orientation as criteria in the selection process. In certain limited circumstances that are specified in the relevant legislation, an employer may discriminate by expressly setting out to recruit either a woman or a man, a person from a specific racial or religious group, or a person of a particular sexual orientation based on the requirements of the job itself. Essentially this is lawful where being of a particular gender, race, religion or sexual orientation is a genuine occupational requirement (GOR) or genuine occupational qualification (GOQ) for the specific post.

Any potentially applicable GOQ or GOR should be identified at the beginning of the recruitment process. It is important, however, to avoid assuming that one of the exemptions will apply, without giving the matter thorough consideration. Jobs can change over time and, just because a particular GOQ applied to the job in the past, this does not automatically mean that it is still legitimate to apply it.

In general, in order for a GOR or GOQ to apply, it must genuinely be necessary, in order to ensure effective performance of the job in question, for the post-holder to be either a man or a woman (as the case may be), a person from a defined racial group, someone who belongs to a specific religion, or someone of a particular sexual orientation. It is not necessary for all the duties of the job to fall within the scope of the stated GOR or GOQ, so long as it can be shown that some aspects of the job create a genuine need for the job to be performed by a person from the specified group.

## TASK

Read through job advertisements in newspapers and magazines. Try to find examples of advertisements that are targeted at a specific group of people because of a GOQ or GOR. Read them carefully to understand why this approach is justifiable (if it is!). It might be most fruitful to look at public sector advertisements because they tend to have more jobs that require GOQs or GORs.

However, it should be noted that, if sufficient numbers of employees of the 'necessary' group are already employed in the same position as the job into which a new employee is to be hired, and if the existing employees could in practice carry out the particular duties to which the GOR or GOQ applies, then it will not be lawful to apply the GOR to the new post. This is demonstrated in the following case:

***Etam plc v Rowan (1989)***

In this case, the employer set out to recruit a shop assistant to work in the ladies' fashion department of one of its shops. The job involved assisting female customers who could be in a state of undress in the changing rooms. Taking this into account, the employer rejected a man who applied for the job. When the man claimed sex discrimination, the Employment Appeal Tribunal (EAT) held that the decency/privacy requirement (see p. 116) could not apply to the job because the employer already had an adequate number of female shop assistants who could deal with female customers in the changing rooms.

Where a GOR or GOQ applies, it does not act to compel an employer to limit a job to one gender or racial group (for example), but merely makes it an option for the employer to apply the GOR or GOQ if they believe it is appropriate and necessary to do so.

It is important to note that in the sex discrimination legislation, GOQs apply only during recruitment (and, in some instances, during training) including the process of determining who should be promoted or transferred to a different post. It is not open to an employer to cite a GOQ in respect of the terms of employment offered to the successful applicant, access to company benefits or perks, or the process of termination of employment.

By contrast, the Race Relations Act 1976 (as amended by the Race Relations Act [Amendment] Regulations 2003), the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003 also allow a GOR to be applied in dismissal. This could be lawful (ie not discriminatory) where, for example, an employee changed their religion to one that made them unsuitable in relation to the performance of the job for which they had been employed.

The number and scope of GORs and GOQs that may be used by employers is very limited, and the list in each of the relevant laws is exhaustive. Thus, it is not open to an employer to invent their own reasons for insisting on recruiting a man, for example, no matter how strongly the employer's management may feel about the matter. Reasons that do not accord quite specifically with one of the defined GOQs or GORs will not be valid.

**Gender – GOQs**

The Sex Discrimination Act 1975 contains a list of GOQs that allow employers to seek to recruit either a man or a woman in limited circumstances. The GOQs are as follows:

***Authenticity or physiology***

A gender GOQ may apply where the essential nature of the job calls for either a man or a woman for reasons of authenticity in entertainment, acting or modelling, or for reasons of

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physiology (for example, in modelling jobs). It is important to note, however, that this GOQ does not incorporate a requirement for strength or stamina. It is therefore not open to employers to restrict employment to men (thus excluding all women who may apply for the job) for reasons of strength or stamina.

### ***Decency or privacy***

It is lawful to restrict employment to only one of the sexes where it is necessary for a job to be filled by either a man or a woman for reasons of decency or privacy. It is important to note that this GOQ will apply only if it can be shown that it is necessary for the post to be filled by either a man or a woman. A preference for either a man or a woman will not suffice. Thus, for example, a health authority would not be permitted to insist on recruiting a female gynaecologist for a hospital job just because a number of female patients at the hospital had expressed a preference or desire to be treated by a woman.

