

# A Thorogood Special Briefing

## Chapter 1 Introduction

- The key changes that are affecting the recruitment process
- What this Briefing aims to do
- Structure and content of the Briefing
- What are the key areas of law for recruitment?

# Chapter 1

## Introduction

Most HR practitioners report that recruiting staff is one of their priority topics, regardless of the economic and labour market climate. Their basic need is to have the right person in the right job and to undertake the task in an effective and unproblematic way. One vital element in any recruitment process is the legal framework that impacts upon it. Most of the well-known texts on employment law, especially those written for the HR practitioner, are, indeed, useful for the recruitment process. The recruitment practitioner can use them, to extract and apply the legal rules that appear to have the most relevance but this can be a difficult and even dispiriting task, as the legal rules that apply to recruitment are taken from virtually all areas of employment law. Even when the 'right' rules are identified, their application to the recruitment process is often subject to special legal requirements. For example, the legal rules relating to data protection contain a code that specifically applies to the collection, storage, access to, disclosure etc of the personal data of job applicants.

This specialist text is responding to a number of legal imperatives, regarding not only the current legislative and case law framework but also the need to be aware of likely future developments so that recruitment practices can anticipate and plan for them.

### **The key changes that are affecting the recruitment process**

Let's identify them in turn.

#### **In the recruitment process itself**

As referred to above, this has been subject to significant change. There has been a move away from the generality of the relatively simple, 'advertise-shortlist-interview-select' process where people meet face-to-face. The law relating to this process is relatively straightforward. However, jobs are increasingly advertised on the Internet, applications are made in a similar way and many interviews take place via video conferencing. CVs are almost inevitably computer gener-

ated. They are often computer scanned. At that stage unpromising applicants are screened out. Selection might then be through the application of psychometric tests, use of bio data etc.

Increasingly, specialist organizations are used to undertake these tasks. For example, specialists are often employed to help recruiters through the maze of immigration law and police checks/screening processes. Indeed, recruitment is one of the most commonly outsourced HR functions. Recruitment methods are subject to constant review and enhancement. Many employers are firm supporters of the use of bio-data, psychometric testing, aptitude tests, work simulation and other scientifically based techniques. Other employers are enthusiasts of “headhunters” (executive search) especially for senior posts. None of these recruitment methods are intrinsically inappropriate, but they all raise important legal issues. For example, how risky is headhunting in the light of an ever-encroaching legal equality agenda? If recruitment skills are outsourced it is important to note that the legal rules still impact on the employer and cannot simply be off-loaded.

### **The type of people being recruited**

There have been major changes in the type of people being recruited. A growing number are from countries in an enlarged EU who are exercising the right to freedom of movement to the UK.

Recruiting staff from outside the UK raises a number of practical as well as major legal issues. In addition, there is pressure from both the European Employment Strategy (EES) and the UK government to ensure that those able to work do so in order to maximize labour market participation. This is causing employing organizations to recruit older people, people with young children, including lone parents and generally many who have not previously entered employment. Included here are people with disabilities. Inevitably, some of those “forced off” the social security support structures are reluctant workers or they present health or other problems. The Welfare Reform Bill 2008, if passed, will intensify these trends. At the same time, amongst these groups of newly participating workers, some want part-time and other forms of flexible work, or will want to work from home.

A growing feature of the UK labour market is the growth in work experience programmes, unpaid traineeships, sometimes government funded. Many organizations also recruit volunteers to provide key and sometimes core skills. Members of both of these groups are not covered by employment contracts, as

they are not paid. However, they do have some important legal rights and employers have significant legal duties towards them. If their recruitment is undertaken in a casual or unprofessional manner, employers will almost inevitably face legal problems.

There are also changes in what job applicants want from employers. Highly skilled people may not be seeking employee status and may prefer freelance, contractor or other employment status. Even when they are employees some are increasingly driving very hard bargains in terms of reward packages. These so-called ‘Gold-Collar Workers’ are less interested in long-term or traditional occupational benefits but are very interested in training and development opportunities within the organization, along with high pay. Many such individuals are using agencies, their own limited companies or “umbrella” companies through which to work. These present very distinctive challenges for recruiters. This, in turn, has major implications for the creation (and management) of the psychological contract as well as the creation of the legal employment relationship. The new Chapter 6 explores the legal implication of recruiting “non-employees”.

### **The basis upon which people are recruited**

In most developed economies there has been continuing growth in part-time work, especially amongst men and an increase in home working and mobile working, along with more use of temporary work agencies for skills provision. The skills provided in this way vary considerably. They go from manual work in, say, cleaning, to professional work, such as nursing and teaching, through to the supply of interim managers, perhaps to be used to drive through organizational change. The new Chapter 6 also covers these groups.

The work-life balance agenda has led to growth not only in part-time work and working from home but also to specialist forms of employment relationships such as job sharing, term-time working and time-account/annualized hours contracts.

