




Issues in Recruitment and Initial Interviews

January 2011
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Recruitment and Initial Interviews



- 2 Aspects
- Discrimination
 - Misrepresentation

Anti Discrimination Act Qld



S.7

age	medical record
race	political opinion
gender	sexual orientation
religion	trade union activity
disability	family responsibilities
marital status	pregnancy or possibility thereof
criminal record	physical or intellectual impairment

Anti Discrimination Act Qld



S.124 Unnecessary information (1) A person must not ask another person, either orally or in writing, to supply information on which unlawful discrimination might be based.

(3) It is a defence to a proceeding for a contravention of subsection (1) if the respondent proves, on the balance of probabilities, that the information was reasonably required for a purpose that did not involve discrimination.

Example-- An employer would contravene the Act by asking applicants for all jobs whether they have any impairments, but may ask applicants for a job involving heavy lifting whether they have any physical condition that indicates they should not do that work.

Anti Discrimination Act Qld



ANTI-DISCRIMINATION ACT 1991 - SECT 10

10 Meaning of direct discrimination (1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.

Example-- R refuses to rent a flat to C because-- C is English and R doesn't like English people C's friend, B, is English and R doesn't like English people R believes that English people are unreliable tenants. In each case, R discriminates against C, whether or not R's belief about C's or B's nationality, or the characteristics of people of that nationality, is correct. (2) It is not necessary that the person who discriminates considers the treatment is less favourable.

(3) The person's motive for discriminating is irrelevant.

Example-- R refuses to employ C, who is Chinese, not because R dislikes Chinese people, but because R knows that C would be treated badly by other staff, some of whom are prejudiced against Asian people. R's conduct amounts to discrimination against C. (4) If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.

(5) In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant.

Anti Discrimination Act Qld



ANTI-DISCRIMINATION ACT 1991 - SECT 11

Meaning of indirect discrimination (1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term--

(a) with which a person with an attribute does not or is not able to comply; and (b) with which a higher proportion of people without the attribute comply or are able to comply; and (c) that is not reasonable. (2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example--

(a) the consequences of failure to comply with the term; and (b) the cost of alternative terms; and (c) the financial circumstances of the person who imposes, or proposes to impose, the term. (3) It is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination.

(4) In this section-- term includes condition, requirement or practice, whether or not written.

Example 1-- An employer decides to employ people who are over 190cm tall, although height is not pertinent to effective performance of the work. This disadvantages women and people of Asian origin, as there are more men of non-Asian origin who can comply. The discrimination is unlawful because the height requirement is unreasonable, there being no genuine occupational reason to justify it. Example 2-- An employer requires employees to wear a uniform, including a cap, for appearance reasons, not for hygiene or safety reasons. The requirement is not directly discriminatory, but it has a discriminatory effect against people who are required by religious or cultural beliefs to wear particular headaddress.

Anti Discrimination Act Qld



S.209 Orders the tribunal may make if complaint is proven include:

- Damages or compensation
- Private or public apology
- Implementation of programs eliminating discrimination
- Employ, re-instate ,move to a specified role or promote a person

“damage”

in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.

Fair Work Act



Adverse Action claims

- may arise from the pre-employment recruitment process
- not limited to actual employment relationship.

By the prospective [employer](#) if :

- (a) refuses to employ the prospective [employee](#); or
- (b) discriminates against the prospective [employee](#) in the terms or conditions on which the prospective [employer](#) offers to employ the prospective [employee](#).

Disability Discrimination Act(CWTH)



DISABILITY DISCRIMINATION ACT 1992 - SECT 15

Discrimination in employment

- (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to [discriminate](#) against a person on the ground of the other person's [disability](#):
- (a) in the arrangements made for the purpose of determining who should be offered [employment](#); or
 - (b) in determining who should be offered [employment](#); or
 - (c) in the terms or conditions on which [employment](#) is offered.

Guides to Legal Aspects of Recruitment



Rationale

The Anti Discrimination legislative framework for recruitment is designed to ensure that people are selected for positions based on their merit, and capacity and suitability for a particular role and are not excluded for unlawful reasons.

