Employment Law Brief

with

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The Black Lives Matter movement has caused many in local government to reflect on the persistence of the inequalities that exist against black and minority ethnic members of the community. The Local Government workforce, particularly at the top of the organisation does not in many cases represent the community a Council serves and this is now, rightly under the spotlight.

One thing that is clearly needed is greater diversity in appointments to senior and leadership roles but progress in this area has been slow and the 'talent pool' is not as strong as it could be, because there has been years of systematic discrimination. When we hear justification of this, as "the best people got the job" we are not disputing that the appointed individuals are strong candidates, but the quest needs to be 'why are they the best candidates?' and addressing both appointment processes but the wider talent pipeline. Those appointed to senior public sector roles, are often those who have had the experience within Local Government and the public sector more broadly, experience many have got, through a system predicated on white privilege. Is it time for a more radical approach? Some leaders certainly think so. Recently leaders in the public sector have reported to be considering using a 'Rooney Rule' approach to the shortlisting of jobs to accelerate this change.

The Rooney rule comes from the world of American football. It was established by the National Football League in 2003 and is names after the then chair of its Diversity Committee, Dan Rooney. Basically it requires that a team selecting a head coach must interview at least one ethnic-minority candidate for the role. Importantly, it is not a recruitment quota. Actual selection is based on whatever criteria apply to the role in question, but the rule at least guarantees that someone from a minority background will be considered for the position.

Would such an approach be legal in the UK? Could an employer guarantee that at least one BAME candidate, for example, would be shortlisted for every senior post? The Equality Act has provisions on positive action but they are notoriously difficult to interpret. Direct discrimination in decisions related to recruitment and promotion is only permitted when the person who benefits from the positive action is 'as qualified as' the person who loses out and no-one really knows just what that means. I wrote last year about the case of Furlong v Chief Constable of Cheshire Police in which the police tried to argue that all those who qualified to be shortlisted for a role were equally qualified so that applicants from underrepresented groups could be prioritised for recruitment. The Tribunal rejected that and upheld a claim of direct discrimination from an unsuccessful, white straight and male candidate. The claim was then settled before it could it go any further so we still don't have an authoritative ruling on the issue, but the case does suggest that the Rooney rule would not be a lawful form of positive action.

Suppose an employer decides to shortlist five applicants – at least one of whom must be from a BAME background – but finds that the five candidates who score most highly against the selection criteria are all white. If a BAME candidate is shortlisted instead of one of those five then that will be direct race discrimination. The person excluded from the shortlist would have been treated less favourably than the BAME candidate on the grounds of race. The fact that the BAME candidate was replacing someone who had scored

more highly in the shortlisting process would – according to the Tribunal in Furlong - mean that the Equality Act provisions on positive action would not apply. So the discrimination would be unlawful.

One approach to the problem would be to apply the Rooney rule in a way that involves no discrimination at all – in which case there would be no need to rely on the positive action measures permitted under the Equality Act. Suppose in our example, no-one from the top five list of candidates is excluded and the BAME candidate is simply added to the shortlist? Direct discrimination requires someone to be treated less favourably treated than someone else. If all those who qualify for the shortlist are included, then they have not been treated less favourably. According to this argument. adding an extra person to the shortlist would not amount to discrimination because no-one is treated less favourably and the recruitment decision itself is based entirely on merit.

Unfortunately, I just don't think this argument quite works in the context of discrimination law. An employer who acts on this basis is really shortlisting six people rather than five. When it decides to add one more person to the initial list of five people it is making its selection of that person on the grounds of race. All those who are not from a BAME background are excluded from any consideration of being added to the original shortlist. If the person who ranked sixth in the shortlisting process is white but is passed over in favour of the best scoring BAME candidate then that would seem to be unlawful direct race discrimination.

This is not to say that adopting the Rooney rule would be the wrong thing to do – but it would carry a legal risk. While a private sector employer might adopt the rule informally without drawing attention to what it is doing, that option is not really there in the public sector where recruitment processes are more formal and transparent. It would only be a matter of time before a rejected job applicant argues that they were better qualified than a shortlisted BAME candidate. Again, in the private sector such a case could be quietly settled – and would not be too expensive. It is not as though the person who has been discriminated against was clearly the best person for the job. At best they have lost a percentage chance of winning the post at the interview stage. Given that most of the people on the shortlist were – on paper at least – better qualified than them, that percentage chance is probably quite small. Similar cases in the public sector however are likely to attract media interest and lead to a very public – and politically charged - debate about the proper scope of positive action. A legal case could run for years before the issue was resolved one way or the other.

There is no easy solution here. Race discrimination has been illegal for more than 40 years, but differences in both opportunity and outcomes remain entrenched – and there is a similar tale to be told in relation to other protected characteristics. A more proactive approach to positive action may well be the only effective way forward. The problem is that the Equality Act does not do much to help. Any public-sector employer adopting the Rooney rule will need to have the stomach for a very public and protracted legal fight.

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