

An Outsider's Guide to Recruiting in the UK, Legally...

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Are you hiring in the UK? Here's what you absolutely MUST know about discrimination law.

As companies increasingly manage their recruitment in a regional or global context, recruiters are more often in a different country from the positions for which they are hiring. This can be a real compliance risk.

Legislation in the UK that affects hiring processes has expanded substantially in recent years, in particular around the area of discrimination. With that in mind, and as the UK is one of the world's larger economies, I thought it might be useful for others if I highlight the key areas that need to be considered when recruiting for your organisation's UK entity.

These are stipulations in UK law, and you are expected to know them. In the UK legal system, ignorance is no defence. This advice is also no substitute for professional legal consultation (see the end of the article for more on that), but I hope it provides useful guidance.

Discrimination

As is common in many countries, UK law prevents employers from making a hiring decision based directly or indirectly upon discriminatory grounds such as sex, race, age, ethnicity or disability. If you have an equitable hiring process, you could be forgiven for thinking that this article will therefore be of little relevance to you.

You are probably wrong.

I am sure we can all spot and avoid direct discrimination in our hiring practices, but UK law also gives protection to prospective employees from *indirect* discrimination. This is much broader in its definition, and has tripped up several companies recently (ironically, some of these have been law firms).

Indirect Age Discrimination

Age discrimination is now a major pitfall for many companies in their recruitment advertising, as indirect discrimination can make it a challenge to accurately describe roles in detail. For example, it is no longer permissible to state that candidates must have "3 or more years of experience in...". If someone who has 2 and a half years of great experience could actually do the job, then this statement would be considered discriminatory.

The most common workaround to this problem is to use adjectives to indicate relative competency strengths. For example, adverts can refer to a requirement for "Strong experience with..." or "Solid experience of..." etc. etc.

Further, employers must also avoid indicating any age preference in their corporate culture (as this can be interpreted as an inherent bias). Any reference to a "young team" or "dynamic environment" are both rocky ground.

Indirect Racial/Ethnic Discrimination

A recent employment tribunal has provided much greater clarity on indirect racial discrimination, and this is perhaps the most challenging circumstance of all. In the case of Osborne Clark Services vs. Purohit (http://www.bailii.org/uk/cases/UKCAT/2009/0305_08_0902.html), a candidate had applied for a training role with a UK law firm whilst not having a valid right to work in the UK. The employer had a policy of never accepting applications for training contracts from non-EEA nationals who required work permits to work in the UK. As a result of this blanket policy, the prospective employer screened the candidate out of their selection process at an early stage on the basis of his work status, and the candidate accused the employer of racial discrimination. He won.

The ruling defines that all candidates, regardless of work status, must be considered equal and hiring decisions can only be made based upon merit alone. However, in the current economic climate the UK government has also clamped down on the distribution of work permits to non-Europeans, so the possibility of being able to hire someone from outside the EEA (European Economic Area) is not guaranteed.

The employer attempted to argue that the number of potential applicants for training posts would involve the employer engaging in considerable administrative costs in making work permit applications which were destined to be unsuccessful. This argument was not accepted and it was stated that work permit issues should only come into consideration at the last stages of selection. For employers, this has the potential to mean that recruiters must spend much greater amounts of time screening applicants for positions, and also managing their processing (where they are required to obtain the right to work in the UK).

As a side point, it is worth noting that the work permit regime in the UK was replaced on 27 November 2008 by the Tier 2 skilled worker category. As the labour market test applies equally to Tier 2 applications as it did to work permits, the same considerations as arose in the case discussed above would still apply to applications subject to the new regime.

Conclusion

In conclusion, the picture is both challenging and at times contradictory. Companies should be particularly careful not to assume that advertising styles that are appropriate in the US (and even other European countries) are legitimate in the UK.

Ultimately, it is at the discretion of individual companies to decide whether the most cost-effective solution is to adopt an out-going search model (using networks and social networking tools), and not to advertise at all. The jury is still out on that.

Key Action Points

- DO NOT justify any hiring decisions (or eliminations) based upon any discriminatory grounds, including:
 - Length of Experience
 - Immigration status
 - Age

- Ethnicity
- Disability

- In job advertisements, NEVER:
 - State time-specific experience requirements
 - Imply an age-specific company culture
 - Screen or eliminate candidates based purely upon immigration status

For Further Guidance on this area of UK law, I can recommend Jen Argent (<http://www.shoosmiths.co.uk/news/2026.asp>), to whom I also owe credit for sanitising this article.