

How to ensure that selection and recruitment practices are non-discriminatory

Job applicants are protected against unfair discrimination in the same way as employees are in terms of the Employment Equity Act 55 of 1998 (EEA). Such protection covers all aspects of the recruitment process from the advertisement all the way to the final appointment stage. It is important for employers to be aware of the requirements for keeping the process within the requirements of the EEA, the Constitution of the Republic of South Africa, 1996 (the Constitution) or other related legislation. South African employment equity legislation is designed to address job reservation, exclusion, and systematic discrimination, particularly of black people, women and people with disabilities that took place under Apartheid.

What is fair and unfair discrimination?

The International Labour Organisation defines discrimination in Convention No. 111 as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

The legal approach in South Africa is that discrimination may be regarded as fair or unfair. Unfair discrimination is prohibited in the Constitution and in the EEA.

Distinguishing between fair and unfair discrimination

Fair discrimination takes place when the employer treats employees or job applicants differently because of the requirements of the job or in order to achieve affirmative action of historically disadvantaged individuals. For example, it may not be unfair for an airline to exclude sight impaired people from applying for pilot positions. Other instances of fair discrimination may include higher pay for an employee with long service compared with the pay received by a newly employed person in the same company who is performing the same or similar work, or a retirement policy which requires retirement at a particular age.

The Employment Equity Act prohibits unfair discrimination against an employee or job applicant in any employment policy or practice on the ground of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, political opinion, culture, language, birth or on any other arbitrary ground. Unfair discrimination may be direct or indirect.

What is direct discrimination?

Direct discrimination is where the employer treats an employee or job applicant differently and unfairly on one of the grounds listed above. The ground is easily identifiable as the reason for different treatment. For example, an employer decides not to promote a woman employee on the basis of the belief that a man is better suited for the job. The key factor is that the differentiation is not based on job requirements such as relevant skill, experience, or qualifications, but rather on the basis of the sex of the employee.

What is indirect discrimination?

Indirect discrimination takes place when a business has a policy or practice in place that appears to be neutral, but it disproportionately impacts people who belong to one group more than others in an adverse

way and on a discriminatory ground. For example, a policy that specifies that only full-time staff may apply for promotion appears to be a neutral policy but, in a workplace where those who work half days (an example of part-time employment) are predominantly women, such a policy may serve as a form of indirect discrimination against women. The impact on women is disproportionate and is likely to be unfair. However, where the employer can show that such a policy is rational and justifiable, for example, the role is not suited to half-day work, it may be found that the policy does not amount to unfair discrimination.

The employer must ensure that its policies and practices are such that they do not indirectly deny employees access to employment, equal opportunities, and benefits on discriminatory grounds.

JOB DESCRIPTIONS

How can one ensure that job descriptions do not directly or indirectly unfairly discriminate against potential applicants?

Job descriptions are important to ensure that the employer can identify key requirements for a particular job. It is important that job applicants or employees are all treated and considered based on a consistent standard that are not based on grounds of unfair discrimination. This removes any bias, prejudice and personal interest which can be problematic in recruitment.

The employer should ensure that job descriptions outline the role and duties of the job. It is important to ensure that these descriptions are realistic and that they are set out so that the descriptions are linked to the job rather than serving as a means to act as a barrier to certain potential applicants. This should include:

- Job title;
- Job Level (in the absence of company levels and grading, it is useful to use the categorisation of occupational levels provided in the Employment Equity Regulations, 2014 in this regard i.e.:
 - top management / executives
 - senior management, professionally qualified and experienced professionals / mid management
 - skilled staff, clerical staff
 - skilled technical and academically qualified / junior management
 - semi-skilled and discretionary decision making
 - unskilled and defined decision making)
- Job reporting lines;
- Purpose of the job;
- Job accountability - functions and responsibilities;
- Requirements including education, experience, knowledge, skills, and competencies.

Generally, when an employer communicates about a job vacancy or advertises a post, it is to ensure that the employer attracts the most suitable candidate for the job. Generally, for a small business, the job vacancy can be communicated through a variety of channels such as social media, in the local newspaper, on community notice boards, with related businesses or relevant stakeholders. It is not a requirement to advertise in a newspaper, but it is important to ensure that the advertising or communication about a vacant post should not inadvertently exclude historically disadvantaged persons.