The decency/privacy GOQ may arise for one of three reasons:

- 1 because the job involves physical contact with either men or women
- 2 where the job has to be performed in a place where individuals are likely to be in a state of undress or using sanitary facilities
- 3 where the job involves the person working or living in a private home.

In all three cases, it must be shown that men or women might reasonably object to the job being carried out by a person of the opposite sex. Thus, jobs such as security officer (where the job duties involve conducting physical searches of men or women), lavatory cleaner and nursing assistant in a private home could be covered. The following case illustrates this point:

### ***Sisley v Britannia Security Systems (1983)***

The organisation operated a security station which was staffed by two female operators. They worked shifts up to 12 hours in length, and were allowed to sleep during the shifts for up to five hours. Within the control station, they had an area where they changed into their uniform, and a collapsible bed that they used. When they slept, they stripped to their underwear so that their uniforms would not become creased.

Sisley applied for a post as security officer and was rejected on the grounds that he was a man and there was a GOQ for a woman on the grounds of decency and privacy – because the employees had to 'live' on the premises, there were no separate sleeping and sanitary arrangements for different sexes, and because the employees stripped to their underwear while sleeping. Sisley claimed sex discrimination. The EAT held that the GOQ was allowed on the grounds of decency and privacy, and hence dismissed the claim of sex discrimination.

### ***Live-in jobs with single-sex accommodation***

If the nature of the job is such that the employee has to live in premises provided by the employer, and there are no separate sleeping quarters or toilet/washroom facilities for men and women, and where it is not reasonable for the employer to provide separate facilities, it will be lawful to seek to recruit only a man or a woman. An example of this GOQ could be a

job on an oil-rig that has communal sleeping and shower facilities and where the people already employed there are exclusively or predominantly men.

### **Single-sex establishments**

It may be permissible to insist on recruiting either a man or a woman where the job is in a single-sex establishment for people requiring special care, such as a hospital, prison, children's home or home for older people. One key point to note is that the residents in the single-sex establishment must be people who require special care. Thus the job of school teacher in a single-sex infants' school would not fall within the remit of this GOQ unless it could be shown that the infants had special needs – for example, if the school specifically catered for children with disabilities, and that involved care of an intimate nature. By contrast, the job of care assistant in a residential home for geriatric women might potentially be covered by the single-sex establishment GOQ, depending on all the circumstances.

### **The provision of personal services**

This GOQ may apply where the job involves the provision of personal services promoting welfare or education, and these services can best be provided by a member of one sex. It is easy to imagine, for example, that a woman might respond more favourably to a female rape counsellor than to a man doing the same job. However, the services to be provided must be personal services for the GOQ to apply. Thus a managerial post in social work that does not involve personal contact with individual clients would not be covered.

### **Jobs outside the UK**

It will be permissible to insist on recruiting a man where the job to be filled involves working in a country other than the UK, and the laws or customs of that country are such that the duties cannot be performed effectively by a woman. The most likely example of this would be a job in a country where women are forbidden to drive in circumstances where the ability to drive was a necessary component of the job.

### **Jobs for married couples**

This GOQ allows an employer to seek to employ a husband and wife team (rather than two single people) where the job is 'one of two to be held by a married couple'.

### **Gender re-assignment**

As the law stands at present, there are two situations in which it may be lawful to refuse employment to a trans-gender person. Specifically, an individual who has announced an intention to undergo a sex change, is part-way through the process of gender re-assignment, or has completed a sex change, may be refused employment in a job that involves:

- working and/or living in a private home in circumstances where objection might reasonably be taken to a trans-sexual
- conducting intimate physical searches.

Even in circumstances where the job involves conducting personal physical searches, however, the employer should consider whether the applicant could be employed and exempted from the requirement to conduct such searches. This is shown in the following case:

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***A v Chief Constable of West Yorkshire Police (2002)***

In this case, a male-to-female trans-sexual who had applied to join the police was rejected on the grounds that she would be unable to carry out personal searches of people in custody. In considering the applicant's claim for sex discrimination, the Court ruled that the police force's assertion that the GOQ applied could not be upheld. This was because it would have been possible to exempt the applicant from the need to conduct searches, particularly in view of the fact that she had made it clear that she had no objection to her trans-sexuality being disclosed to colleagues if necessary.

As noted in Chapter 4, the UK government has confirmed that it will introduce legislation (the Gender Recognition Act) to give trans-gender people the legal right to be regarded as belonging to their acquired sex in every way. When the Act is implemented, the GOQ described here will no longer be applicable to people who have completed the trans-gender process.

