

Insights

AFFIRMATIVE ACTION IN THE US – IS THERE A UK EQUIVALENT?

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This blog follows on from recent developments in the US regarding affirmative action. Introduced in the early 1960s, affirmative action increased the representation of women and minorities in areas of employment, education and culture, areas from which they had historically been excluded. It resulted in situations where US employers could be obliged to select, promote or prefer less qualified candidates.

A landmark US Supreme Court ruling in June this year struck down affirmative action in the area of college and university admissions, declaring that race-based affirmative action programmes were unconstitutional.

Although the decision addressed higher education, its implications have been felt more widely. In recent months, diversity, equity, and inclusion (DEI) initiatives across US corporations have been under attack. This includes lawsuits against large employers, such as Kellogg's and some major US retailers, and letters from thirteen Republican Attorney-Generals to leaders of Fortune 100 companies warning them that they will face Congressional oversight and private lawsuits if they continue to use affirmative action.

So, does all this have any resonance in the UK?

As a starting point, affirmative action would not be acceptable practice in the UK. Mandatory quotas of under-represented groups would inevitably involve "positive discrimination", which in the UK is unlawful under the Equality Act 2010 (EqA).

However, positive **action**, which is quite different from affirmative action, is lawful. This is set out in sections 158 and 159 of the EqA. The UK's "Inclusive Britain" initiative, which began in March 2022, included the government's guidance for employers on positive action in the workplace, published in April of this year. The government's guidance emphasises how positive action, under sections 158 and 159, can benefit employers.

Although positive action is not widespread in the UK (and there are few statistics available), there are some good examples.

- The NHS 'Stepping Up Programme' is a leadership development programme created in 2018 for aspiring employees from ethnic minorities who work within healthcare. The NHS states it "aims to create greater levels of sustainable inclusion within the NHS by addressing the social, organisational and psychological barriers restricting [ethnic minority] colleagues from progressing"; and
- Police Scotland has a dedicated positive action team. They hold events such as women only police recruitment. These courses are aimed at encouraging women across Scotland to consider a career in policing and are designed to provide an insight into the role of a police officer or special constable. Women are currently under-represented in Police Scotland, and it is hoped the events will inspire more women to consider a career in policing.

It is worth noting that these positive action schemes are not mandatory, and the aim is to encourage, rather than compel.

POSITIVE ACTION FROM A LEGAL PERSPECTIVE

The Equality and Human Rights Commission's Employment Code of Practice (the Code) states that positive action means measures which "alleviate disadvantage experienced by workers who share a protected characteristic, meet their particular needs, or increase their participation in relation to particular activities". It allows additional help to be provided for people who share a protected characteristic to create a level playing field, but without giving preferential treatment.

Before applying sections 158 and 159 of the EqA, employers have to "reasonably think" there is a group which faces a particular disadvantage, has different needs, or comprises a disproportionately low representation within an organisation. Although not strictly necessary, it is advisable for any employer to provide credible and sufficient evidence to confirm there is *de facto* under-representation. Evidence might be statistical or, where that is not available, by evidence based on consultation, monitoring or national surveys.

Subject to the employer "reasonably thinking" the above, there are two types of lawful positive action set out in the EqA:

TYPE ONE – THE GENERAL RULE

This is the most common form of positive action. Under section 158 of the EqA, an employer can use positive action where it reasonably thinks individuals with a protected characteristic are disadvantaged, have different needs or are disproportionately under-represented in an activity. If this is the case, the employer can take proportionate action to enable or encourage those individuals to overcome or minimise that disadvantage to meet those needs, or to enable or encourage their increased participation in that activity.

Example

National research shows that South Asians have low rates of participation in the legal profession. A law firm seeks to tackle this by offering networking opportunities to members of the South Asian community. This would be a form of positive action in that it encourages participation by a group with a protected characteristic. Another example of positive action could be providing a mentoring programme to help South Asians achieve more senior positions in an organisation.

There are no quotas and no obligation on employers actively to prefer anyone above anyone else.

TYPE TWO - RECRUITMENT AND PROMOTION (THE “TIE-BREAKER”)

This is less common and carries a level of risk. Unlike section 158 of the EqA, this involves the employer making a choice between candidates.

Under section 159 of the EqA, and specifically in relation to recruitment and promotion, an employer can use positive action where the qualifying features of section 158 of the EqA are present (see above). This is subject to:

- the person with the protected characteristic being “as qualified as” others also being considered for recruitment or promotion; and
- the employer not having a blanket policy of automatically treating people who share the protected characteristic more favourably than persons who do not have it.

Employers should try using positive action measures under the general rule or apply the tie-breaker provision at the end of a recruitment process when they are more likely to have evidence that the two candidates are equally well qualified.

