

Brachers Bitesize

# Succession planning, promotions and pitfalls

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Presented by:

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**Welcome**

# Presenters slide



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Provides employment law and HR advice for a wide variety of clients.

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Specialist Employment Lawyer for over 20 years.

Acts mainly for employers across a range of industries.

Colin was recently named as a 'Recommended Lawyer' in the Legal 500 2021 directory.

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# Poll 1

Do you have a policy governing internal promotions and appointments (career development)?



# Poll 2

Do you open all internal job opportunities to all employees?



# Key Issues

# Key Scenarios

- Succession Planning:
  - Can I appoint my preferred internal candidate without opening up the role to anyone else?
  - Can I appoint my preferred external candidate without opening up the role to anyone else?
  - Can I allow applicants but choose who can be considered for a vacant role?
  - How transparent/fair does a competitive process have to be?

# Key Scenarios

- Promotions and Job Changes:
  - Temporary vs permanent
  - Acting up
  - No going back?





# The Law

# The Law

- Statutory Laws
- Discrimination Law
- Contract Law
- Special Cases

# Statutory Laws



# Statutory Laws

- Very little (other than discrimination):
  - Equality Act 2010
  - Agency Worker Regulations 2010
  - Maternity and Parental Leave Regulations 1999
  - Employment Rights Act 1996 (redundancy cases)
- No clear specific statutory laws on general internal vacancies and opportunities

# Discrimination Laws

Equality Act 2010 Code of Practice

## Employment Statutory Code of Practice

# Discrimination Law

- Equality Act 2010
- EHRC – Code of Practice – Employment

# Discrimination Law

## 39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

# Discrimination Law

## 39 Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.



# Discrimination Law

39(3) An employer (A) must **not victimise** a person (B)—

- (a) in the arrangements A makes for deciding to whom to offer employment;
- (b) as to the terms on which A offers B employment;
- (c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

- (a) as to B's terms of employment;
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

| Protected Characteristic   | Direct | Direct by Association | Indirect | Harassment | Victimisation | Failure to make reasonable adjustments | Discrimination Arising from .... |
|----------------------------|--------|-----------------------|----------|------------|---------------|--|----------------------------------|
| Age                        | ✓      | ✓                     | ✓        | ✓          | ✓             |  |                                  |
| Disability                 | ✓      | ✓                     | ✓        | ✓          | ✓             | ✓                                      | ✓                                |
| Gender Reassignment        | ✓      | ✓                     | ✓        | ✓          | ✓             |  |                                  |
| Marriage/Civil Partnership | ✓      |                       | ✓        |            | ✓             |  |                                  |
| Race                       | ✓      | ✓                     | ✓        | ✓          | ✓             |  |                                  |
| Religion or Belief         | ✓      | ✓                     | ✓        | ✓          | ✓             |  |                                  |
| Sex                        | ✓      | ✓                     | ✓        | ✓          | ✓             |  |                                  |
| Sexual Orientation         | ✓      | ✓                     | ✓        | ✓          | ✓             |  |                                  |
| Pregnancy & Maternity      | ✓      |                       |          |            | ✓             |  |                                  |

# Discrimination Law

- Four general types:
  - Direct
  - Indirect
  - Harassment
  - Victimisation (retaliation)
- Two disability specific types in addition:
  - Arising from the consequences of a disability
  - Failure to make reasonable adjustments

# Direct Discrimination

- This applies where:
  - A person (A)
  - discriminates against another (B)
  - if,
  - because of a protected characteristic,
  - A treats B less favourably than A treats or would treat others.

# Direct Discrimination

- **On a comparison of cases for the purposes of direct discrimination there must be no material difference between the circumstances relating to each case.**
- You cannot justify this type of discrimination save in age discrimination cases.

# Indirect Discrimination

- A person (A)
- discriminates against another (B)
- if
- A applies to B a provision, criterion or practice
- which is discriminatory
- in relation to a relevant protected characteristic of B's.

# Indirect Discrimination

- A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:
  - A applies, or would apply, it to persons with whom B does not share the characteristic, (“Equal Application”)
  - **it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (“Group Disadvantage”)**
  - **it puts, or would put, B at that disadvantage, and (“Individual Disadvantage”)**
  - **A cannot show it to be a proportionate means of achieving a legitimate aim. (“Justification”)**

# Indirect Discrimination

- Legitimate Aim
  - Cannot of itself be discriminatory
  - Quality, performance etc.
- Proportionality
  - Balancing exercise
  - “appropriate and necessary”
  - Does not have to be the only possible way of achieving the legitimate aim, it is sufficient it could not be achieved by less discriminatory means.



