

## **Fair Discrimination for Profit**

### **An EBS Management Guide**

***Barry Rees, EBS Director of Human Resources Services, highlights how you can ensure your people policies help you focus on the real decision making areas – those that will add value to your bottom line.***

All employers are subject to a plethora of anti-discrimination legislation on sex, race, disability, sexual orientation, religion or belief, age, part-time workers, fixed-term workers ..... the list goes on. There are currently 29 separate pieces of legislation that impact employers in mainland UK (see Annex A for a list).

The penalties for getting things wrong can be considerable – both in costs awarded against the company and in personal grief for all parties involved.

At the heart of all of these pieces of legislation is the premise that you should “not treat an individual less favourably” because of the subject of that piece of legislation.

However, ‘discrimination’ is not always bad. Dictionary definitions of ‘discrimination includes:

- to be able to see the difference between two things or people:
- the quality or power of finely distinguishing

In business we all have to make decisions every day, and in doing so we use our judgement to ‘discriminate’ between the issues – and our businesses thrive when we make the right decision, and suffer when we get it wrong.

#### **Fair Discrimination**

When you make a decision based on objectively justifiable criteria then you are using a ‘fair discrimination’. As an example, when you decide to employ a delivery driver it would be perfectly fair to require them to have a current driving licence, and there could be no unfair discrimination in turning down a candidate that did not have a driving licence.

However, turning someone down because they were female, black, gay or a Buddhist, would be unfair, as none of those attributes have any impact on their ability to drive (nor would using the stereotypical view that women are worst drivers than men!).

The only criteria you should be interested in, in relation to their driving, is can they do it!

The discrimination definition of ‘finely distinguishing’ might enable you to take this further by specifying further, more detailed criteria:

- Have they got points on their licence for speeding, driving through red lights etc?
- Have they undertaken any ‘advanced driver training’?
- Have they got experience of delivery driving (as opposed to domestic use of a vehicle)?
- Does their licence enable them to drive HGV lorries?

## Establishing Decision Criteria

Rather As we can see from the above, the key issue to making fair discrimination is to ensure that the decision criteria you use are actually related to the decision you are about to make.

This means that you have to make some preparations about the decision you are going to make.

If we stick with our delivery driver decision, you would need to establish what the employee would actually be required to do. Many companies will put this down in writing in the form of a Job Description:

<b>Delivery Driver Job Description</b>	
Experienced delivery driver on the national team.	
You will be responsible for the safe and efficient operation of a Company vehicle and assist in providing an effective delivery and collection service to the customers or branches as necessary.	
You will make sure that the vehicle is loaded correctly and the supporting paperwork is carried out.	
Full clean driving licence required.	
Responsible for all delivery paperwork ensuring that proof of delivery is obtained and then taken back to transport office.	

If we consider the above, basic, job description we can start to define the decision criteria for each point - setting out the type of information that the candidate would need to satisfy us of in order to be offered the job:

Job Description Statement	Decision Criteria
Experienced delivery driver on the national team	<ul style="list-style-type: none"> <li>• What level of experience is required?               <ul style="list-style-type: none"> <li>○ Car / Van / HGV etc</li> <li>○ Tachograph knowledge required?</li> </ul> </li> <li>• What type of work experience?               <ul style="list-style-type: none"> <li>○ Multi-drop / Single drop</li> <li>○ Similar type of customers</li> </ul> </li> <li>• What geographical coverage would be normal (as part of the 'National Team')?               <ul style="list-style-type: none"> <li>○ Overnight stops?</li> <li>○ Securing loads etc</li> </ul> </li> </ul>
You will be responsible for the safe and efficient operation of a Company vehicle and assist in providing an effective delivery and collection service to the customers or branches as necessary.	<ul style="list-style-type: none"> <li>• Used to driving same vehicle, or driving whatever was available.</li> <li>• Can explain what daily checks would use to ensure vehicle was road worthy</li> <li>• What specific interaction with the customers or branch staff is actually involved</li> </ul>
You will make sure that the vehicle is loaded correctly.	<ul style="list-style-type: none"> <li>• Manual Handling training</li> <li>• Use of route plan packing (last drop – first loaded)</li> <li>• Use of Fork Lift?               <ul style="list-style-type: none"> <li>○ Had training / medical?</li> </ul> </li> </ul>
Full clean driving licence required.	<ul style="list-style-type: none"> <li>• Licence for all types of company vehicle</li> <li>• Are any endorsements acceptable</li> </ul>
Responsible for all delivery paperwork ensuring that proof of delivery is obtained and then taken back to transport office.	<ul style="list-style-type: none"> <li>• Experience of operating similar process before</li> <li>• Evidence of dealing with Customer Queries</li> </ul>

Having agreed what the decision criteria are, you may want to 'weight' them – as some criteria may have more importance than others. So having a driving licence would be a high priority criterion, whilst limited experience of delivering to one part of the UK would be a lower one.

## Collating Decision Information

Having agreed the decision criteria you can then collate the relevant information to enable a decision to be made. This can often be done in stages.