**Race – GOQs**

Like the Sex Discrimination Act 1975, the Race Relations Act 1976 contains some GOQs that allow employers to restrict employment in certain posts to people of a particular colour or nationality. The GOQs are as follows:

***Authenticity***

The authenticity GOQ applies where the essential nature of the job calls for someone of a particular racial group for reasons of authenticity in entertainment or modelling. This GOQ expressly includes front-of-house jobs in public restaurants, cafés or bars. For example, the owners of a Chinese restaurant would be permitted to seek to recruit Chinese waiting staff in order to create an authentic atmosphere. This principle cannot, however, be lawfully applied to behind-the-scenes jobs such as that of kitchen porter, or to jobs in private clubs or staff canteens.

***The provision of personal services***

It is permissible to seek to recruit someone from a defined colour or nationality where the job involves the provision of personal services promoting welfare to people of that racial group, and there is evidence that these services can best be provided in this way. The services to be provided must be personal services if the GOQ is to be relied on. It might, for example, be legitimate to seek to recruit someone of Bangladeshi ethnic origin into the post of social worker, if the people in the community in which the post-holder is to be working are predominantly Bangladeshi and it is reasonably believed that they would respond more favourably to someone from their own country than to a person from a different ethnic origin doing the same job. However, it must be clear that the services are personal, as shown in the following case:

***London Borough of Lambeth v Commission for Racial Equality (1990)***

The London Borough of Lambeth was keen to encourage more applications for housing benefit from members of ethnic minorities. Hence, they advertised for two positions in the housing department stating that they would be filled by members of the 'black community'. However, the Commission for Racial Equality (CRE) argued that the GOQ of personal services did not apply in this situation because the jobs were primarily managerial, and hence the successful applicants would not be significantly involved in providing any specific personal services. They also noted that the definition of the section of the population that the job holders would be dealing with was vague. The Court of Appeal supported the view of the CRE. The jobs were too distant from the actual provision of personal services, and hence the GOQ did not apply.

***Race – GOR***

Over and above the permitted GOQs that apply to the concepts of colour and nationality, the Race Relations Act 1976 contains a general provision that, if it is genuinely necessary for the holder of a particular post to be of a particular race, ethnic origin or national origin, the prospective employer may lawfully discriminate in favour of someone from that race, ethnic or national origin, provided also that the race-related requirement is proportionate in the particular case. This genuine occupational requirement (GOR) was added to the Race Relations Act in July 2003 following the implementation of the Race Relations (Amendment) Regulations 2003.

The following case gives an example of how a GOR might be applied:

***Board of Governors of St Matthias Church of England School v Crizzle (1993)***

Crizzle was Deputy Headteacher at the school. She was of Asian origin and a non-communicant Catholic. The school was a voluntary-aided Church of England school. The Headteacher resigned; Crizzle applied for the job and was rejected. The advertisement for the job specified that the successful applicant should be suitably qualified, with inner city experience, and a committed communicant Christian. Crizzle claimed unlawful race discrimination.

The tribunal held that there had been unlawful race discrimination. They determined that there had not been direct discrimination because the decision had been made on the grounds of religion (there was no legislation relating to religious discrimination in force at the time) and not on the grounds of race. However, they found that there had been indirect race discrimination because a significantly smaller proportion of people of Asian origin would be able to comply with the criterion of being a committed communicant Christian in comparison with people from other ethnic groups. They also found that the criterion of being a committed communicant Christian was not justifiable because the primary purpose of the school was education and not the promotion of the Christian faith.

However, the EAT over-ruled this decision. They found that the criterion of being a committed communicant Christian was justifiable because the school was entitled to determine that their primary purpose went beyond education and also included the promotion of a particular approach to religious worship.

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## Religion – GORs

The Employment Equality (Religion or Belief) Regulations 2003 contain two provisions that allow employers to discriminate in favour of those who belong to a specific religion when recruiting, when considering individuals for promotion or transfer, or (in the event that an individual changes their religion) in dismissal.

### ***Genuine and determining occupational requirement – general GOR***

If it can be shown that being of a particular religion or belief is a genuine and determining occupational requirement for the post in question, then it is permissible to recruit someone from a specific religion. Thus recruitment into the job of minister in the Church of Scotland may be restricted to applicants who uphold the religious principles of the Church of Scotland. The job of cleaner in the church would not, however, fall within this GOR, since there would be no logical need for the cleaner to uphold a particular faith in order to be able to perform cleaning duties effectively. This exception is therefore narrow and applies only where there is a very clear connection between the work to be done and the characteristics required to perform it. The GOR will only be valid where it is necessary for particular job duties to be carried out by someone of a specific religion and not merely because someone of that religion would be preferred.

