

HR AND EMPLOYMENT LAW IN EDUCATION

Ensure your recruitment process is legally compliant

Lawyers **Ian Deakin** and **Dai Durbridge** answer questions about legal aspects of the recruitment process, including information requests, data retention, contracts and references.

It's important that your recruitment process is robust, not just in terms of hiring the best person for the role, but also in ensuring that you're not falling into potential legal pitfalls.

The annual HR & Employment Law conference is a valuable opportunity to ask questions and check the facts. Here lawyers from Browne Jacobson address questions put to them by delegates.

GDPR, data and information

1. At what point should we be asking for information about criminal convictions? If we ask for this information on application forms, could we be at risk of a fine from the ICO?

You should ask at shortlisting stage – you don't really need the information before then. This way you limit the number of people whom you ask, which fits nicely with data minimisation, one of the six GDPR principles. If you ask earlier and that process is referred to the ICO, the ICO is likely to ask you to explain why you are doing it. Would there be a fine? My instinct is no, but I could be wrong. My advice: ask at shortlisting stage.

2. In terms of GDPR, is it acceptable to copy candidates' identification and qualifications documents at interview, then shred them for the non-appointed candidates?

Yes, that should be fine. You collected the data for a particular purpose, that purpose ends when you decide not to take the application any further and so you should destroy the data.



3. Is there a defined period HR in a school would be expected to keep recruitment details and interview notes of unsuccessful candidates?

That all depends on what your retention and destruction policy says. If it is silent on the point or you don't have one, I suggest you review the [IRMS Information Management Toolkit for Schools](#) to see what they recommend in their policy. Many schools follow that approach.

4. Do employers have an obligation to share completed references with the employee if requested? Would this need to be requested in a SAR or FOI format?

No, they don't. There is a specific exemption in the Data Protection Act 2018 upon which an employer can rely that means the right of access (a subject access request) does not apply to confidential references.

DBS checks

5. Is it acceptable to apply for a DBS for a new employee at the point when they accept the job, if this is earlier than three months before their start date?

There is no official expiry date for a criminal record check issued by DBS, but obviously any information on the DBS certificate will only be accurate at the time the certificate was issued. Is it going to be held for a significant period of time? The code of practice (which governs organisations using the DBS checking service) requires that the information revealed is considered only for the purpose for which it was obtained and should be destroyed after a suitable period has passed – usually no longer than six months.

Contracts and offers of employment

6. A position of employment is offered then information comes to light that work history over 10 years at a school was omitted due to dismissal. How should we proceed?



It depends on whether it is a conditional or unconditional offer. There is a risk of a breach of contract claim if you withdraw a job offer that was made unconditionally. This will entitle the prospective employee to sue the employer for damages, which in most instances would be an amount corresponding to payment for the period of notice to which the employee would have been entitled had he or she started work and then been dismissed. If the offer was conditional on receipt of satisfactory references, and the information was contained in a reference, you can lawfully withdraw the offer without being in breach of contract.

7. Does a full contract have to be available on day one of employment? Is a section 1 statement sufficient?

The section 1 statement doesn't have to be provided on day one: you are obliged to provide (where employment is to continue for more than one month) the section 1 statement no later than two months after their employment begins. The statement can be in the form of an employment contract.

8. Can a clause be built into letter of confirmation to say that fixed working patterns may change in the future due to the timetable?

Yes – you can include a clause which builds in flexibility, for example in terms of job duties, working hours or location. However, if there is a change built it then it is important this is made as clearly as possible.

Dai Durbridge is a partner in the education team at Browne Jacobson. He provides advice and training to teachers and other education professionals on relevant legal and practical issues. He has a particular focus on safeguarding issues, having written numerous articles on information sharing, handling allegations against staff, vetting and barring scheme and the GDPR.

Ian Deakin is a senior associate with Browne Jacobson LLP, specialising in HR and employment law. Ian acts for organisations in a wide variety of sectors, advising them on everything from employment tribunal litigation and day to day advice, right through to complex TUPE issues.