Pre-employment screening – does a candidate have a right to procedural fairness?

When does the employment relationship begin?

Legally, the start of a relationship between an employer and employee begins with the acceptance of an offer of employment, but does the applicant have any kind of relationship with their potential future employer prior to this, and if so what kind of behaviour can both parties expect from each other?

The inherent 'fairness' of the employment contract is governed by many things not least of which is the 'employment market'. If the economy is favourable to the employee, then the employee will find it easier to bargain in their employment contract[1]. But the foundation of an employment relationship is built on more than bargaining power. The employment relationship is also a 'psychological contract' whereby there are certain assumptions and expectations that managers and employees have to offer and in turn are willing to deliver. The employer's obligations include a duty to pay wages, to provide a safe workplace, to act in good faith towards the employee and not to act in such a way as to undermine the trust and confidence of the employment relationship. Similarly, the employee has obligations which include obedience, competence, honesty and loyalty[2].

The development of trust in the employment relationship is strongly influenced by areas such as recruitment, company induction programmes, performance reviews, career development and grievance handling. A sense of trust is engendered by the development of a mutual understanding of expectations and obligations, both employers and employees and employees of employers.

It is only when an employee commences work for the employer that the legal relationship between the parties become subject to and fall within the scope of employment legislation, but this does not mean that the applicant does not have privacy rights during the recruitment process when the initial relationship with the employer is developing.

Pre-screening and background checks

Employers have a duty to hire somebody who will not risk the company brand or other co-workers. In some circumstances the employer will have legal obligations to conduct due diligence in hiring and could be negligent if they do not do so. However, employers or their recruitment agents will often use a lot of personal information when making hiring decisions. A search of the applicant's social media accounts will lead to an assessment of the applicant's credibility based on posts made by the applicant on sites such as *Facebook* and *Instagram*. The applicant's CV will be matched with information provided by the applicant on sites such as *LinkedIn.* In some cases, the applicant might be asked to undergo further screening including criminal history checks, work eligibility checks, medical checks, licensing records and even a financial history check. Employers cannot request information regarding racial or ethnic background, political opinions, age, gender or sexual orientation to inform the recruitment process. However, whether such factors influence the decision to offer the applicant employment is impossible to establish and consequently the applicant has no real legal redress if they suspect such factors unfavourably influenced a decision not to hire.

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[1] All Answers ltd, 'Human Resource Management Employment Relationship' (Lawteacher.net, October 2018) <https://www.lawteacher.net/free-law-essays/employment-law/human-resource-management-employment-relationship-employment-law-essay.php?vref=1> accessed 25 October 2018

[2] See further:https://nscpolteksby.ac.id/ebook/files/Ebook/Business%20Administration/ARMSTRONGS%20HANDBOOK%20OF%20HUMAN%20RESOURCE%20MANAGEMENT%20PRACTICE/15%20-%20The%20Employment%20Relationship.pdf

In Australia, *The Privacy Act* 1988 protects a person's information including what information can be collected and how it can be used. The Australian Privacy Principles contained in the Act, outline how Australian government agencies and large companies must handle, use and manage personal information. If you're a small business, the Office of the Australian Commissioner (OAIC) offers a checklist to help you decide if the Act applies to your organisation. Importantly the Act also provides individuals with the right to access any information gathered[3].

Employers can use the applicant's credit history and, in some circumstances, medical history for the purpose of making employment decisions but not without the applicant's consent. Compensation orders can be sought if it is established that credit reporting information has been obtained without authorisation[4]. Of course, the applicant eager to gain employment may be more willing to consent and allow the employer access to information that is essentially private in the hope of gaining employment with the employer.

Does the applicant have a right to procedural fairness?

Most employers will be less than candid with applicants when rejecting the applicant for employment. Catch all phrases like "*you were not considered to be a good cultural fit for the organisation"* or "*we're looking for someone with more experience*" will often be the most information a candidate will receive after undergoing the employer's recruitment process.

The applicant can of course make an application to correct inaccurate credit history information, but other information provided to potential employers during recruitment will often more be difficult to address. A former employer or their representative who provides denigrating information during reference checks that directly harms the applicant's chance of future employment could face legal action by the applicant but once again this is exceedingly difficult to establish[5]. Furthermore, the requirement under principle 6 of the *Privacy Act* to seek a person's consent to use or disclose their personal information for a secondary purpose does not apply to the referrer, because the reference they have given is not "about" them, so it is not "their" personal information.

It is improbable in most cases that an applicant would seek legal redress, particularly in circumstances where an applicant's past legal history may also be considered relevant by potential future employers. The potential for litigation is also the reason that some organisations have a 'No Reference' policy or are only willing to confirm basic information such as employment title and dates of employment. In some circumstances provisions under the *Privacy Act* allow applicants to seek notes provided on them during any part of the recruitment process whether it be from a prospective employer, recruitment agency or reference checking company[6].

Conversely, previous employers or their representatives can be liable for losses arising from false references provided about an applicant during the recruitment process. Damages could include such things as remuneration, the cost of hiring and training and any severance packages[7].

Do more sophisticated employment screening techniques result in better outcomes?

With more and more contract, 'on demand' workers and people working remotely, the use of technology to verify background information is now commonplace. Screening technology can include taking a photograph of a candidates face and using algorithms to match the photo with a supplied

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[3] See Division 4 and 5 of the Privacy Act 1988 (Cth):- https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/pa1988108/

[4] See Division 6 of the Privacy Act 1988 (Cth): - https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/pa1988108/

[5] See for example the UK decision of *Spring v Guardian Assurance plc* [1994] UKHL 7

[6] See principle 13 - If the applicant considers that the information contained in the reference is inaccurate, under principle 13 they may request that the information be corrected

[7] See further :- https://www.news.com.au/finance/work/giving-a-job-reference-could-be-legally-dangerous-warns-workplace-lawyer/news-story/2d02c817cfba39bd8cfa581c09654001

image. Another method used is the Federal government's Document Verification Service (DVS). This agency matches details from the applicant's identity documents such as a Medicare card or driver's licence with government records.

In September 2017, the European Court of Human Rights handed down its decision in the case of *Bărbulescu v. Romania* [2017] 61496/08 in which the Grand Chamber found that an employer's IT policy could not entirely remove an employee's privacy at work and that the right to private life and the right to privacy of correspondence continues to exist in the workplace. However, protecting the privacy rights of a job applicant is a more difficult proposition. Trust and confidence in the potential employment relationship begin well before a written offer of employment is made. It is in both parties interest to act in a manner that will allow a strong and mutually beneficial relationship to develop.

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