### ***Ethos – specific GOR***

The second provision relates to organisations that have an ethos based on a particular religion or belief, such as churches or religious schools. In this case, the GOR based on religion or belief may be applied to any post so long as it can be shown to be a genuine requirement. The difference between this GOR and the general GOR described in the preceding paragraph is the word 'determining'. In other words, where the employer is an ethos-based organisation, being of a particular religion or belief need not be a decisive requirement for the post in question, although it must still be a genuine requirement that is broadly relevant to the organisation. Under the religious ethos GOR, a Catholic school (for example) may be able to justify requiring all its teachers to be Catholic on the grounds that teaching the principles of the Catholic faith to pupils is part of every teacher's responsibility. Even this GOR, however, would be unlikely to justify insisting that the school cleaners must be Catholic. Although the ethos-based organisation GOR is broader than the general GOR, this does not mean that it can be applied universally within the organisation.

In both cases, the employer must be able to demonstrate that it is proportionate to apply the religion or belief requirement in the particular case.

## Sexual orientation – GORs

The Employment Equality (Sexual Orientation) Regulations 2003 also contain a general GOR and a specific GOR:

### ***Genuine and determining occupational requirement – general GOR***

The general GOR can be applied where being of a particular sexual orientation can be shown to be a genuine and determining occupational requirement for the post in question, and the employer can demonstrate that it is proportionate to apply the requirement in the particular case. This is parallel to the general GOR in the Employment Equality (Religion or Belief) Regulations 2003. A possible example could be a job whose main function was the provision of counselling to young people who are gay or lesbian.

**Purposes of an organised religion – specific GOR**

The second GOR in relation to sexual orientation is available where the employment is 'for the purposes of an organised religion'. However, the sexual orientation GOR can only be relied on if it is being applied either to comply with the doctrines of the particular religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

The range of jobs that can be said to be 'for the purposes of an organised religion' is very narrow and is likely to include only such jobs as ministers of religion involving work for a church, synagogue or mosque where the religion in question disapproves of homosexuality or where many of the religion's followers find it unacceptable. This GOR will not therefore apply to all jobs in an organisation that has an ethos based on a particular religion. This is because the wording in the statute makes it clear that, in order for the sexual orientation GOR to apply, the job itself must exist for the purposes of an organised religion rather than just be a job in an ethos-based organisation. For example, it could be argued that the job of nurse in a religious hospice is not 'for the purposes of an organised religion' but rather that the job exists for the purpose of health care.

**TASK**

Find out if any jobs in your organisation, or an organisation with which you are familiar, have any GOQs or GORs. Read the relevant job descriptions and person specifications and try to understand why a GOQ/GOR is relevant.

**CASE STUDY**

A local church advertised for a youth worker, and it was clearly stated in the advertisement that the successful applicant must be a committed Christian. A youth worker who claimed to be an atheist saw the advertisement and decided to apply because he would like to work in this particular area of the country.

His application was refused on the grounds that he would not be able to carry out the main function of the job – which was teaching young people about the Christian faith. He responded that he was still able to give the teaching, even if he did not believe it himself. However, he then found out that a further requirement of the job was to be a regular attendant at Sunday services in the church, and at that stage withdrew his application.

If he had been prepared to teach the Christian faith, even if he did not believe it himself, should he have been excluded from the applications?

**POSITIVE ACTION AND DISCRIMINATION**

Positive discrimination (sometimes termed 'reverse discrimination') in employment is not permitted by UK law (unless one of the GORs or GOQs applies). In other words, it is not lawful to recruit a black candidate in preference to a white candidate, or a woman in preference to a man, if the white candidate or the man is better suited to the job in terms of qualifications, experience and skills (as noted later, there is an exception to this principle if the positive discrimination is on the basis of disability). This principle stands firm even if the

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motivation for appointing a particular person is based on a genuine desire to promote diversity, to increase the numbers of people from a disadvantaged group in employment, or to create a more balanced workforce. At the point of selection for the job, the principle of equality must always prevail, and gender, race, religion and sexual orientation must never be taken into account as a criterion for selection.

One example of an employer who misinterpreted the law in this area is shown in the following case:

***Roadburg v Lothian Regional Council (1976)***

In this case, two men and one woman were short-listed for the post of voluntary services officer. The Council wished to maintain a balance between the sexes in the team of officers, and therefore decided initially to appoint one of the men. The female applicant was offered a different job elsewhere in the Council. Subsequently, neither post was filled as a result of financial cuts. The woman nevertheless succeeded in a claim for direct sex discrimination on the grounds that the arrangements for filling the first post had been discriminatory.