In our Delivery Driver example, your first collation / decisions might be made from reviewing CV's. By using the decision criteria like a check list you can quickly sort through to see how individuals compare. You will typically end up with three piles:

- Those that appear to meet all the criteria – these are likely to form your pool of interview candidates
- Those that appear to meet all of your priority criteria, but may have shortcomings on some of the lesser criteria – these would be your 'reserve pool'
- Those that appear to not meet some or all of the priority criteria – these can be rejected.

When you move onto the interview stage you begin to collate more detailed information – and have the opportunity to probe candidates in more detail to satisfy yourself that their application matches what you see before you.

## Documentation

By documenting your decision criteria, and how candidates match them, you are also building a 'defence trail' against any claim of unfair discrimination. You would be able to show the objective decision process that you made – against the needs of the job.

## Making the Final Decision

In a perfect world by following all of the above you would be left with just one great candidate – and you would offer them the job.

The reality is often different, either you have to compromise, because no candidate matched all of the criteria, or you are left with a small group of individuals that could do the job – and you need to pick one of them.

In the former example, where no candidate matched all of the criteria, you have to distinguish between the priority criteria and the lesser criteria, and decide what you would have to do to bring each candidate up to the required level (assuming that you do not just look for more candidates). Such 'improvement' or 'training' requirements may in themselves provide you with new decision criteria that you can make your judgement on. So if one person needed manual handling training, which would cost £300 and another had to be trained to use a fork-lift, at a cost of £2,000, your new decision criterion might be 'cost'.

Where you are left with a small group of candidates that all appear to be suitable it is really important that you do not un-do all of your good work and pick an irrelevant criteria to make the final decision (like they support Chelsea too!)

Look for other criteria that differentiate between them – that are job related. An example may be how far they live from the depot – if available driving time will be an issue then this could be a valuable criterion.

Another criterion might be how much notice they have to give their current employer – if they are available straight away or in one week, that may be more attract to you than someone who has to give a month's notice.

## Review Your Policies

'Fair Discrimination' will not just happen on its own, you will need to review your policies to ensure that all decisions are being made on sound business reasons – not unsound, unfair, ones.

Unwritten processes or practices are often the most easily abused – and leave your business in greater risk of an expensive tribunal claim. For key business decisions you should ensure you have at least a framework policy or procedure that lets everyone know what is expected of them – and what types of criteria are no acceptable to use.

## **Business Benefits**

By focussing on the key business decisions, in a business focussed way, you will make better decisions that will improve your bottom line. It can also enable your workforce to see that things are done fairly – and that can increase motivation and reduce retention – which also has a positive impact on your profits.

*If you would like to discuss any of the information contained in this guide or need assistance in creating business led decision criteria, please feel free to contact Barry Rees on 01844 211084 or [barry.rees@ebs-hr.co.uk](mailto:barry.rees@ebs-hr.co.uk).*

## Annex A

There are numerous relevant statutes, statutory instruments and EU directives which are relevant to discrimination. These are set out under separate headings below:

### Main Statutes

- Equal Pay Act 1970
- Sex Discrimination Act 1975
- Race Relations Act 1976 - as amended by the Race Relations (Amendment) Act 2000
- Disability Discrimination Act 1995
- Equality Act 2006

### Statutory Instruments

#### *Age Discrimination*

- The Employment Equality (Age) Regulations 2006 (SI 2006/1031)

#### *Disability Discrimination*

- The Disability Discrimination (Meaning of Disability) Regulations 1996 (SI 1996/1455)
- The Disability Discrimination (Blind and Partially Sighted Persons) Regulations 2003 (SI 2003/712)
- The Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673)

#### *Equal Pay*

- The Equal Pay (Question and Replies) Order 2003 (SI 2003/722)
- The Equal Pay Act 1970 (Amendment) Regulations 2003 (SI 2003/1656)
- The Occupational Pension Schemes (Equal Treatment) (Amendment) Regulations 2005 (SI 2005/1923)

#### *Race Discrimination*

- The Race Relations Act 1976 (Statutory Duties) Order 2001 (SI 2001/3458)
- The Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626)

#### *Religious Discrimination*

- The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660)
- The Employment Equality (Religion or Belief) (Amendment) Regulations 2003 (SI 2003/2828)

#### *Sex Discrimination*

- The Sex Discrimination (Question and Replies) Order 1975 (SI 1975/2048)
- The Sex Discrimination Act 1975 (Amendment) Regulations 2003 (SI 2003/1657)
- The Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102)

### ***Sexual Orientation Discrimination***

- The Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661)
- The Employment Equality (Sexual Orientation) Regulations (Amendment) Regulations (SI 2003/2827)

### **Additional statutes and statutory instruments dealing with discrimination**

- The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)
- The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002(SI 2002/2034)
- Employment Rights Act 1996 (sections relating to maternity and dependant carer leave)
- Race Relations (Amendment) Act 2000

### ***European Directives***

- Equal Treatment Framework Directive (2000/78/EC)
- Equal Treatment Amendment Directive (2002/73/EC)
- Race Directive (2000/43/EC)
- Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services (2004/113/EC)