# Victimisation

- A person (A) victimises another person (B) if A subjects B to a detriment because:
  - B does a protected act, or
  - A believes that B has done, or may do, a protected act.

# Victimisation

- Each of the following is a protected act:
  - bringing proceedings under the Equality Act 2010;
  - giving evidence or information in connection with proceedings under the Equality Act 2010;
  - doing any other thing for the purposes of or in connection with the Equality Act 2010;
  - making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010.
- Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- But being incorrect is not the same thing as bad faith.

# Discrimination

EHRC Code of Practice:

## Promotion and transfer

17.82

Issues and considerations that arise on recruitment (see Chapter 16) can arise again in respect of promoting or transferring existing workers to new roles. It is unlawful for employers to discriminate against, victimise or harass workers in the way they make opportunities for promotion or transfer available or by refusing or deliberately failing to make them available. An employer may need to make reasonable adjustments to the promotion or transfer process to ensure that disabled workers are not substantially disadvantaged by the process for promotion or transfer or by the way the process is applied.

# Discrimination

## EHRC Code of Practice:

17.83

Failure to inform workers of opportunities for promotion or transfer may be direct or indirect discrimination. To avoid discrimination, employers are advised to advertise all promotion and transfer opportunities widely throughout the organisation. This includes development or deputising opportunities or secondments that could lead to permanent promotion.

- “advised” not obliged.
- “widely”

# Discrimination

## EHRC Code of Practice:

17.84

If an employer has an equal opportunities policy and/or recruitment policy and procedures, it would be good practice to ensure that these policies are followed when internal promotions or transfers are taking place. This can help ensure that that selection is based strictly on demonstrable merit. Unless a temporary promotion is absolutely necessary, employers should avoid bypassing the procedures they have adopted for recruiting other staff.

# Discrimination

## EHRC Code of Practice:

17.85

Employers should consider whether it is really necessary to restrict applications for promotion and other development opportunities to staff at a particular grade or level. This restriction would operate as a provision, criterion or practice and, unless it can be objectively justified, could indirectly discriminate by putting workers sharing a protected characteristic at a particular disadvantage.

# Discrimination

## EHRC Code of Practice:

17.86

Employers must also ensure that women on maternity leave are informed of any jobs that become available and must enable them to apply if they wish to do so. Failure to do so may be unfavourable treatment, and thus could amount to discrimination because of pregnancy and maternity (see also Chapter 8).

# Discrimination

## EHRC Code of Practice:

17.87

Arrangements for promoting workers or arranging transfers must not discriminate because of disability – either in the practical arrangements relating to selection for promotion or transfer, or in the arrangements for the job itself. It is also important for employers to consider whether there are any reasonable adjustments that should be made in relation to promotion or transfer.



# Discrimination

## EHRC Code of Practice:

17.88

Opportunities for promotion and transfer should be made available to all workers regardless of age. Different treatment because of age is only lawful if it can be objectively justified as a proportionate means of achieving a legitimate aim (see paragraphs 3.36 to 3.41).

# Discrimination

## EHRC Code of Practice:

### 17.89

It would be good practice for employers to build the following guidelines into any policies and procedures they may have relating to promotion and career development:

- If posts are advertised internally and externally, the same selection procedures and criteria should apply to all candidates.
- If appropriate – especially with larger employers – selection decisions based on performance assessments should be endorsed by the organisation's human resources department.

### 17.90

Employers should not make assumptions about the suitability of existing workers for promotion or transfer.

# Contract Law



# Contract Law

- Express Terms:
  - Rare to see express commitments in a contract on promotion or vacancies
  - Promotions and vacancies policy?
- Implied Terms

# Employer Implied Key Duties

- Duty to pay wages
- Duty to indemnify
- Duty to provide work
- Duty to give reasonable notice
- Health and safety duties
- Duty provide a suitable working environment
- Duty to provide reasonable support
- Duty to redress grievances

# Employer Implied Key Duties

- Duty not to act capriciously in relation to pay
- Duty to advise employees of rights and benefits
- Duty to give references
- Duty of Mutual Trust and Confidence

# Employer Implied Key Duties

Malik and another v Bank Of Credit & Commerce International SA 1998

*"The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"*

# Employer Implied Key Duties

- Mutual duty (rarely used against employees)
- Breach is repudiatory
- Malice not necessary
- Judged objectively
- Not a good faith duty (innocent mistakes can breach)



# Employer Implied Key Duties

- No clearly established position on internal vacancies or promotions.
- But feasible to see cases where the process adopted could be argued to breach mutual trust and confidence.