In line with the principle that positive discrimination is unlawful, setting a quota – for example, for the recruitment of people from a minority racial group – would not be permissible because a quota would probably lead to positive discrimination. Conversely, establishing targets is allowable. The difference is that a target is something to aspire to and will encourage positive measures to be taken within the ambit of the law, while a quota would be a figure that would have to be achieved at all costs, irrespective of the merit of the individuals who applied for employment.

Within the above general framework, certain forms of positive action (sometimes known as affirmative action) are permitted by the legislation, provided they take the form of *encouragement* to members of an under-represented or disadvantaged group to take up opportunities for employment or training. In effect, positive action will widen the pool for selection, promotion or development, and increase the chances that people from a minority group can be legitimately employed or promoted.

However, where positive action is being planned or carried out in recruitment, this will not entitle the employer automatically to exclude people from consideration who do not belong to the under-represented group. At the point where any decision is being made as to whom to short-list or appoint, the principle of equality must prevail, and the gender, race, religion or sexual orientation of the applicants under consideration must play no part.

It will also be vital to make sure that the steps taken to encourage members of the minority group to come forward for employment do not overstep the mark of what is permissible in law.

Positive action in relation to gender and race may be undertaken only when either men or women, or people from a particular racial group, are under-represented. There will be an under-representation of a particular group if the number of people employed from that group in a particular type of work has, at any time during the previous 12 months, been

disproportionately low when compared with the group's proportion in the workforce as a whole, or with the population from which the employer normally recruits.

Under a provision of the Race Relations (Amendment) Act 2000, public authorities in Britain have a statutory duty to promote race equality. Authorities have had to comply with the general requirements of the Act since April 2001, and with the specific duties since May 2002. The statutory duty only applies to race, although the Sex Equality (Duties of Public Authorities) Bill was introduced into the House of Commons in Autumn 2004 with the aim of placing a positive duty on public sector employers to promote gender equality and prevent discrimination. In addition, the Disability Discrimination Bill contains a provision that (when enacted – the date is not currently known) will compel public authorities to positively promote equality of opportunity for people with disabilities both within employment and in the exercise of their public functions.

The equivalent provisions related to religion and sexual orientation permit employers to take steps to encourage people of a particular religion (or sexual orientation) to take advantage of employment opportunities, provided such action is carried out to prevent or compensate for disadvantages linked to religion (or sexual orientation) suffered by those of that religion (or sexual orientation). Positive action is therefore a lawful means of attempting to redress an existing imbalance.

Despite the limitations, positive action may be a useful tool for employers who wish to promote diversity within their workforce. Employers may, however, wish to consider the possible negative effects of positive action – namely, that applicants who are not from the under-represented group may feel that their prospects are diminished, and may be discouraged from applying for employment. There may even be resentment from within the organisation from those who perceive (perhaps mistakenly) that women or people from minority racial groups (for example) are being given priority in recruitment or are receiving extra-favourable treatment.

It is important to note that positive action is not compelled by law (apart from the provision relating to race equality in public authorities) but instead is an option that allows employers to choose to take certain steps to increase the number of people from under-represented or disadvantaged groups that they employ.

Examples of positive action, where it is permitted, are as follows:

- targeting the advertising of a vacant post – for example, placing advertisements in publications that are known to be popular with Asian or Chinese people, advertising in a different geographical area, or using a business journal read predominantly by women
- stating in a job advertisement that applications from women or from people from a minority racial or religious group will be particularly welcome – although, if this is done, there should also be a statement in the advertisement that the job is open to both sexes and all racial (or religious) groups
- publishing a booklet promoting employment opportunities that exist within the organisation and targeting it at female undergraduates

- setting up a careers fair or promotional event targeted at overseas nationals to encourage them to learn about the organisation and apply for employment
- developing links with community groups that work to promote the interests of people from minority or disadvantaged groups
- stating in a job advertisement that focused training will be provided for new recruits from the under-represented group – for example, to increase the opportunities for women to be equipped for into supervisory or management posts
- promoting flexible working practices (which, arguably, benefit everyone).

The Disability Discrimination Act (DDA) 1995, although similar in many ways to the other anti-discrimination legislation, has some features that are distinct and different from the other laws. One difference is that the Act is structured so that it technically allows a disabled candidate to be selected for a job in preference to non-disabled person simply because they are disabled. In other words, the Act does not contain any provision that prohibits discrimination against someone because they are not disabled, although such favouritism in recruitment is not, of course, compulsory. Furthermore, the duty to make reasonable adjustments under the Act could, arguably, be viewed as a form of positive discrimination.

