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UK Employment: Is now the time for (positive) action?

#MeToo, Black Lives Matter and other issues have raised inclusion to the top of the corporate agenda. Some employers are now considering radical measures to remove barriers to progress. In doing so, they must consider the UK's legal framework and in particular, the line between lawful positive action and unlawful positive discrimination.

Key takeaways

Recent global events represent a wakeup call for many organisations in their pursuit of a more inclusive and diverse workforce. Issues raised by the transformational #MeToo and Black Lives Matter movements (amongst others) have moved inclusion to the top of the corporate agenda and highlighted societal barriers that may have inhibited progress in this area to date.

Whilst most businesses acknowledge the benefits of a diverse workforce, many would agree that tangible progress from previous inclusion and diversity ("**I&D**") programmes has sometimes been painfully slow. As a result, some are now exploring more radical measures that may help 'shift the needle'.

When formulating I&D strategies, employers must assess proposed measures in the context of the legal framework and pay particular attention to the fine line between lawful positive action, and unlawful positive discrimination. This article considers the boundaries of permitted positive action in the UK and seeks to provide practical guidance for organisations navigating these important issues.

Why it matters: A wakeup call

Key industry investors and stakeholders are reinforcing the pressure for change. In 2020, Legal & General and the Confederation of British Industry launched new diversity targets and incentives for UK listed companies. The UK's Financial Reporting Council has also stressed the importance of enhanced reporting requirements under the UK's Corporate Governance and Stewardship codes, and noted concerns about the effective implementation of diversity policies, targets and monitoring at boardroom level. The case for more targeted efforts is expected to be further strengthened in 2021 with the likely introduction of mandatory ethnicity pay gap reporting.

As a result, many organisations are critically evaluating whether systemic bias remains ingrained, no matter how much training on unconscious bias has been rolled out and, if so, whether the time has come to tackle this through positive (or affirmative, in the US) action measures. Even the Equality and Human Rights Commission (EHRC) suggests that the achievement of substantive equality requires "*selective and proportionate preferential treatment in recruitment and employment*".

Positive action generally involves targeted initiatives in order to redress the imbalance and "level the playing field". It is usually designed to overcome barriers to opportunity or redress substantial imbalances in the workplace. Some examples of positive action include:

Recruitment:

- proportionate job shortlists
- aspirational targets for particular employee groups
- enhanced referral bonus schemes for diverse candidates
- targeted open day / apprenticeship / development schemes
- guaranteed interview schemes

Other:

- targeted training and development programmes
- coaching and mentoring schemes
- establishment of internal support, ally networks and resource groups
- funding of outreach and education programmes

Positive action under the Equality Act 2010

The UK's Equality Act 2010 permits (but does not require) private sector employers to use positive action generally and specifically as a tiebreaker for preferential treatment in a recruitment or promotion process. (Different obligations apply to the public sector, but these are outside the scope of this article.)

General positive action measures are subject to relatively flexible legal criteria. These permit initiatives where an employer *reasonably* thinks that individuals who share a particular protected characteristic (e.g. those of a particular sex, race, sexual orientation etc.):

- suffer a disadvantage related to that characteristic;
- have disproportionately low participation levels in a particular activity; or
- have bespoke needs.

Where this is the case, employers can take action which represents a proportionate means of achieving the aim of minimising that disadvantage, encouraging participation or addressing the needs specific to those who share the protected characteristic in question. Measures of this type would typically include targeted open days, mentoring circles, employee resource groups and the establishment of aspirational diversity targets; further examples are set out above.

The more specific tiebreaker provisions allow an employer to go further. Where candidates for recruitment or promotion are equally qualified, the employer can lawfully select the individual with a particular protected characteristic (e.g. a BAME candidate) provided that:

- **it reasonably believes that those who share that characteristic suffer a particular disadvantage or are disproportionately under-represented;**
- **the action is a proportionate means of minimising that disadvantage or improving participation; and**

- **the employer does not have a general policy of treating those with particular protected characteristics more favourably.**

In addition, there is a specific provision in the Equality Act confirming that no account shall be taken in respect of direct discrimination related to special treatment afforded to a woman in connection with pregnancy or childbirth.