Care must be taken to ensure that the wording of job advertisements does not have the effect of stereotyping the type of candidate that is being sought or excluding potential applicants on either the listed grounds of unfair discrimination or on arbitrary grounds. For example, when writing the advertisement, the employer should not identify a particular discriminatory attribute such as, 'Jason's Burgers is looking full-time and part-time drivers. We are looking for energised, young and dynamic people.' In this example, use of the word 'young' may potentially exclude potential applicants on the ground of age. The advert should not specify that the applicant must be a specific age, gender, religion or race unless this is justifiable in terms of the job requirement. Job advertisements should place emphasis on competencies required for the job and should accurately reflect the inherent or essential requirements (i.e. the core functions) of the job.

APPLICATION FORMS

What type of job application form must an employer use?

Use of a job application form is optional. Where used it should focus on the requirements of the job and contain biographical information to provide an employer with an easy mechanism for evaluating applications. Information that can be included on a form is:

- Name;
- Age or Date of Birth;
- Citizenship or a job permit may be required for compliance with laws relating to the employment of foreign nationals;
- Race and gender may be required for purposes of promoting employment equity;
- Contact information;
- Previous positions held;
- Training and experience;
- Skills;
- Experience;
- Educational qualifications; and
- References.

What should an employer avoid placing in a job application form?

Generally, there is no hard and fast rule with regards to job application forms, but there is certain information that an employer should avoid placing in an application form, for example, an applicant's religion, marital status, the number of children or dependents, unless this is specifically required for the job (for example, when a particular Church is seeking the services of a Priest from a particular Religious denomination).

TESTING

When may an employer conduct psychometric testing?

Psychological or similar testing of an employee is prohibited according to section 8 of the Employment Equity Act, unless the test or assessment being used:

- has been scientifically shown to be valid and reliable;
- can be applied fairly to all employees;
- is not biased against any employee or group;
- has been certified by the Health Professions Council of South Africa, or any other body which may be authorised by law to certify those tests or assessments.

Generally, psychological testing can be used to assess whether a candidate's abilities match those required to perform the job provided that such testing or assessment complies with the EEA.

Is medical testing allowed?

Medical testing includes any test or inquiry to ascertain whether a job applicant or an employee has any medical condition. Employers must ensure that in conducting interviews they do not ask questions about the job applicants' medical condition or health unless this is related to the requirements of the job. If the employer makes such an enquiry it may result in an unfair discrimination claim if the applicant believes there is a link between the enquiry and him/her subsequently not getting the job.

Medical testing is prohibited, unless-

- Legislation permits or requires testing; or
- It is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employment benefits or the inherent requirements of a job.

By way of example, it may be permissible for applicant pilots to be assessed in order to ascertain whether they have the required standard of vision to perform the job.

It is important to highlight that contractual provisions that seek to introduce medical testing must comply with the law. An employer cannot rely on a job applicant's consent as a justification for medical testing especially if there is no apparent need or link to the nature of the job concerned.

According to section 7(2) of the EEA testing of an employee to determine HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court.

When may an employer conduct medical testing on a disabled job applicant?

In certain instances, in order to attempt to accommodate a person with a disability, an employer may make a job offer conditional on medical or functional testing. Testing must comply with the statutory requirements and should determine if the applicant is able to perform the essential functions of the job with or without reasonable accommodation or without there being a risk to the employee's health. An employer may test applicants with disabilities and not require all other applicants to undergo testing.

The employer may withdraw the job offer if the testing shows that:

- Accommodation requirements would create unjustifiable hardship; or

- The applicant is unable to perform the inherent requirements of the job; and
- There is an objective justification that relates to health and safety.

The employer must ensure that the tests conducted do not unfairly exclude people with disabilities and should not be prejudicial as to how they are applied, assessed, or interpreted.

SELECTION

Affirmative Action

All employers, even if not designated, are encouraged to implement affirmative action measures by employing persons that have been historically disadvantaged on the basis of race, gender or disability. In this regard, employers are encouraged to select a suitably qualified person that is historically disadvantaged, even if a competing candidate may have more experience or skills than the historically disadvantaged person.