### TASK

Return to the job advertisements that you looked at in the first task in this chapter. Did you see any evidence of positive action in any of the advertisements? If you did, did you think that people from the group that is not being targeted might be discouraged from applying for the job in question?

### AVOIDING INDIRECT DISCRIMINATION IN JOB FACTORS

In the early stages of the recruitment process, an employee specification should be written that describes the type of person the employer seeks to appoint in terms of qualifications, experience and skills, etc. Such criteria may, however (if the employer is not alert to the possible difficulties), be potentially indirectly discriminatory on grounds of sex, sexual orientation, race or religion. Specifically, the imposition of inappropriate or unnecessarily high standards or criteria may indirectly discriminate against people of one sex compared with the other, or against people from a particular minority racial group or religion. It is therefore very important that the requirements and standards specified for job candidates' qualifications, experience and skills, etc. should be objectively and sensibly matched to the needs of the job without allowing personal opinions to play any part.

Two examples of potentially discriminatory criteria are:

- 1 a requirement for the post-holder to work unsocial or very long hours, which would discriminate indirectly against women; unless the requirement could be justified on objective grounds related to the job or to the business, it would be unlawful
- 2 a condition that whomever is appointed must speak fluent English, which would discriminate indirectly against anyone brought up in a country whose first language is one other than English; unless the requirement was relevant to the job and proportionate, it could be judged unlawful.

In writing person specifications, therefore, care should be taken to:

- write the employee specification objectively and in accordance with the needs of the job, excluding any subjective views or personal opinions
- scrutinise the proposed criteria for the job in order to ensure they are genuinely relevant, rather than being based on convenience, personal preference or somebody's whim
- review, even if a requirement is relevant to the job, whether it is proportionate (ie not excessive) and whether the aim to be achieved could be attained in a different (non-discriminatory) way
- take care not to overstate the qualifications and level of experience required to perform the job
- pay special attention to any personal qualities ascribed to the prospective job-holder (eg 'outgoing personality'), as they may be the result of somebody's personal opinion and therefore unnecessary
- avoid using age limits
- avoid stipulating that a candidate must be physically fit, unless this is necessary for the job (since this requirement could place disabled candidates at a disadvantage)
- avoid making general statements that are prone to subjectivity – for example, requiring candidates to be 'outgoing', 'enthusiastic' or 'energetic'; since most people believe that they have these qualities anyway, they will not assist the recruitment process and may inadvertently discriminate.

It will be helpful, in preparing an employee specification, to identify which criteria are necessary for the job to be done effectively and which are merely desirable. Having made these distinctions, it is advisable to stick to them. In other words, if a criterion has been stated as 'desirable', it should not subsequently be the sole reason for the rejection of a particular candidate unless there are two or more candidates who match the 'necessary' criteria equally in every respect.

It is important that all candidates for the job are fully informed of all the duties of the job at an early stage in the recruitment process. Doing this will ensure that applicants have an opportunity to consider fully whether any aspect of the job conflicts with their religion or belief. It may be, for example, that an applicant who is a vegetarian (and who believes strongly that it is morally wrong to use animals for human consumption or gain) would not wish to work in a job where animals were used for experimentation purposes, or in a job that involved preparing or serving meat in a restaurant. There is no obligation on an employer to offer employment to someone who, as a result of their religion or belief, is unable or unwilling to undertake key parts of the job.

It is generally good practice to exclude questions about gender, marital status, number and ages of children, nationality, age and disability from the main part of an application form. Although some of this information will be needed in respect of the person who is appointed, it is hard to envisage how any of it could be relevant to the short-listing process. Arguably, the exclusion of such information from the application form ensures that all job applicants are treated fairly and equally, and any conscious or subconscious bias in the minds of those responsible for short-listing will be avoided.

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Published by the CIPD.

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As already noted, one way of obtaining the required personal information about applicants without compromising the objectivity of the recruitment process is to design the application form with a tear-off page. The tear-off page can contain any necessary personal questions about gender, marital status, nationality, age and disability, and can be removed by the employer's HR department before the application form is passed to the line manager responsible for the vacancy. In this way, the risk of discrimination is minimised while at the same time HR staff have information to hand that they may need during the recruitment process.

The personal details form should encourage applicants to disclose any disability that they may have, while also making a statement about the employer's commitment to a positive approach towards the employment of disabled people. It is also a sound idea to make the application form available in alternative formats – for example, in Braille or extra-large print, and also electronically.

Job application forms should not contain questions that require applicants to reveal their religion or belief, or their sexual orientation.