See

- ADCQ Website for a Guide to Recruitment
- Interviewing a person with a Disability? See:
<http://jobaccess.gov.au/Employers/Recruiting>

Legal Aspects of Recruitment



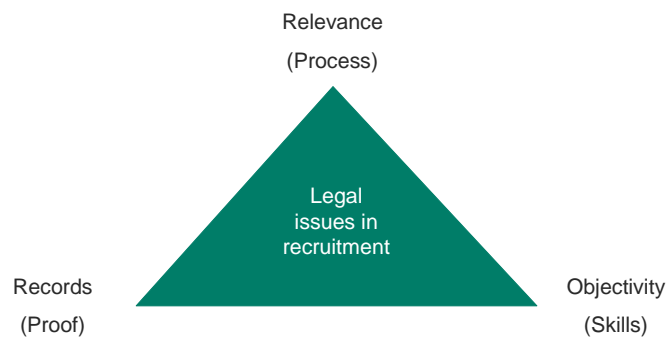
What discussion, questions and examinations regarding a person's disability and its effects may be legitimate, necessary and desirable in many cases?

- to determine whether a person can perform inherent job requirements
- to identify any reasonable adjustments required, in selection for employment or in the performance of work
- to establish rights and obligations regarding superannuation, workers' compensation and other insurance

Legal Aspects of Recruitment



Three key issues...



Legal Aspects of Recruitment



Relevance

objective methodology

Objectivity

the *skill* of the interviewer

Records

a critical legal requirement

Costs of Legal Ramifications



In 2010 4.6% of discrimination claims in QLD were related to pre-work-recruitment decisions and the recruitment process

In QLD, successful discrimination cases can attract awards of up to \$40,000. However, if a discrimination claim is brought under Federal laws, there is no cap on amounts that may be awarded.

Impacts



Sourcing

- Risk Identification
- Using processes that mitigate the risk

Interview Processes

- Risk Identification
- Legal precedent
- Using processes that mitigate the risk

Impacts



Making a selection decision

- Risk Identification – “objectivity”
- Use processes that mitigate the risk – use of a documented scale and accredited rating systems.

Behavioural Reference Checks

- Risk Identification – exercise ‘duty of care’
- Use processes that mitigate the risk

Case Studies



1. Gardener v Norcott [2004] QADT 39 (7 December 2004)

Use of the term "young team" in an advertisement was sufficient to support a finding of age discrimination. A 46 year old chef responded to the ad and advised the director of the company that he was happy to work with young people. The director said she would call him back, but did not do so. The chef was awarded \$2,500 in damages!

2. Hobbs v Anglo Coal (Moranbah North Management) Pty Ltd v Hendry [2004] QADT 28 (2 September 2004)

A coal miner with a long history of unfitness for mine work applied for a position of contract production worker. The HR Manager refused to allow him to start work as the result of his previous history of unfitness. The Tribunal found that the Company had not properly assessed his ability to perform the genuine occupational requirements of the position and awarded \$16,000 plus interest to compensate him for loss of the opportunity to work in the mine.

3. Blair v Goldpath & Callinan 2010 QCAT (27 September 2010)

Applicant for warehouse/storeman was asked in interview :do you have children, date of birth, general health ,sick days.S124-Unnecessary information as to parental status and age contravened. Compensation declined, but apology ordered.

Misrepresentation



Competition and Consumer Act (formerly the TPA)

- Schedule 2-the Australian Consumer Law
- S31.Misleading conduct relating to employment

A [person](#) must not, in relation to employment that is to be, or may be, offered by the [person](#) or by another [person](#), engage in conduct that is liable to mislead [persons](#) seeking the employment as to:

(a) the availability, nature, terms or conditions of the employment; or

(b) any other matter relating to the employment.

Note: A pecuniary penalty may be imposed for a [contravention](#) of this section.

Misrepresentation



S345 Fair Work Act

- 1) A person must not knowingly or recklessly make a false or misleading representation about:
 - (a) the [workplace rights](#) of another person; or
 - (b) the exercise, or the effect of the exercise, of a [workplace right](#) by another person.

Note: This subsection is a [civil remedy provision](#) (see Part 4-1).

(2) Subsection (1) does not apply if the person to whom the representation is [made](#) would not be expected to rely on it.

- Applies to false and misleading statements to prospective employees also.

Misrepresentation



Who is potentially liable?

“Person”-may include

- Recruitment agent
- Interviewer
- Author of advertisement
- Employer

- Persons “aiding and abetting” a corporation in engaging in misleading and deceptive conduct.

Misrepresentation



Common Misrepresentation

- Remuneration and benefits
- Career prospects
- Security
- Term of appointment
- Duties and responsibilities
- Seniority
- Strength of the business

Misrepresentation



Process

Carefully consider:

- the role requirements
- The prospects for career advancement
- Remuneration scales
- The current position of the Applicant

Be Realistic

Don't

- Glorify the role
- Talk up rewards to an unachievable level
- Withhold or omit critical information

Misrepresentation



Cases

- O'Neil v MBF
- Robertson v Knott Investments
- Fraser Kirk v McInnes and Ors (the David Jones case)

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