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Before you start

Today you will be learning about your pre-employment rights – the rights you have before you start a job. The list of topics is as follows:

- *Discrimination*: Where race, gender or disabilities is the reason that you do not get the job; where selection procedures are not just unfair but also unlawful
- *References*: What rights you have when a prospective employer asks you for a reference; what you can do when something is said about you that is misleading or untrue
- *Medical reports*: What rights you have when an offer of employment is conditional on a satisfactory report from a doctor; the right you have to see the report and challenge its contents
- *Criminal convictions*: How far an employer can go into your background; where you stand if you think some past misdemeanour has put paid to your chances
- *Prying questions*: What rights you have when prospective employers want to probe into your private life
- *Misrepresentation by employers*: The duty employers have to not give you false information about a job
- *Offers that are withdrawn*: Where you stand if a job offer is cancelled

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Discrimination

In deciding who gets the job and who does not, it is unlawful for employers to discriminate against applicants because they are the wrong gender or race or because of their disabilities. There are a few exceptions to this rule. For example, a film company when casting for a part can stipulate actors of a certain sex and/or ethnic origin that is consistent with the character they are going to play.

These so-called genuine occupational qualifications are, however, rare and are unlikely to be found in most normal mainstream employment.

Race

Race discrimination extends to colour, race, nationality or national or ethnic origin. This means it is just as taboo to turn down applicants because they are Welsh as it is to say no to them because they are black or they are Eskimos.

Sex

Sex discrimination includes discrimination on grounds of marital status as well as gender. So, for example, it is unlawful to give preference to a single person because the job involves long stays away from home, i.e. married people might have more problems adjusting. Refusing employment to a woman because she is pregnant is quite clearly sex discrimination (the less favourable treatment is linked directly to her sex).

Disabilities

Turning an applicant down because he or she has a disability is also unlawful unless the employer considers first whether it would be possible to make an adjustment to the job. For

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instance, if the job involves working in an environment where fumes are present and the applicant has a chest condition, the employer could look at how practical it is to provide a face mask.

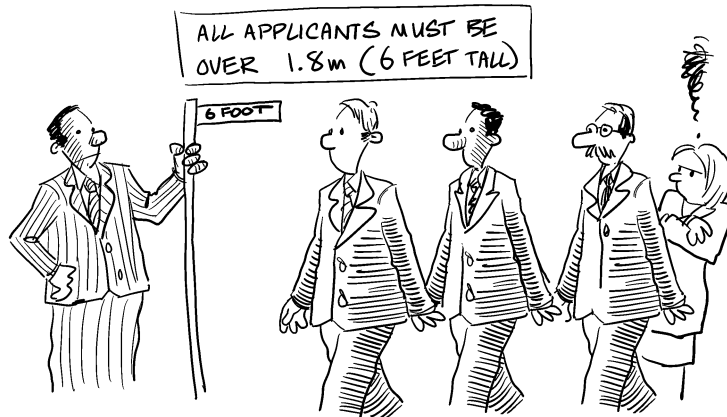
Disability has a wider meaning under the 1995 Disability Discrimination Act than it did previously. A disability is defined as any physical or mental impairment that has a 'substantial and long term adverse effect on [the] ability to carry out normal day-to-day activities'. The bottom line here is that any employer who turns you down for a medical reason is potentially treading on thin ice.

Direct and indirect discrimination

Race and sex discrimination are broken down into two types – *direct* and *indirect*.

- At the selection stage, *direct discrimination* arises when interview lists and short-lists are drawn up or job offers are made to exclude candidates of a particular sex or racial group
- *Indirect discrimination* is rather more subtle. It can happen, for example, when a selection criteria is used which makes it harder for members of a particular sex or racial group to qualify

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References

A common enough event when you are applying for a job is to be asked to give the name of a referee. Having observed the usual formalities of checking with the referee first to see if he or she is happy to act on your behalf, you are then usually left in the dark as to what actually goes in the reference. If you do not get the job, your thoughts naturally turn to the reference and whether the referee said something about you that served to put your prospective new employer off.

So what are your rights when it comes to references?