It may be advantageous in any event to scrutinise the application form thoroughly to ensure it asks only questions that are relevant to the job. The Employment Practices Data Protection Code (Part 1) ([www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)) (which provides guidance on how to comply with the Data Protection Act 1998 in the context of recruitment) recommends that employers should:

- use different application forms for different jobs
- aim to seek information from job applicants that is proportionate to their business needs
- not request information about applicants' private lives
- remove or amend any questions on application forms that are not directly relevant or necessary to the selection decision.

The Data Protection Code is not legally binding on employers, but an employer who does not adhere to its principles may find, in the event of a legal claim against them, that the court or tribunal will use the Code as a measure of assessing the appropriateness of the employer's actions. In other words, any evidence of non-compliance is likely to operate to the employer's detriment.

## TASK

Look at the application form(s) used by your organisation, or an organisation with which you are familiar. Can you think of any ways that they could be improved to avoid any likely occurrences of discrimination?

## MONITORING RECRUITMENT

It is generally considered to be good practice for employers to monitor their recruitment processes in order to promote equality. Indeed, public authorities are under a positive duty to

conduct racial monitoring of job applicants as a result of the implementation of the Race Relations Amendment Act 2000.

Where an employer is planning or reviewing how it should monitor job applicants, they may wish to consider monitoring not only candidates' racial origins, but also their gender, age and whether they have a disability, since a comprehensive exercise is likely to produce maximum benefit. It is important, however, to distinguish between information that is needed for the purpose of monitoring, and information required for recruitment and selection. It will be equally important to communicate to job applicants that any personal information provided will not be used as part of the process of short-listing or selection, and that the information will be used to assist the organisation to review and improve its equality and diversity practices.

The objectives of monitoring in recruitment would generally be to:

- establish whether the proportions of men and women and people of different racial groups who apply for employment are proportionate to the numbers in each of these groups within the general community
- identify whether a higher proportion of applicants of one sex or racial group than another is rejected for employment, and at what stage in the recruitment process they tend to be rejected
- review the age profile of those who apply for jobs, and establish whether or not the correlation between this and the age profile of those who are appointed is the same
- review how many disabled people apply for employment and, of those who do apply, what proportion are subsequently employed
- take action to establish the reasons for any evidence that suggests that a disproportionate number of women, men, members of minority racial groups, people in different age bands or disabled people do not apply for employment or are rejected for employment, and to devise means of remedying this situation.

The Data Protection Act 1998 contains restrictions on the type of information that employers are allowed to gather about job applicants (and existing employees). In particular, the Act prevents employers from collecting certain information that is classed as 'sensitive data' unless one of a list of conditions is met. 'Sensitive data' is defined under the Act as information about an individual's racial or ethnic origins, religious or philosophical beliefs, sexuality, physical or mental health, trade union membership and the commission of any criminal offence. Essentially, the employer should ensure that they have clear, express consent from all job applicants to authorise the holding of any such data, and that job applicants are informed about the purpose for which the information is being gathered.

The easiest way to achieve compliance with the law in this area is to place a clause in the application form stating that the employer wishes to process certain information (which should be defined – eg information on ethnic origins), the purpose for which the information will be processed, and how and by whom it will be processed. The job applicant's signature should be requested against the clause to indicate their consent to the information being gathered and processed under the Data Protection Act 1998.

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**CASE STUDY**

An organisation recruiting a large number of graduate trainees each year added a question to its application form asking all applicants to declare their sexual orientation. The applicants were very uncomfortable with answering this question, wanting to know why it was being asked.

The organisation responded that it was being asked so that it could monitor the recruitment data to ensure that people of a particular sexual orientation were not being discriminated against. However, the applicants were still unhappy with the approach that was being taken. Was the approach acceptable?

**TASK**

Find out if your organisation, or an organisation with which you are familiar, monitors its applicants for jobs. If it does, look at the statistics and see what they tell you. If it does not, ask if you could monitor recruitment for a while and, again, see what the statistics tell you.

**ENSURING SHORT-LISTING IS DONE AGAINST OBJECTIVE CRITERIA**

The key aim in short-listing should be to draw up a manageable list of candidates for interview for a specified post, all of whom could potentially do the job in terms of the qualifications and experience outlined in their job application form or CV. Short-listing is best done methodically by comparing each application with a previously prepared employee specification. Such an approach should ensure objectivity and minimise the risk of bias on sex, racial grounds or age influencing the choice of candidates. Obviously, factors such as gender, race, etc. should play no part in the short-listing process.

