


A balancing act: Navigating between positive action and discrimination in the workplace

23 September 2024  Gemma Lynch

The Equality Act 2010 (EqA 2010) encourages employers to take positive action to address inequalities and support individuals from underrepresented groups. This can include measures aimed at promoting diversity within the workforce, such as targeted recruitment campaigns, mentoring programs for minority staff, and diversity training for all employees. But what happens when an employer strays from positive action into positive discrimination?

Let's first have a look at the difference between the two concepts:

Positive Action

Positive action refers to measures taken to support or encourage individuals from underrepresented groups to overcome or minimise disadvantages in employment opportunities or to meet their specific needs. It is about levelling the playing field and it is permitted under section 158 of the EqA 2010.

Examples of positive action include offering targeted training programs, mentoring for underrepresented groups, or encouraging specific groups to apply for roles where they are underrepresented. Positive action does not involve preferential treatment in the selection process; rather, it aims to equip all candidates to compete on equal terms.

Employers are not obliged to take positive action under the EqA 2010. However, public sector employers, including those in the NHS, may have a duty to consider it under the public sector equality duty (PSED). Positive action plays a crucial role in helping public sector organisations fulfil their obligations under the PSED. It allows public sector organisations to take specific steps to help overcome disadvantages experienced by people who share a protected characteristic, meet their different needs, and encourage their participation in public life or other activities where their participation is disproportionately low.

Positive Discrimination

Positive discrimination involves treating someone more favourably because of a protected characteristic, such as race, sex, age, or disability, beyond what is necessary to level the playing field. An example of positive discrimination would be hiring a less qualified candidate over a more qualified one solely because the former is from an underrepresented group.

Positive discrimination is generally unlawful under the EqA 2010. Recruitment decisions should be made based on merit and not based on protected characteristics. However, there is a narrow exception in recruitment and promotion known as the "tie-break" provision. This allows an employer to choose between two equally qualified candidates based on a protected characteristic if people with that characteristic are underrepresented in the workforce or suffer a disadvantage connected to that characteristic.

Turner-Robson and others v Chief Constable of Thames Valley Police

In *Turner-Robson and others v Chief Constable of Thames Valley Police*, an Employment Tribunal found that promoting a minority ethnic Sergeant directly to a Detective Inspector role without a competitive process constituted unlawful positive discrimination. The case was brought by three white police officers who were overlooked for the role, which was filled without advertisement or a competitive selection process, aiming to fast-track minority ethnic officers. The Employment Tribunal rejected the Respondent's defence that this was part of a positive action, under S158 EqA 2010, ruling it amounted to direct race discrimination. The officers were denied the chance to apply or be considered, which the Employment Tribunal deemed not a proportionate means to achieve a legitimate aim. The Employment Tribunal criticised the lack of an equality impact assessment and the inadequate equality and diversity training for decision-makers.

So, does positive action still have a role to play?

London Ambulance Service

It has been reported this week that London Ambulance Service is considering a policy where for all roles band 7 and above, hiring managers would be expected to detail to the CEO the steps they had taken to support individual applicants if a candidate for a minority ethnic background is not appointed. The proposed policy comes off the back of the Trust's EDI committee report that states "[Black and minority ethnic] candidates are two times less likely to be successful than white candidates at job interviews with issues with recruitment process." The aim of the policy is said to be a specific focus for all leaders to be held accountable for reducing discrimination and creating an inclusive Trust. On the face of it, this would amount to positive action as opposed to positive discrimination. However, care should be taken not to overlook candidates from other ethnic backgrounds such that this strays into positive discrimination.

Treading carefully – using positive action effectively

For health employers in particular, positive action helps ensure that the workforce better reflects the diversity of the community it serves. By actively encouraging applications from underrepresented groups, employers can tap into a broader talent pool and can uncover highly qualified candidates who might otherwise have been overlooked, potentially due to unconscious bias or systemic barriers to entry. Evidence has consistently shown that a diverse and inclusive workplace lead to higher levels of employee engagement and satisfaction.

In summary, positive action in recruitment is a powerful tool for building a diverse, dynamic, and inclusive workforce. It not only benefits the individuals and communities that have historically been underrepresented but also enhances the overall performance of the organisation. However, as *Turner-Robson and others v Chief Constable of Thames Valley Police* reminds us, whilst positive action is encouraged under the PSED, it must be carefully balanced and must not cross into the territory of positive discrimination, which remains unlawful. Actions taken should be proportionate and based on evidence of need or underrepresentation. Employers seeking to rely on positive action in recruitment or promotion decisions should tread carefully and consider the need for equality impact assessments before implementing such policies.

Key contact



Gemma Lynch

Legal Director

Gemma.Lynch@brownejacobson.com

+44 (0)330 045 2631

Related expertise

Services

Employment

Employment services for
healthcare

Public law