

Is it ever too late to withdraw a job offer?

A job candidate may look perfect, but sometimes even the most promising relationships can go sour. **James Green** considers some difficulties that can arise when you want to withdraw an offer of employment.

Q We have made an offer of employment and our preferred candidate has accepted. However, our business requirements have changed. Can we simply withdraw the offer if she has not started work yet?

A Surprising though it may be, the answer is unfortunately not. Once a candidate has accepted an unconditional offer of employment then a binding contract exists between employer and candidate, even if the candidate has not yet joined. If you do not proceed with the hire, then you will be in breach of contract and the candidate may be entitled to damages for that breach.

Many candidates in that situation will chalk it up to experience but, if you do get someone who is reluctant to walk away, the value of any claim would typically be the net salary and cash value of any benefits that the candidate would have received during her notice period. In many cases, particularly where the candidate is required to work a probationary period, that notice period may be relatively short. The position is more problematic with a senior hire who has a long notice period. In those circumstances the potential value of a claim could be high, although would be reduced if the candidate was able to obtain other work.

You should also consider the reasons why an offer is being withdrawn to ensure that these are not tainted by discrimination. Risks may be high if an offer is withdrawn following a medical assessment or if a candidate informs you that she is pregnant. It is good practice to document the reasons for the withdrawal so that you have evidence, should you need it, to counter any allegation of discrimination.

Q We have made an offer and the chosen candidate has accepted. However, she has delayed the start date a number of times and we have lost patience. Can we withdraw the offer?

A You will not be able to simply withdraw the offer. Instead you will need to give your candidate a final deadline by which she must start, making it clear that if she has not joined by then, the offer will be withdrawn.

It is sensible when making a written offer of employment to make that offer subject to a number of conditions. This means that an obligation to employ the candidate will not exist until all those conditions are satisfied.

Typically, such conditions might include the need for satisfactory references, proof of qualifications, proof of the right to work in the UK, completion of a medical assessment and acceptance of the employer's standard terms of employment. By making a conditional offer in this way, if you later receive an unsatisfactory reference, for example, then you can lawfully withdraw the offer.

It is less common to include a requirement that the employee starts work on or before a particular date, but that is potentially a useful requirement. You will need to take account of the candidate's notice period in their current employment to avoid arguments that you are inducing a breach of contract, but by setting a final date as a condition of the offer, if the candidate does not start work by that time then you can withdraw the offer (assuming the reason for the delay is not caused by you).

Q We have made a verbal offer of employment and the candidate accepted by telephone, but we have not documented this. The candidate's future line manager does not want to proceed with the hire and tells me this will be fine because we do not have a written contract in place. Is he right?

A Not necessarily, a contract does not always have to be in writing to be binding. Provided both parties intended to enter into a binding agreement when they were speaking on the telephone, this is sufficient to create a contract. In these circumstances, if you do not proceed with the hire then there is a risk of a claim for breach of contract as set out above.

While it is good practice to telephone a candidate to inform them that you wish to make them an offer (not least because your competitors may be chasing the same individual), it is important to make clear that a formal offer of employment will follow in writing and to explain any conditions that might attach to that offer.

Q A candidate has accepted our offer of employment but only if we increase his salary by £5,000. The hiring manager has changed her mind and now wants to appoint another candidate instead. Can we do this?

A Yes. If a candidate wants to accept an offer of employment then they must accept all the terms of that offer. If they accept some terms but propose a higher salary, then what the candidate is doing is making a counter offer. In these

circumstances, the employer can decide not to proceed with the hire because no contract would exist between employer and candidate.

Q We have completed a recruitment exercise, made an offer to a candidate, and she has accepted. She now tells me she is pregnant and will need to start her maternity leave a few months into her new job. We have a shortage of personnel and desperately need someone to fill the role. What should we do?

A It would be unlawful discrimination to withdraw the offer because of the candidate's pregnancy or her entitlement to take maternity leave, even if you have pressing business requirements to do so. To avoid the risk of a discrimination claim, you will need to proceed with the hire and make arrangements for maternity cover in the same way as you would for an existing member of staff.

Q We filled a vacancy with a candidate who has excellent qualifications. Since starting work he has been a star performer and sailed through his probationary review. However, following a routine check, we have discovered that his qualifications are not nearly as good as he claimed. What should we do?

A Candidates draft CVs and application forms to show them in the best possible light and a certain amount of "glossing" may be forgivable. However, if the inaccurate CV calls the candidate's honesty into question then this could constitute gross misconduct. In some circumstances these issues can be discovered many years after the candidate has started work but, provided you act swiftly once you discover the dishonesty, then you can still terminate employment fairly.

Some caution is necessary, however, as it is important to be sure that a candidate has actually been dishonest before you take formal action. You will want to take a view as to how serious the issue is. In some cases, records may be incomplete or inaccurate through no fault of the candidate, and so it is important to establish the facts by carrying out an investigation before deciding to dismiss.

THE AUTHOR

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