Legal risks

These positive action provisions are intended to strike a balance, representing a limited and proportionate exception to the Equality Act's overarching principle of equal treatment. Many employers have been nervous about making full use of these provisions however, and in particular the tie breaker provision, due to a fear of potentially uncapped liability for discrimination complaints, as well as potential negative PR, if they get it wrong.

Case law suggests this nervousness is well founded. "Reverse" or "positive" discrimination claims have been widely reported. For example:

- In ***Eversheds Legal Services Ltd v De Belin*** **[2011] IRLR 448** the Employment Appeal Tribunal ruled on a decision to give notional maximum points for a particular criteria to an employee on maternity leave for the purposes of a redundancy selection process (in order to avoid disadvantaging her as a result of her maternity leave). The EAT ruled that this amounted to direct discrimination against male colleague in the selection pool. It was held that the measure was disproportionate and therefore did not fit within the "special treatment" exception.
- In ***Furlong v Chief Constable of Cheshire Police*** **ET2405577/18**, an employment tribunal made a similar finding of discrimination in favour of a white, straight man. He challenged a recruitment exercise by Cheshire Police, which had attempted to apply the tiebreaker provisions in favour of BAME, female, LGBT and disabled candidates from a pool of applicants who had met the "pass" threshold set by its assessment centre. The force had deemed all candidates who passed as of equal merit, whereas data from the assessment centre and interview showed that the candidates who had passed ranged from weak to strong passes. The tribunal said that the fact that they were all "over the bar" did not make them equal. The tribunal also said the approach broke the rule against blanket policies; it was a strategic approach and a blue print to get those with the identified protected characteristics across the line first. In addition, the tribunal held that the police should have waited longer to see the effects of recent diversity and inclusion programmes, and that a blanket approach of this scale was disproportionate. This latter point is perhaps surprising; while the number of BAME police officers had increased, the overall numbers remained woefully low and it was unsurprising that the force wanted to see faster progress.

Although these efforts failed, there is recent and helpful Supreme Court guidance outside the employment context in ***R (Z and another) v Hackney London Borough Council & Another*** **[2020] UKSC 40**. The case related to a housing association which provided social housing to members of the Orthodox Jewish community. There was evidence that this community faced a number of disadvantages and struggled to find appropriate housing in the area which would meet their particular needs. The court ruled that its policy was proportionate and justified; it was therefore lawful as general positive action under the Equality Act, as well as lawful under another specific provision relating to charities. The court confirmed that the approach to proportionality requires identification of a legitimate aim, and then an assessment of whether a measure taken to promote that aim is proportionate in its effects in pursuing it, having regard to other interests at stake.

In this case, the policy was lawful. Firstly, it was a direct counter to disadvantage suffered by the Orthodox Jewish community within the private, social housing sector (i.e. the legitimate aim)it and secondly, it only applied to 1% of the overall pool of social housing in Hackney, so its practical impact on prospective tenants not from that community was low (i.e. it was proportionate). The Court accepted that it was appropriate to look at the issue on a group basis - in other words, by weighing the benefits to the Orthodox Jewish community against the disadvantages suffered by other groups as a result, rather than focusing on one individual who happened to be badly affected by the policy.

The court also considered the argument that a blanket policy would be unlawful. On the facts, it was satisfied that the housing association did not in fact operate a blanket policy and that it would open up its properties to others if there was ever any surplus, but it also noted that until the disadvantage suffered by the Orthodox Jewish community is achieved, it would be proportionate for it to operate a simple "blanket policy" and to do otherwise would create a significant burden. That conclusion requires some caution in the employment context, where an employer is likely to be perceived as having deeper pockets than a small housing charity. It is also clear that a blanket policy of favourable treatment is not permitted where the employer is seeking to rely on the tiebreaker provisions.