Exercising care

In most cases the reference in question will be from a previous employer, for example, your boss in your last or most recent job. Incumbent on such a person is a duty to take reasonable care over what goes in the reference; Notably that:

- Any information is accurate
- Any opinions stated are based on accurate facts

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What this means in practice is that if you did not get the job because of a bad reference and if the information supplied in the reference was untrue or misleading, then you could have a case for claiming damages. Your ex-employer did not exercise care and you have a right to expect this.

Libel

The law also protects you if anything said in a reference is libellous, i.e. if your ex-employer really oversteps the mark and makes a statement about you that is an unjustified slur on your character.

Because of legal challenges, employers are getting more and more wary about what they put in written references or they resort to only giving references over the phone. Does the law give you any protection against false, misleading or slanderous verbal references? The answer is yes. The difficulty is, of course, proving what has been said.

The right to see a reference

The first challenge you face when taking issue with an unfavourable reference is getting sight of it so that you can check what it says. Some employers may be prepared to show you the references they have received but the majority – not wishing to get drawn into arguments – will probably say no. Is there anything you can do to force an employer to show you a reference? The answer is yes. If an unfavourable reference is given as the reason you are not offered a job and

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you suspect it contains false or misleading information, you can go to a court and ask for the reference to be disclosed.

Warning

Before exercising this right, bear in mind that a referee is perfectly at liberty to give a fair and well-founded opinion of you even though it may not be to your liking. In other words, do not go down this route simply because of sour grapes. Reserve action for those who, out of carelessness or maliciousness, have scuppered your chances of getting a job you deserve.

Medical reports

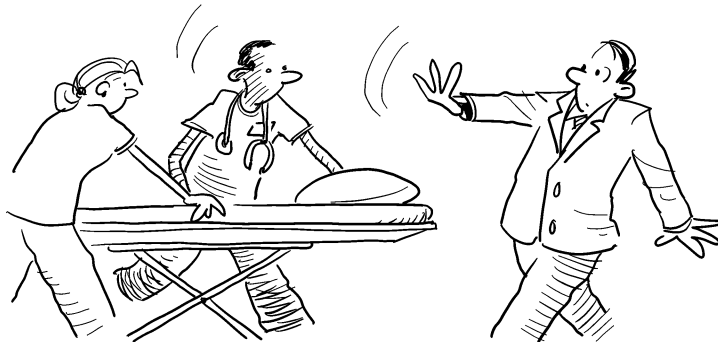
A job could be offered to you subject to a medical report and in this instance the report could be one supplied by your doctor or by a company-nominated practitioner. What are your rights when it comes to medical reports? Do you have the rights to:

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- See what the medical report says?
- Challenge it if you feel it is misleading or wrong?

The right to say no

Of course it could be that you object to a medical report as a matter of principle. It has to be said that a report can only be submitted to an employer with your written consent. However, withholding consent could create an impasse as far as moving your application forward is concerned. This is an avenue you should only go down after careful consideration of the likely repercussions.



The right to access

You have the right to see any medical report before it is shown to an employer or alternatively you can ask to see any report that has been submitted in the last 6 months. The latter is useful if, for example, you chose not to see the report before it was submitted but you subsequently found yourself turned down for the job because the report was unsatisfactory. You may be intrigued to discover what the report had to say and you can exercise your right by making a request to the doctor who supplied it.

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Challenging a medical report

You can challenge a medical report if you feel that it is misleading or wrong and you can do this by writing to the doctor who supplied the report, giving your reasons. The doctor then has two choices:

- If the doctor accepts what you are saying he or she can amend the report
- If the doctor disagrees with you then he or she can send in the report in its original form and you have the right to attach a statement saying why you consider the report to be misleading or wrong.

You have a further right in these situations and that is to refuse permission for the report to be passed on. Again, however, this is a case of first considering the likely repercussions.

Criminal convictions

When you apply for a job it is normal practice to be asked to fill in an application form on which you may be asked to declare any criminal convictions. Equally the question 'Do you have any criminal convictions?' may crop up during the course of an interview. So where do you stand when employers seek to make enquiries into the murkier parts of your past? How far can they pry and what rights do you have?