An important recent legal development has been the extension of the law affecting business changes, including service provision through the TUPE regulations 2006. In effect, the recruitment process following a service change (transfer) has very distinctive features and could be described as “involuntary” recruitment. The legal rules are complex but it is important to note their impact on the transferee who becomes the new employer of the transferred employees who have joined the organization via a very different route than standard recruitment!

Another development has been regarding the notion of an: ‘employer of choice’. Such an employer is not just one that is successful but also has a strong ethical underpinning. Applicants seek information on the organization’s broader policies and practices. A court case, a scandal, especially involving a breach of law (including relating to recruitment) will deter a growing number of applicants.

### **The law impacting on recruitment**

The legal agenda has changed dramatically in recent years. The agenda has widened and intensified. At the heart of the recruitment process remains the contract of employment (or other form of employment relationship) and the necessity to ensure that the contract is correctly created and documented. No matter how ideal the candidate is for a post, if the recruitment process has led to ambiguities about the content of the contract or there are other misunderstandings, problems will likely arise. However, in recent years some very important new topics have developed or considerably expanded.

One such example is the anti-discrimination agenda that is applying to an ever-widening range of people. Discrimination on grounds of age, religion and belief (including many non-religious-like beliefs), sexual orientation and gender re-assignment indicate how careful recruiters must be in this regard. There have been major changes to disability discrimination law and equal pay case law has produced some dramatic decisions. At the time of writing, the radical Equality Bill 2009 was going through Parliament. The extension of the duty on public bodies to “promote equality” along with explicit provision for “positive discrimination” are especially relevant for recruitment. It is vital that the scope of law is understood (all employers are now covered by anti-discrimination law) but also the extent to which organizational policies and practices are subject to legal challenge. The procedural aspects of anti-discrimination claims have also changed, with more emphasis on the recruiter justifying practices and decisions to prove that they did not unlawfully discriminate, along with demonstrating that equality is fully integrated into all organizational policies and practices. This includes:

- Requirements from EU law on recognition of non-UK qualifications and other measures to ensure freedom of movement for EU citizens.
- The considerably tightened provisions relating to immigration and recruitment of non-EEA people.
- A widening data protection agenda. This directly impacts on data sought from job applicants, its use and storage.

- Laws relating to the screening of applicants are now well established, as the provisions of the Police Act, 1997 have been rolled out. Legal changes regarding sex offenders and perpetrators of other crimes are of growing importance. When fully implemented the Protecting Vulnerable Groups legislation will have a major impact.
- Laws relating to the use of intermediaries in the process of accessing skills have been tightened. In particular, the Conduct of Employment Agencies and Businesses Regulations, 2003, 2006 and 2007 have major practical implications for the use of recruitment specialists or temporary agency staff. Equally important will be the implementation of the 2008 Temporary Agency Work Directive.

## What this Briefing aims to do

### It aims to:

- Provide a clear explanation of the key areas of law applying to the recruitment process. It includes, where appropriate, the reasons for the development of those legal rules and what they aim to achieve.
- Explain the application of the rules to the recruitment processes.
- Deal with typical practical issues, especially those arising out of case law and recent legislation.
- Provide some practical advice on sources of information and support.
- Address the most common dilemmas and problems facing recruiters. This includes questions such as:
  - Does a contract of employment have to be in writing to be valid?
  - Is a job description part of the contract of employment?
  - If I offer a contract on a freelance basis, can I avoid employment law duties? Is it relevant that HMRC has “sanctioned” the arrangement?
  - If I automatically reject a 68-year-old applicant am I at risk? Do I need a good reason to do so?
  - If I offer a job that is formally accepted but the person does not turn up to start work, can I sue them?

- If I use a recruitment agency or ‘headhunter’ to recruit staff and they fail to comply with anti-discrimination law, am I liable for them?
- If I learn after offering a job that the candidate has had what I consider to be, a poor health record in her previous job, can I withdraw the offer?
- If I find out that a job applicant lied on their CV, what can I do?
- If a job involves tennis coaching young children on a part-time basis, what checks should I do? What if the person is just assisting on a voluntary basis?
- Are there risks in not externally advertising posts?
- Are there risks in paying ‘above the odds’ to recruit a very skilled person in circumstances where we have had problems filling the post?
- If I want to “balance up” my workforce with more people who have disabilities or are from ethnic minority groups, can I do this?

Clearly, being unaware of relevant legal rules or ignoring them carries obvious legal risks. Claims can be made in appropriate cases in Employment Tribunals but also in the civil courts. In some situations, failure to comply with the legal rules can lead to the imposition of a criminal penalty. Should a case get to court and be the subject of local or national media attention, reports that a candidate was rejected because they were, ‘too old’, ‘were pregnant’, ‘had a beard’, ‘would not have fitted in with the chaps’, or ‘our customers would not like to deal with someone in a wheelchair’, will likely be very damaging for business reputation.

## Structure and content of the Briefing

This Briefing takes the reader through the usual stages of the recruitment process. This means that from when a potential vacancy is identified through to the point of providing employment contract documentation, that the key decisions are considered in a logical way. It can therefore be read as a whole to provide an overview of the law and its application to recruitment, or it can be used for specific purposes, for example, to identify the rules that apply to advertising or to the health screening of applicants. I have included a direct link to the relevant legal source if a reader wants to follow up a more detailed point.