# Example

- Example:
  - A, B and C are all Sales Executives.
  - A new opportunity of Senior Sales Executive is available.
  - A is given the role as they are considered by the Sales Director to be the best person for the role, this is supported by their sales figures over several years.

# Example

- Example:
  - A, B and C are all Sales Executives.
  - A new opportunity of Senior Sales Executive is available.
  - A is given the role as they are considered by the Sales Director to be the best person for the role, this is not supported by their sales figures over several years as compared to B and C and not other clear reasonable basis is present.

# Example

- Example:
  - A, B and C are all Sales Executives.
  - A new opportunity of Senior Sales Executive is available.
  - A, B and C apply.
  - A competitive interview process is conducted but the Director of Sales tips of C about the questions to be asked. C get the job.

# Special Cases



# Agency Workers

- Agency Workers Regulations 2010
- Right to be notified of any vacancies at the hirer.
- Kocur v Angard Staffing Solution Ltd 2022 – Court of Appeal:
  - The Claimant was employed by Angard and supplied to Royal Mail Group Ltd as an "Operational Post Grade" ('OPG').
  - Angard is a wholly owned subsidiary of Royal Mail and only supplies its workers to Royal Mail.

# Agency Workers

- When Royal Mail had vacancies at OPG level, direct employees who were already in different permanent roles, or were in other less secure (but directly employed) roles, were allowed to apply before agency workers.
- It was argued that the right under the Agency Workers Regulations 2010 to be notified of any vacancies at the hirer, included by implication the right to apply for those jobs.
- Rejecting that argument, Lord Justice Green said:

# Agency Workers

- *"Upon the basis of the recitals to the Directive and the contents of the travaux préparatoires, there is no hint of [a right to apply for vacancies]...ever having crossed the minds of the [EU] Commission, the Council or Parliament..."*

*[T]he appellant's argument assumes that when the Directive was adopted (in 2008) temporary workers and permanent workers were treated as comparable in every respect. However, as already observed...the Directive recognises that temporary workers are not, in all respects, comparable with permanent workers..."*



# Redundancy

- More complex arguments around making reasonable efforts to find alternative employment and what is “fair” in terms of the process for such positions.
- Special rules on trial periods.
- Special Maternity Leave statutory rights in respect of preference over alternative vacancies. (regulation 10 Maternity and Parental Leave Regulations 1999).

# Conclusions



# Our Scenarios

## Can I appoint my preferred internal candidate without opening up the role to anyone else?

- The law does not absolutely or specifically prohibit this.
- Direct Discrimination Risk? Not recommended by the EHRC Code but that is not the law. Risk is likely to be low so long as the preferred candidate is not preferred for the wrong reasons or a rejected candidate not rejected for the wrong reasons!
- Indirect Discrimination Risk? Can be hard to show a group disadvantage?
- Breach of Mutual Trust and Confidence – not clearly but can be fact sensitive.

# Our Scenarios

## **Can I appoint my preferred external candidate without opening up the role to anyone else?**

- The law does not absolutely or specifically prohibit this.
- Direct Discrimination Risk? Not recommended by the EHRC Code but that is not the law. Risk is likely to be low so long as the preferred candidate is not preferred for the wrong reasons or a rejected candidate not rejected for the wrong reasons!
- Indirect Discrimination Risk? Can be hard to show a group disadvantage?
- Breach of Mutual Trust and Confidence – not clearly but can be fact sensitive.

# Our Scenarios

## Can I choose who can be considered for a vacant role?

- The law does not absolutely or specifically prohibit this.
- Direct Discrimination Risk? Not recommended by the EHRC Code but that is not the law. Risk is likely to be low so long as the preferred candidate is not preferred for the wrong reasons or a rejected candidate not rejected for the wrong reasons!
- Indirect Discrimination Risk? Can be hard to show a group disadvantage?
- Breach of Mutual Trust and Confidence – not clearly but can be fact sensitive.

# Our Scenarios

## How transparent/fair does a competitive process have to be?

- Discrimination Law does not specifically address or require this.
- However, the more opaque the process the more likely employees may consider decisions have been made on unlawful grounds and the harder it will be for the employer to prove a lawful reason.
- Reasonable adjustments duty applies in disability cases.
- Breach of Mutual Trust and Confidence – an unfair process could breach mutual trust and confidence.

# Key Scenarios

- Promotions and Job Changes:
  - Temporary vs permanent:
    - be clear
    - set a review date?
    - Set an automatic lapse date?
    - Set an automatic confirmation date?
    - Beware of backfilling permanently
  - Can they go back? Who has the right to determine this? In what circumstances? Be clear in the terms of the temporary move, document this in clear contractual terms?



# Questions