Designated employers are those that employ in excess of 50 employees or whose business exceeds a certain turnover in terms of the Employment Equity Act. Designated employers are obliged to implement affirmative action measures in terms of the EEA.

How does an employer assess whether a prospective employee is suitably qualified?

A suitably qualified person has the necessary qualifications, skills and experience to perform the critical functions of the job. According to the section 20 (3) of the EEA a person may be suitably qualified for a job as a result of any one of, or any combination of that person's-

- Formal qualifications;
- Prior learning;
- Relevant experience; or
- Capacity to acquire, within a reasonable time, the ability to do the job.

The employer must review all the factors and determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

Factors to consider when setting out the core requirements of the job

An employer may differentiate between applicants for employment based on the inherent requirements of a job. An inherent requirement is one which is a permanent, essential element of the job, or an 'indispensable attribute' of the job.

Employers should avoid stereotyping or using proxies for the core requirements. For example, a job which requires heavy manual labour and physical strength should state so as part of the inherent requirements of the job, rather than specify a young male is required for the position.

INTERVIEWS

How should an employer conduct an interview in line with legislation?

It is recommended that an employer develop a standard interview questionnaire. This is a questionnaire prepared before the interview listing a set of questions that will be asked from each applicant interviewed to determine suitability for the job. The interview questionnaire should be based on the job description, particularly essential elements of the job and qualification, experience, and competency specifications.

What questions are likely to be discriminatory and should be avoided in an interview process?

There are questions that an employer should steer away from in an interview process. For example, the following list of questions are potentially discriminatory, and unless justified with reference to the core requirements of the job should be avoided-

- Are you pregnant or planning on having children?
- How will you manage this job if you have children?
- Which religion are you affiliated with?
- Aren't you too old or too young for such a post?
- What is your sexual orientation?
- Are you married?
- Are you HIV-positive?
- Which political party do you vote for?

REFERENCE AND BACKGROUND CHECKS

Is an employer permitted to conduct background checks?

Generally, an employer may conduct integrity checks, such as verifying the qualifications of an applicant and contacting references. Investigating whether an applicant has a criminal record may be done with the consent of the employee if this is relevant to the requirements of the job. In some instances, legislation or industry regulations may require that an employee should declare whether s/he has a criminal record.

MAKING AN OFFER OF EMPLOYMENT

What must an employer consider when making an offer of employment to similarly suited employees?

An employer may pay two employees different salaries as long as this differentiation is rational and not based on a discriminatory ground. The employer may pay employees differently based on fair criteria, including the following:

- the responsibility demanded of the work, including responsibility for people, finances and material;
- the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal; and

- physical, mental, and emotional effort required to perform the work.

The employer may also take into account, to the extent that it is relevant, the conditions under which work is performed, including the physical environment, psychological conditions, geographical location of the work, and time when the work is performed. In addition to the criteria specified above, any other factor indicating the value of the work may be taken into account in evaluating work, if the employer shows that the factor is relevant to assessing the value of the work. The assessment must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or on any arbitrary ground that is prohibited in terms of section 6(1) of the EEA.

What are the rational and fair grounds that the employer can rely on to pay employees differently?

The employer can pay employees differently if the difference is fair and rational and based on one or more grounds including, but not limited to:

- seniority or length of service, qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
- performance, quantity or quality of work;
- scarce skills;
- demotion as a result of organisational restructuring;
- where an individual is employed temporarily in a position for purposes of gaining experience or training;
or
- any other relevant factor.

The above factors need to be applied rationally. This means that the employer should not place undue weight on a single factor. For example, if a receptionist has twelve years' service and another has two years, it is not rational to pay one employee ten times as much as the other. The two receptionists should earn within the same pay range, allowing for one employee to be paid slightly higher than the other.

Note, an employer may justify the value assigned to an employee's work by reference to the classification of a relevant job in terms of an applicable collective agreement or sectoral determination made by the Minister of Employment and Labour in terms of section 55 of the Basic Conditions of Employment Act 75 of 1997.