**Chapter 1** sets down the key elements of the legal framework. Emphasis is placed on the contract of employment and other employment relationships that have contractual form. The key stages of job offer, and job acceptance are fully explained, along with such matters as provisional offers, counter offers through negotiation and the legal reasons why some types of ‘contracts’ are not legally valid. The key pieces of legislation that have direct relevance for the recruitment are identified and explained, so as to provide a ‘legal overview’ of recruitment and ‘signpost’ the issues set out in more detail elsewhere in the Briefing.

**Chapter 2** deals with the preliminary issues and options open to recruiters. Included here for example, are the questions of employment status (to recruit on an employee or self employed basis and to note the impact of ‘worker’ status), using an agency or other intermediary, recruiting from within the organization or advertising externally, offering a permanent or fixed-term post etc. Issues of advertising are considered in detail along with devising application forms, provision of information for applicants and related matters.

**Chapter 3** deals with preparing for recruitment, selecting the recruitment method and developing relevant materials and processes.

**Chapter 4** deals with the selection process and verification of key data; making job offers and dealing with responses.

**Chapter 5** deals with the follow-ups to job offers, and the increasingly important area of checks and screening, including health screening.

**Chapter 6** deals with recruiting non-employees and considers the distinctive legal issues that arise and how to comply with them.

**Chapter 7** deals with special terms of contract that need to be expressed and the documentation of the contract. There is consideration of the role of, say, job descriptions, and organizational policy documents.

## What are the key areas of law for recruitment?

There is, of course, no specific area of law applying to recruitment. A wide range of both UK and EU provisions affects the recruitment process.

The major areas of law that are of relevance are:

- The law of contract, especially as applying to the contract of employment and to other employment relationships.

- Employment protective legislation, including the Employment Rights Act 1996 and the Employment Relations Act 1999.
- Anti-discrimination law applying on grounds of sex, race, disability, religion or belief, sexual orientation, gender re-assignment, nationality (within the EU), age but also as applying to part-time workers and those on fixed-term contracts of employment, and from 2010, agency temps.
- Legislation relating to privacy and personal integrity, such as, under data protection legislation, the Human Rights Act, the law of confidentiality and defamation.
- EU legislation on freedom of movement, recognition of qualifications, posting of workers and the right of establishment.
- The law requiring screening, police checks etc. and screening where work concerns working with vulnerable people.
- The law relating to immigration, asylum seeking, work permits and other administrative requirements.
- The law of negligence, in particular, applying to the provision or use of references.

As well as these substantive areas of law, the courts and tribunals appear to comply with a few **Guiding Principles** when applying the rules to the recruitment process. The Principles have no legal status. They are simply observable from case law. They are:

- Courts and tribunals remain reluctant to force an employer to take on an applicant they do not want or do not have confidence in, even though the law has been broken, and even where there are breaches of anti-discrimination law. The remedy provided by a tribunal will be compensation. However, the level of compensation will often reflect the seriousness of the employer's conduct and the fact that the claimant was denied a job despite having the skills to do the job. There is no 'cap' on compensation when there has been unlawful discrimination and tribunals are increasingly willing to impose "aggravated" damages on employers to indicate the tribunal's strong disapproval of a recruiter's conduct.
- Similarly, when an offer is withdrawn for unjustified grounds, the remedy tends to be that of compensation rather than an order compelling the employer to continue employment. When the employer

is a small firm there is an even greater reluctance to require employment of a successful claimant to a tribunal.

- Courts and tribunals have traditionally been reluctant to interfere with the professional judgement of recruiters. They have generally supported employers who say that an applicant's previous sickness absence record was poor (and withdrew an offer when learning of it), even though another employer would have said it was acceptable. Similarly, employers are generally free to decide the relevance of, say, scores on aptitude tests and psychometric tests, and are not required to recruit the one with the 'highest' scores. Nonetheless, in recent years tribunals are probing more closely, especially through anti-discrimination law and aim to see transparent and consistent criteria-referenced decisions. The changing emphasis requires careful training of all those involved in the recruitment process, along with on-going monitoring and review.
- The need for transparency in all aspects of the recruitment process is the key emerging principle. This requires, for example, accurate record keeping and clarity in the process itself. For example, do the candidates know whether their performance in an aptitude test is the element or just one of the elements in the decision-making? Is it clear what role the interview plays? How important is prior experience in a similar type of employing organization? Many candidates report themselves to be confused as to precisely what was important to the recruiters. They often suspect that what they were told was a sham and that the recruiters had their own undeclared 'agenda'. This is a strong motivation to bring a claim to a tribunal!

Transparency and professionalism should also extend to all engaged in recruiting. The law reports are full of tales of successful claims following a 'throwaway' comment or observation made by, say, a lay member of an interview panel. Where the lay members are non-executive directors, school governors, members of health trusts or local councilors it is vital that they are well prepared for the recruitment process and equally familiar with the legal rules applying to it.