

## **THE LEGAL FRAMEWORK FOR RECRUITMENT AND SELECTION**

Each school has a number of obligations under UK and European law when involved in the recruitment and selection of staff. An outline of the core legislation is provided below. The legislation provides a framework through which individuals can seek redress through an employment tribunal and relates to all aspects of employment. Also provided is information in relation to the Schools Staffing (England) Regulations 2003.

For further information on any aspect of the legislation, please contact a member of the Schools HR Team.

### **Equality Act 2010**

The Equality Act came into force in October 2010. It harmonised and replaced existing anti-discrimination legislation, including the Race Relations Act (1976), the Sex Discrimination Act (1975) and the Disability Discrimination Act (1995).

The Act defines the various types of potential discrimination by referring to a number of 'protected characteristics' that qualify for protection. These are: age; disability; gender reassignment; race; religion or belief; sex; and sexual orientation. In some circumstances people who are married or have civil partners, and women who are pregnant or on maternity leave, have protected characteristic status. Further information about the protected characteristics can be found below.

The Act has also replaced the previous public sector Race, Gender and Disability Equality Duties with a Single Equality Duty. The main aims of the general equality duty are: to eliminate discrimination which is unlawful, to advance equality of opportunity and to foster good relations between communities.

### **Discrimination**

It is unlawful to discriminate against someone in or applying for employment unless there is an occupational requirement for doing so (see Appendix P).

Lancashire County Council promotes equality of opportunity for employees and users of its services and aims to ensure that no job applicant, employee or service user receives less favourable treatment because of a protected characteristic or is disadvantaged by any condition or requirement that cannot be shown to be justifiable.

An individual can seek redress if they feel they have been discriminated against in the following ways:

## Direct Discrimination

Direct discrimination occurs when someone is treated less favourably to another person because of a protected characteristic they are or are thought to have (see 'perception discrimination' below), or because they associate with someone who has a protected characteristic (see 'discrimination by association' below).

## Discrimination by Association

This applies to age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. This is direct discrimination against someone because they associate with another person who possesses a protected characteristic. "Association" covers relationships such as parent, son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person does not have to be a permanent one.

## Perception Discrimination

This applies to age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. This is direct discrimination against an individual because others think they possess a particular protected characteristic. It applies even if the person does not actually possess that characteristic.

## Indirect Discrimination

This applies to age, disability, gender reassignment, marital and civil partnership status, race, religion or belief, sex, and sexual orientation.

Indirect discrimination can occur when you have a condition, rule, policy or even a practice within the school that applies to everyone but particularly disadvantages people who share a protected characteristic. Possible examples include:

- applying criteria which stipulate that applicants should have 10 years' continuous employment/service – this may exclude more women than men, and is therefore likely to be discriminatory. It could also be discriminatory against young people;
- stipulating a height requirement for a job may be discriminatory against women and men from certain ethnic minority groups;
- having a dress code that dictates no headgear can be worn may be discriminatory against members of certain religious groups.

Indirect discrimination can be justified if you can show that you acted reasonably i.e. that it is 'a proportionate means of achieving a legitimate aim'. A *legitimate aim* might be any decision you make in running your school which may disadvantage a particular protected characteristic. The aim has to be lawful and represent a real objective

consideration – e.g. health, welfare and safety considerations – but if the sole aim is to reduce costs it is likely to be unlawful. Being proportionate really means being fair and reasonable, including showing that you've looked at 'less discriminatory' alternatives to any decision you make. You are likely to have to provide an evidence-based response to any claim of indirect discrimination showing why you believe your action is objectively justified.

### Harassment

Harassment is "unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual".

Harassment applies to all protected characteristics except for pregnancy and maternity, and marriage and civil partnerships. Employees are now able to complain of behaviour that they find offensive even if it is not directed at them, and the complainant need not possess the relevant characteristic themselves. Employees are also protected from harassment because of perception and association (see definitions above).

### Third Party Harassment

This applies to age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

The Equality Act makes you potentially liable for harassment of your employees by people (third parties) who are not employees of the school. You will only be liable when harassment has occurred on at least two occasions, you are aware that it has taken place, and have not taken reasonable steps to prevent it from happening again. However, the two incidents of harassment may have been carried out by different people.

### Victimisation

Victimisation occurs when an employee is treated badly because they have made or supported a complaint or raised a grievance under the Equality Act, or because they are suspected of doing so. An employee is not protected from victimisation if they have maliciously made or supported an untrue complaint.

There is no longer a need to compare treatment of a complainant with that of a person who has not made or supported a complaint under the Act.

