Employment Law Brief

with

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Positive action has always been a controversial area. Even the label is the subject of debate. Should we be talking about positive action or positive discrimination – is there a difference between the two? And when, if ever, is it justifiable to recruit or promote somebody because of their protected characteristics?

There are those who would argue that all appointments should be strictly on merit. Others would say that the only way to ensure that public services better represent those they serve is to engineer it so that a larger proportion of underrepresented groups are selected by recruitment processes that may otherwise be tainted by structural discrimination and unconscious bias.

The Equality Act has provisions dealing with what it describes as positive action. This allows direct discrimination in favour of underrepresented or disadvantaged groups - so calling it positive discrimination would not be completely unreasonable. However, the employer must be able to show that the positive action is justified as a proportionate means of achieving a legitimate aim. When it comes to recruitment and promotion the scope is even more limited. As well as the general requirement for justification, Section 159 of the Equality Act limits any discrimination in this area to cases where the candidates are 'as qualified' as each other to be recruited or promoted and where the employer 'does not have a policy' of treating those who share the protected characteristic in question more favourably than those who do not share it.

If the precise meaning of these terms does not leap out at you, then join the club. S.159 is infuriatingly imprecise and the difficulty of determining when it can and cannot be used is one key reason why most employers have steered well clear of it. It must be said however that one of the reasons for the ambiguity is that the policy aims of the Minister putting it through parliament – Harriet Harman – were curtailed by the requirements of EU law, which limits the extent to which positive action is permitted. In Abrahamsson & Anderson v Fogelqvist a Swedish Regulation dealing with the appointment of academics required suitable qualified women to be selected in preference to men. The ECJ held that this was a breach of the Equal Treatment Directive, but that it would be permissible for positive action to be taken when the candidates possessed 'equivalent or substantially equivalent merits' and where the assessment took account of their specific personal situations. This is the concept that the phrase 'as qualified as' is clearly intended to capture.

Some have argued that the requirement for candidates to be 'as qualified as' each other means that positive action can only be used as a tie-breaker – a final criterion to be applied when the employer can't think of any other basis for distinguishing between candidates. This probably goes too far. S.159 does not just apply to the final selection of candidates – it covers any direct discrimination in the context of recruitment or promotion. It could apply to the initial sift of applications, or the way in which selection criteria were applied to arrive at a short-list. At these earlier stages the employer has not completed its assessment of candidates and does not know which of them might turn out to be the best - all it knows is that each is as qualified as the other on the basis of the selection criteria that have been applied at that stage.

On the other hand, Government guidance on the application of S.159 specifically warns against an employer setting an artificially low threshold for candidates to qualify for a job and then claim that everyone who clears that threshold is equally qualified. This is just guidance of course, and it is ultimately for the courts to determine what 'as qualified as' means.

They may soon be asked to do just that. We now have a Tribunal decision in the case of Furlong v Chief Constable of Cheshire Police. In that case an applicant for a role as police constable was rejected in favour of candidates who were either women, BME or LGBT and successfully claimed discrimination on the grounds of sex, race and sexual orientation. The employer claimed that they were entitled to favour underrepresented groups under S.159, but the Tribunal rejected this defence.

What the police tried to argue was that everyone who passed through the selection process – which included a combination of written assessments and an interview - was suitable to recruited and could therefore be 'deemed equal' - with the result that the employer was thereafter free to give priority to those candidates from underrepresented groups. The Tribunal disagreed. It could not really be said that everyone who had 'passed' the selection process was as qualified as anyone else to be recruited. Within that group there were those who had passed with flying colours and those who had just scraped through. Indeed, the employer's argument was seriously undermined by the fact that once the favoured candidates had been selected the remaining positions were offered according to how well the individual candidate had done in the selection. In any event, the Tribunal found that the positive action taken in this case was not a proportionate means of achieving a legitimate aim. The force should have waited to see how other positive action measures designed to encourage a more diverse range of candidates to come forward was bedding in before resorting to this more extreme measure.

This is an important point. Selecting candidates on the grounds of their race, sex or sexual orientation is highly discriminatory and should generally be a last resort once other positive action measures have failed. This could include targeted advertising campaigns, outreach to local schools and colleges or a careful review of selection criteria to ensure that they are not needlessly deterring women or minorities from coming forward. Employers should also of course think carefully about the culture of organisations and ask whether they are as inclusive as they should be. Actual discrimination in the selection of candidates should only be a last resort.

It is important to stress that Furlong v Chief Constable of Cheshire Police is just a Tribunal decision. It does not set a legal precedent and I would expect an appeal. Indeed, this could

be an important opportunity to clarify just what the rather ambiguous phrase 'as qualified as' actually means. If employers are allowed to discriminate in favour of underrepresented groups among all of those candidates who meet the requirements of the job and are suitable for selection, then this would allow public services to improve the diversity of their intake in large-scale recruitment exercises. If positive action in recruitment is confined to choosing between two candidates who have been assessed as essentially equal, then large-scale positive action will be practically impossible.

While I understand the attraction of insisting on equality of treatment, the reality is that more than 40 years after the introduction of discrimination legislation we still see huge inequality and job segregation. If that is to be addressed – particularly in large public services such as the police or fire and rescue – then we need the courts to take a wider view of when positive action is permissible than the Tribunal took in this case. There is no point in interpreting the Equality Act in such a narrow way that employers could rarely be confident that positive action would be lawful. Hopefully the Furlong case will – eventually – provide us with some clarity.

Don't forget to check more about Darren Newman on his blog at A 'Range of Reasonable Responses or on twitter at @DazNewman