Getting it right: Top tips

Lessons learned from these cases and other available guidance, including from the Equality and Human Rights Commission, should give employers more confidence in justifying diversity measures on the basis of the Equality Act's positive action provisions:

- **Evidence your reasonable belief:** Employers need to evidence their reasonable belief that those who share a particular protected characteristic require targeted measures to address a disadvantage, bespoke need or under-representation; such as a low proportion of BAME or female employees at particular levels within an organisation. Employers do not need statistical proof (although this would of course help), but will generally need qualitative evidence or data which demonstrates the need, whether from its workforce or wider sector, in order to meet this threshold.

- **Justify data processing:** Employers will need to consider whether individuals are potentially identifiable from the data required to justify positive action measures. If so, they will need to factor in compliance with the GDPR and Data Protection Act 2018. Data revealing race or ethnic origin, religious or philosophical beliefs, health, sex life or sexual orientation is particularly sensitive and its use requires enhanced scrutiny. Employers are recommended to carry out (and regularly review) a Data Protection Impact Assessment to analyse these risks and ensure relevant data processing is transparent, secure and necessary for the purposes of pursuing positive action.

- **Weigh up proportionality:** Proportionality requires a balancing of: (i) the severity of the disadvantage, need or underrepresentation and its impact; (ii) how effective the positive action measure is expected to be in addressing this; and (iii) its potential impact on others, including whether there are other (less discriminatory) steps which could achieve the proposed aim. Ongoing review is also essential; a fast-tracked interview scheme for women is more likely to be proportionate if it is targeted at specific male-dominated roles and subject to regular assessments with the aim of ensuring it does not go further than necessary as participation improves.

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- **Define the needs of the protected group:** General positive action may be permitted where individuals who share a protected characteristic have needs that are different from the needs of those who do not share the protected characteristic. This test has a relatively low threshold and it would likely be sufficient for a group to require additional support in a given area, such as targeted IT training for older members of the workforce.
- **Carefully assess whether candidates really are "as qualified as" one another:** The tiebreaker provisions may only be used where two candidates are as qualified as each other. As demonstrated by the Cheshire Police case above, it is not sufficient that the candidates have each passed an interview or achieved an application test benchmark; more granularity is required. The EHRC suggests that employers would need to assess candidates against a range of relevant criteria, including their ability, professional experience, qualifications and other required qualities. Where individuals are as qualified as each other based on a broad assessment of all criteria, employers could then consider taking a candidate's protected characteristic into account as the deciding factor.
- **Consider implications of policies:** In order to rely on the tiebreaker provisions, employers cannot have a general policy of treating a protected group, such as black or female candidates, more favourably in connection with recruitment or promotion. In our view, a policy of being prepared to consider the tiebreaker provisions on a case by case basis, each with bespoke proportionality and merit assessments, should be defensible. However, the scope of what constitutes a prohibited policy remains unclear. The Hackney case suggests that unlike the tiebreaker provisions, employers may be able to rely on a policy under the general positive action provisions, but care would be needed to ensure that this was kept under regular review.
- **Take care with intersectional measures:** Neither the general positive action or tiebreaker provisions are particularly helpful in seeking to address intersectionality, i.e. where individuals face discrimination based on multiple characteristics. Instead, they focus on disadvantages, needs and low participation levels that are relevant to those who share a single, common protected characteristic. The current statutory language therefore encourages employers to justify positive action initiatives by reference to prejudice suffered by particular, identifiable groups sharing a single characteristic.
- **But… don't rule positive action out because it's too risky:** Employers should take comfort in the fact that there are a variety of common positive action initiatives that can achieve positive results without significant legal risk. Steps such as the establishment of targeted open days, mentoring circles, employee resource groups, aspirational targets and a requirement for diverse interview panels can, where carefully planned and implemented, form part of a progressive and low risk I&D strategy.

Time for positive action?

Whilst employers should certainly be mindful of the risks that positive action measures may overstep the mark, careful planning, evidence and analysis and ongoing review should help to strike a balance.