## Protected Characteristics

### Age

The Equality Act makes it unlawful to discriminate on the grounds of age, both in terms of older employees and younger employees. However, different treatment because of age is not unlawful direct or indirect discrimination if you can objectively justify it, i.e. if you can demonstrate that it is "a proportionate means of meeting a legitimate aim". Age is the only protected characteristic that allows employers to justify direct discrimination.

### Disability

The Equality Act exists to ensure that people with disabilities do not suffer detriment due to their condition. The Act makes it unlawful to treat a person with a disability less favourably than another person for a reason related to their disability and makes it unlawful to discriminate against current or prospective employees with disabilities. Disabled people are covered by the definitions of discrimination outlined above.

The legislation defines a disability as "a physical or mental impairment which has a substantial and long term adverse effect on the ability to carry out normal day-to-day activities". The definition also extends to people who have had such a disability but are now recovered but where the disability has a continuing impact, and to people who have a severe disfigurement. People who have been diagnosed with cancer, HIV and multiple sclerosis are automatically defined as having a disability as are those registered (or eligible to be registered) as blind or partially sighted.

Disability also has two additional types of discrimination:

- Discrimination arising from a disability – occurs where the less favourable treatment is because of something connected to the person's disability but not the disability/condition itself. For example, refusing to appoint a blind person who is a guide dog owner to work at a school because the school has a "no dogs" policy. The discrimination in this case would be because the person uses a guide dog not because they are disabled. It may be possible to objectively justify a decision relating to discrimination arising from a disability.
- Failure to comply with the duty to make reasonable adjustments. Employers have a duty to make reasonable adjustments to the premises or employment arrangements if they substantially disadvantage a disabled employee, or prospective employee, compared to a non-disabled person. It should be noted that individuals do not have to be registered disabled in order to declare that they have a disability. Headteachers can seek advice and guidance from a member of the Schools HR Team when dealing with issues relating to disability discrimination.

Examples of reasonable adjustments that could be made during the selection process include the provision of a British Sign Language interpreter at interview, holding interviews on the ground floor of the school or giving a candidate a later/earlier interview time if their condition affects them more significantly at a particular time of day. Where an adjustment is held to be "reasonable" (based on factors such as cost, practicality, possible disruption) an employers' failure to make it cannot be justified.

Section 60 of the Equality Act 2010 prevents employers from asking job applicants about their health before offering them employment except for some 'specified reasons'. This provision restricts the ability to ask job applicants during interviews about the number of days' absence they have had in the recent past.

The 'specified situations' where health-related enquiries can be made prior to the offer of employment are for the purposes of:

- finding out whether a job applicant would be able to participate in an assessment to test their suitability for the work;
- making reasonable adjustments to enable the disabled person to participate in the recruitment process;
- finding out whether a job applicant would be able to undertake a function that is intrinsic to the job, with reasonable adjustments in place as required;
- monitoring diversity in applications for jobs;
- supporting positive action in employment for disabled people e.g. a question on the application form which is used solely to trigger an interview guarantee policy; and
- enabling an employer to identify suitable candidates for a job where there is an occupational requirement for the person to be disabled.

### Gender Reassignment

The Equality Act makes it unlawful to discriminate on the grounds of gender reassignment. A transsexual person is someone who proposes to, starts or has completed a process to change his or her gender, and does not necessarily have to have commenced medical treatment.

It is discrimination to treat transsexual people less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent because they were ill or injured.

## Marriage and Civil Partnership

The Equality Act protects employees who are married or in a civil partnership against discrimination. Single people are not protected.

## Pregnancy and Maternity

The Equality Act makes it unlawful to discriminate on the grounds of pregnancy or maternity during the period of a pregnancy or any period of statutory maternity leave. During this period, pregnancy and maternity discrimination cannot be treated as sex discrimination.

You must not take into account an employee or potential employee's period of absence due to pregnancy-related illness when making a decision about their employment (e.g. an offer of employment).

## Race

The Equality Act makes it unlawful to discriminate on the grounds of colour, race, nationality, or ethnic or national origin.

## Religion or Belief

The Equality Act makes it unlawful to discriminate on the grounds of religion or belief, including a lack of a religion.

There may be a defence to a claim for discrimination on the grounds of religion or belief in employment where the nature of the employment, or the context in which it is being carried out, means that being of a particular religion or belief is an occupational requirement, and it is proportionate to apply that requirement in the particular case.

Any school wishing to rely on this provision must establish that the requirement is necessary to comply with a religious doctrine, or to avoid conflict with the strongly held religious convictions of a significant number of religious followers, or demonstrate that the nature of the work and the context in which it is carried out brings with it an occupational requirement.

At the stage when the job description and person specification are being formulated, schools must clearly state why they say that a particular religion or belief is an occupational requirement and must make it clear to prospective applicants that there is such a requirement. The chair of any panel must keep a note of those reasons to ensure that they can be explained in the event that a disappointed job applicant challenges a school or Governing Board in an employment tribunal.