The criteria for appointment should be decided in advance rather than attempting at a later time to justify the selection of a particular applicant by 'post-hoc rationalisation' as shown in the following case:

***Bishop v The Cooper Group plc t/a Coopers Thames Ditton (1992)***

In this case, two male applicants were successful in their applications for work as car technicians while a highly qualified female applicant was unlawfully rejected. The employment tribunal determined that the organisation justified the decision after it had been made – rather than determining criteria in advance of the decision and then applying them.

If a disabled candidate appears to have the requisite experience and qualifications for the post in question, but there is some concern in the mind of the person responsible for short-listing about the person's abilities, the best approach is to invite the candidate to interview and explore their abilities in relation to the post through an open and fair questioning process. Negative attitudes towards disabilities are common in recruitment and should be strongly

resisted. Rejection for employment purely on the grounds of a person's disability would constitute disability discrimination, which would be unlawful. Some employers adopt a policy of automatically inviting for interview any disabled applicant who meets the essential criteria for the post, and this approach is to be recommended.

The key to ensuring equality and diversity in short-listing is to make sure that decisions are based on an assessment of the facts provided on each candidate's application form or CV as measured against the requirements stated on the employee specification. Allowing personal opinions or attitudes to influence decisions may lead to discriminatory practices that could be unlawful.

Care should also be taken to avoid assumptions about individual candidates and the type of work they would want to do, or be capable of doing.

Some classic examples of discriminatory assumptions, invalid generalisations and stereotypes are:

- women are not suitable for jobs that involve heavy or dirty work
- a young female applicant is unlikely to remain in employment for long because she's bound to decide to start a family
- a woman with young children will be unable to work long hours or travel away from home on business
- a woman with children cannot be fully committed to her job
- part-time employees do not take their job responsibilities seriously
- problems of authority and effectiveness will arise if a young person is appointed to a supervisory post
- an older person, if recruited, will not stay long with the organisation
- older people take a lot of time off work due to sickness
- disabled people take a lot of time off work due to sickness
- disabled people are trouble because they will need all sorts of special arrangements made for them
- problems might arise if a woman is recruited into a post where she will be working alone with a man much of the time
- a candidate from a particular racial or cultural background will not fit into the team
- a candidate of foreign nationality will need a work permit, and that will inevitably cause an inordinate amount of hassle for the organisation
- someone from a particular religion will cause disruption because they will demand frequent time off work to pray
- it wouldn't be a good idea to recruit a gay or lesbian individual because they might be harassed by their colleagues.

It would be inherently unfair and unprofessional to allow any of these spurious assumptions to affect the decision as to whom to short-list. Blanket assumptions of this nature carry with them the risk that a job applicant who is highly suitable for the job could be rejected. Furthermore, in some cases, non-selection for the short-list based on this type of false reasoning could lead to a successful complaint of unlawful discrimination at an employment tribunal.

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**TASK**

Find out how your organisation, or an organisation with which you are familiar, carries out the process of short-listing. Do you think that the process seems to be free of bias, or can you identify any improvements that could be made?

**KEY POINTS FROM THIS CHAPTER**

- The laws prohibiting discrimination on grounds of sex, race, disability, sexual orientation and religion expressly outlaw discrimination throughout the process of recruitment and selection.
- There are limited exceptions to the general principle that it is unlawful to use gender, race, religion or sexual orientation as a criterion in the selection process; these are known as genuine occupational requirements or genuine occupational qualifications.
- Certain forms of positive action are permitted in UK law provided they take the form of encouragement to members of an under-represented or disadvantaged group to take up opportunities for employment or training.
- The specifications for jobs should be carefully examined to ensure that there are no factors contained that are indirectly discriminatory.
- The monitoring of applications to an organisation can help identify if there are groups that are under-represented.
- The Employment Practices Data Protection Code (Part 1) recommends that employers should use different application forms for different jobs, seek only information that is proportionate to their business needs and refrain from requesting information about applicants' private lives.
- The process used for short-listing should be free of any factors that are potentially discriminatory.

**EXAMPLES TO WORK THROUGH**

- 1 You work in a residential home for older people, which has both male and female residents. Currently, all but one of the care assistants is female. Some of the male residents are complaining that they are being assisted by a female when bathing and dressing. One of the care assistants has resigned and hence there is a vacancy. The Manager of the home wants to state in the advertisement that a male care assistant is required. What do you advise?
- 2 The ethnic origin and gender of the applicants to your organisation have been monitored over a six-month period, and it is clear that a number of ethnic minorities that are well represented in the local population are under-represented in the applications that have been made. How could you address this?
- 3 Write a person specification for the job you hold, or a job that you have held. Make sure that there is nothing in the specification that is potentially discriminatory.