'Spent' convictions

You do not have to disclose any conviction that is 'spent'. This term is used by the Rehabilitation of Offenders Act 1974 to define the point at which your debt to society is repaid and the slate is wiped clean. 'Rehabilitation periods' as they are

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known, depend on the type of sentence received. For example, the rehabilitation period for a fine is 5 years.

If a prospective employer asks you to declare any convictions and if your convictions are spent then the proper answer to give is 'none'. If a spent conviction subsequently comes to light (i.e. during the course of your employment) the law continues to protect you. For example, if an employer dismisses you for concealing a conviction that is spent, the dismissal would automatically be unfair and you could claim compensation.

'Prying' questions

What other protection does the law afford you when it comes to questions at interviews or on application forms – questions that do not seem to have any bearing on your ability to do the job? What, for example, if a prospective employer asks you intimate questions about your sex life or to disclose information about your political views?

Sensitive personal data

There are certain categories of information which are defined as 'sensitive' under the 1998 Data Protection Act. These are:

- Information about racial or ethnic origins
- Political views
- Religious beliefs
- Trade union affiliations
- Medical information
- Sex life and sexual orientation

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- Involvement in crime – including any current criminal proceedings

If you are asked to disclose sensitive personal information you have a right to know:

- For what purpose the information is required
- Who will have access to it

It is an employer's duty to ensure that sensitive information is not held on file for any longer than is absolutely necessary.

Some lines of questioning are quite clearly unacceptable. For instance, an employer who asks a female applicant repeat questions about whether she has plans to start a family, is signalling an intention to discriminate on grounds of sex. The answer? If you are turned down for the job, seek redress under the Sex Discrimination Act of 1975.

Unless properly justified, prying questions can also be in breach of your rights under Article 8 of the European Convention on Human Rights – the right to respect the privacy of your home and family life. More of this on Wednesday.

Misrepresentation by employers

Next on the list of pre-employment rights is the right to be given fair and accurate information about the job you are applying for. Where do you stand, for example, if an employer feeds you with false facts at an interview or paints a rose-coloured picture of the job? Furthermore, what if promises are made to you that do not materialise, such as promises to increase your pay after a probationary period or

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to include you in a bonus plan? Worse still, what if you leave a perfectly good job to take up an offer that has been misrepresented to you?

The law

The Misrepresentation Act 1967 gives you the right to claim damages for any losses you sustain because the terms of a contract have been misrepresented to you and this includes the terms of a contract of employment. What this highlights, of course, is the all-important rule when it comes to job offers – get as much in writing as you possibly can. This especially applies to anything that has a material bearing on your decision to take the job – such as a golden hello or your participation in a share option scheme or a seat on the board at some point in the future. With the terms set out in black and white, there is less scope for argument over whether the job was misrepresented to you or not.

Offers that are withdrawn

You are all set to start in a new job when a letter arrives in the post telling you that everything has changed and that the job is no longer available. Where do you go from here? Is it just a case of gritting your teeth or do you have any rights that you can fall back on?

The contractual position

Tomorrow we will take a look at contracts of employment and one interesting fact will emerge: a contract is formed once an offer of employment is accepted. This means that, when an offer you have accepted is withdrawn, the employer is put in the position of having to terminate the contract –

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meaning, in turn, that they have to give you notice. Where, for example, the contract provides for 3 months' notice and you are told that the job is no longer available, then the monetary equivalent of 3 months' notice is owed to you.

Summary

Today we have considered the rights you have when you are applying for a job and going through the various stages of selection. You have learnt that:

- Turning you down because of your race, gender or disabilities is illegal
- Making it harder for you to meet selection criteria for the same reasons is also illegal
- You have recourse to justice if an inaccurate, misleading or libellous reference is the reason that you do not get the job
- You have the right to see medical reports and take issue with what they say
- You have the right to draw the veil over criminal offences that date from a long time ago
- At interviews, you have a right to know the reasons for questions about your private life
- You can retaliate when employers break their promises or do not give you the full facts about a job
- You have the right to compensation if you accept an offer then find that it is withdrawn