In dealing with matters pertaining to this, at the decision making stage of the job interview, Headteachers must again ensure that clear notes of the decision making are kept.

An occupational requirement on the grounds of religion or belief must not be used as a basis for discrimination on other grounds, such as race or disability.

Where schools are considering the utilisation of exemptions to this legislation on the grounds of religion, the appropriate Diocesan Authority should be contacted for advice and guidance.

## Sex

The Equality Act makes it unlawful for employers and other organisations to treat women or men less favourably because of their gender.

## Sexual Orientation

The Equality Act protects bisexual, gay, heterosexual and lesbian people and makes it unlawful to discriminate against a person on the grounds of their sexual orientation.

## **Positive Action**

Positive action measures are allowed within the Equality Act. Positive action can be taken when an employer "reasonably thinks" that people sharing a particular protected characteristic suffer disadvantage connected to that characteristic, people who have that protected characteristic have needs which are different from people who do not have it or participation in an activity by people who share the protected characteristic is proportionately low. To "reasonably think" can be based on a workforce or service profile or based on the proportion of people in the population compared with this. Positive Action means an employer can encourage people from under-represented groups to apply for employment opportunities and to offer training or traineeships which do not lead to a guarantee of employment.

It is also permissible to provide positive action training to existing employees to assist them in career development where there is an under-representation in specific areas of activity. However, on completion of such training, employees must be considered within the selection process alongside other employees.

Examples of positive action include:

- Encouraging applicants from ethnic minorities or specific faith groups to apply for job vacancies by giving talks about employment opportunities or displaying publicity material in temples, mosques, community centres used by people from ethnic minorities.

- Providing access or development training to encourage suitable female applicants for future management roles.
- The Equality Act allows broader positive measures for the protected characteristic of disability, such as the recommendation that schools adopt a policy whereby all disabled applicants who meet the minimum essential requirements specified in the person specification be invited for interview (this complies with the "Disability Confident" symbol), or other actions – so long as the final appointment decision is made on merit assessed through a competitive selection element. Positive action training such as the WorkStart Scheme is also allowed.
- Targeting recruitment campaigns/adverts to publications or websites that are marketed to under-represented groups e.g. young people or gay and lesbian people so long as that is not the only means of advertising.

Positive action means encouraging fair competition. Selection to posts must still be based on ability, though positive action may be applied on a case-by-case basis to select a candidate from a disadvantaged or under-represented group for appointment where two candidates are deemed to be 'as qualified'. This differentiates positive action from positive discrimination, which is unlawful.

## **Equal Pay**

The Equality Act retains the framework that was previously in place. This means that in most circumstances a challenge to pay inequality and other contractual terms and conditions still has to be made by comparison with a real person of the opposite sex in the same employment.

However, a change in the Equality Act allows a claim of direct pay discrimination to be made, even if no real person comparator can be found. This means that a claimant who can show evidence that they would have received better treatment from their employer if they were of a different sex may have a claim, even if there is no-one of the opposite sex doing equal work in the organisation. This would be a claim under sex discrimination.

## **Pay Secrecy**

The Equality Act makes it unlawful for employers to prevent or restrict their employees from having a discussion to establish if differences in pay exist that are related to protected characteristics.



## **The Local Government and Housing Act 1989**

This Act places various obligations on local authorities making appointments. In particular, Section 7 (1) of the Act requires that appointments be made on merit.

### **Politically Restricted Posts**

Every Local Authority is under a duty to prepare and maintain a list of politically restricted posts.

Headteachers, Principals, Teachers and Lecturers are all exempt from political restrictions under section 2 (10) of the Local Government and Housing Act 1989 and will not be regarded as holding politically restricted posts whatever their role or remuneration level.

## **Rehabilitation of Offenders Act 1974**

All school appointments are exempt from this Act and are subject to Disclosure and Barring Service checks.

The main aim of this Act is to recognise that a person convicted of a criminal offence, after a period where actions are not repeated, can be considered reformed. The Act identifies specific periods after which convictions can be considered spent and disregarded.

Some offences are now filtered and will not appear on a DBS certificate. These are known as 'protected offences.' It is unlawful to take offences that are protected into account when making appointment decisions.

A person is not necessarily precluded from working within a school simply by declaring that they have a conviction on their application form. Such a disclosure on the form gives the interview panel the opportunity to discuss the issue with the applicant. If the interview panel do not believe that the conviction will affect the candidate's ability to do the job in question, they may discount the conviction. For further advice and guidance on this, please contact a member of the Schools HR Team.

Further information about the employment of ex-offenders can be found in a guidance note prepared for schools, which can be found on the Schools Portal.

## **Immigration, Asylum and Nationality Act 2006**

Provisions in the Immigration, Asylum and Nationality Act 2006, which came into force on 29 February 2008, make it a criminal offence to take on an employee who is subject to immigration control and who:

- (a) has not been granted leave to enter or remain in the United Kingdom; or
- (b) does not have permission to work in the United Kingdom.

Employers therefore have a responsibility to ensure that prospective employees are eligible to work in the United Kingdom in line with the requirements set out in Sections 15 – 25 of the Act.

All external applicants shortlisted for a post at a school must produce a document or a combination of documents to show their right to work in the United Kingdom. When applying these procedures, you must ensure that you do so in ways that do not involve or imply racial discrimination.

See Appendix E for further advice and guidance in relation to the Immigration, Asylum and Nationality Act.

### **Human Rights Act 1998**

The Human Rights Act 1998 incorporates the principles of the European Convention on Human Rights (1953), in respect of fundamental rights and freedoms. It is directly enforceable against state and public authorities, so as a Local Authority we may face claims under or as a result of the Human Rights Act. All UK courts, including employment tribunals, will take the Act into consideration when hearing employment-related claims.

The Articles of Convention taken into the Act that are most likely to impact on recruitment and selection are:

Article 8: Right to respect for private and family life.

Article 9: Freedom of thought, conscience and religion.

We need to respect the specific circumstances people have in respect of these two articles.

### **Data Protection Act 2018/the General Data Protection Regulation 2018**

The Data Protection Act 2018 and GDPR exist to ensure that data held on individuals is processed in a fair and proper way. They give individuals some rights to review information held on them, and require data holders to be open about how they use their data.

There are a number of elements of the recruitment and selection process for which the Data Protection Act has implications. In terms of recruitment and selection, applicant's personal details submitted with their application form should only be used in accordance with the Act, for example for selection and interview purposes and for employment records, if the application is successful.

## **Working Time Regulations 1998**

The Working Time Regulations 1998 incorporate requirements involving working arrangements/time which, as an employer, we are required to comply with. This includes a maximum number of hours an employee is permitted to work, the maximum number of hours an employee can work without a rest break and a statutory entitlement to a minimum amount of annual leave.

## **School Staffing (England) Regulations 2003**

Chapter 1 Part 3 of the Education Act 2002 (the Act) has replaced many of the sections from the Schools Standards and Framework Act 1998. The Act covers the staffing of Community, Voluntary Controlled, Community Special and maintained nursery schools.

The School Staffing (England) Regulations 2003 came into effect on 1 September 2003. The relevant areas of the Regulations in relation to recruitment and selection are summarised as follows:

### **Appointment**

The Headteacher should take the lead in appointments outside of the Leadership Group.

Headteachers may involve others in the process (including Governors) but may not delegate responsibility for the final decision in relation to appointments.

The appointment of Assistant Headteacher does not fall under the normal expectation to be delegated to the Headteacher.

### **Appointment of a Headteacher and Deputy Headteacher**

The Regulations have clarified issues around the advertisement of posts, rights to representation of the Local Authority and Diocesan Authority attendance and advisory rights.

### **Appointment of staff other than Headteacher and Deputy Headteacher**

There is no automatic obligation to replace teaching posts with teachers. This is linked to the national remodelling agenda and allows schools the freedom to look at all options when a vacancy arises.

The Local Authority may make representations to the Governing Board if it has outstanding concerns about the recommendations on pay and grading. With regard to this, schools must be aware of the potential for decisions on such issues to have a negative impact on other schools with regard to equal pay claims. Governing Boards

have the power to determine the job descriptions, pay and grading of support staff within the framework of grades used by the Authority, although the Schools HR Team will provide advice on the parity of any proposals.

### **Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002**

The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 concentrate mainly on the treatment of existing staff on fixed term or temporary contracts.

Temporary and fixed term contracts can be offered for legitimate reasons, for example cover for long term sickness or maternity leave, where a contract is linked to specific funding or linked to the completion of a specific project or task, or if the school's budget is such that it could be facing a need to reduce staffing. Schools must be aware of the need to be specific when justifying the use of a temporary or fixed term contract.

Headteachers must also be mindful of the fact that employees on a temporary or fixed term contract may be entitled to a redundancy payment if their contract comes to an end. In certain cases, the most appropriate course of action legally may be to consider whether there are other members of staff (even permanent members of staff) that should also be considered for redundancy along with the member of staff on a temporary or fixed term contract. The advice of a member of the Schools HR Team should be sought where schools are considering the termination of a temporary or fixed term contract of 2 years or longer.

Further guidance on the use and termination of temporary (and fixed term) contracts can be found on the Schools Portal.