Example

A school has no black employees. When a vacancy arises, two candidates of equal merit are in a tie-breaker situation with the school having to find some way to choose between them. One candidate is black, and the other is not. The school chooses to offer the job to the black candidate. This would be lawful under the positive action provisions of the act because the black candidate has a protected characteristic that is underrepresented in the school’s workforce, and the black candidate is of equal merit to the other candidate.

However, there are legal risks in “tie-breaker” provisions. The 2019 case of *Furlong v Chief Constable of Cheshire Police* illustrates this. In a bid to increase its number of female, ethnic minority, LGBTQ+ and disabled police officers, Cheshire Police made the slightly bizarre decision to treat 127 candidates who passed the recruitment tests (regardless of score) as being “as qualified as each other” and therefore requiring a tie-break. With a tie-break in place, Cheshire Police used positive action to favour individuals with protected characteristics. The tribunal concluded that Cheshire Police had used an artificially low threshold to assess the candidates in order to invoke positive action - it was difficult to understand how 127 candidates could be deemed as being

“equal”, especially bearing in mind that some candidates were marked as a “borderline pass”, while others were marked as a “strong pass”.

The tribunal held that Mr Furlong, a white, heterosexual male, was directly discriminated against because of his sexual orientation, race and sex as he would have been recruited if the force had instead used a merit-based approach.

This case serves as a reminder that the “tie-breaker” always carries a risk, should only be used between a maximum of 2 or 3 employees and not as a blanket policy for groups with protected characteristics.

POSITIVE DISCRIMINATION?

As referred to above, this is unlawful in the UK (subject to sections 158 and 159 of the EqA as described above). The Code states that positive discrimination involves “preferential treatment to benefit members of a disadvantaged or under-represented group who share a protected characteristic in order to address inequality.” Positive discrimination is prohibited under the EqA, except in very limited circumstances, for example where an occupational requirement applies, such as a requirement for recruiting women at a women’s refuge or rape crisis centre.

Example

A bank seeks to address the low participation of partners who are homosexual by interviewing exclusively homosexual candidates regardless of whether they meet the criteria for partnership. This is unlawful positive discrimination.

POSITIVE ACTION – GUIDANCE FOR EMPLOYERS

Positive action is a useful, lawful tool to enhance DEI (Diversity, Equity and Inclusion). As a matter of good business practice and following on from the examples of the NHS and Police Scotland, public and private sector employers may wish to take positive action measures, as they may bring benefits to their organisation or business. Benefits can include better reflecting the multi-ethnic nature of customers and clients, widening the pool of talented, experienced and skilled candidates from which to recruit, and producing a more dynamic workforce that is better able to respond to change. Such measures may also help employers have an improved understanding both of foreign and global markets as well as the needs of a more diverse range of customers – both nationally and internationally. Additionally, employers are likely to benefit in terms of reputation and employee engagement.

Finally, we set out some tips for employers that might wish to use positive action.

HAVE A PLAN OR POLICY

It is sensible to create a positive action policy, describing the steps that will be taken to promote fair opportunities. The government's guidance suggests some ideas of what to include in a positive action policy, such as specific outcomes the employer is aiming to achieve, possible actions to achieve those outcomes; and measurable indicators of progress towards those aims.

BE CLEAR THIS IS NOT POSITIVE DISCRIMINATION

Employers should include a section on positive discrimination clarifying that it is unlawful and perhaps highlighting the distinction between positive action and positive discrimination.

CLEAR AND CONSISTENT COMMUNICATION

Employers are advised to maintain transparency around positive action measures. They should prepare their workforce when they are planning to introduce a positive action initiative and ensure that their workforce understands the reasons for any initiatives, as well as the benefits that it will bring both to the organisation and to them.

ACT PROPORTIONATELY

The government's guidance states that proposed positive action must go no further than is necessary to address the existing condition. Employers should consider whether proposed positive action is an appropriate way of achieving the stated aim and balance the potential positive outcome against the potentially discriminatory impact on other groups.

KEEP POLICY UNDER CONSTANT REVIEW

If all goes to plan, the legitimate aim intended to be achieved through positive action is achieved. In such instances, it would no longer be justifiable for the employer to continue positive action. The only way for an employer to be aware of this is to have a timeline for measuring progress and a review mechanism in relation to the progress and impact of any positive action, including any policies.

HAVE A FAIR RECRUITMENT PROCESS

It is important for employers to follow a fair recruitment process that is consistent, non-discriminatory and objective. This is assisted by establishing reasonable and measurable selection criteria, using structured and standardised interviews, assessing candidates on their relevant skills and competencies, and assembling diverse hiring panels. Employers should also ensure that, as far as possible, arrangements made during the recruitment process do not put any candidates at a disadvantage in connection with a protected characteristic.

PROVIDE EQUALITY TRAINING

The best way for employers to ensure that their employees feel comfortable in the workplace is to offer DEI training, which will equip them with the necessary skills to recruit and develop staff equitably. It could cover anti-discriminatory practices as well as how to report inappropriate or offensive behaviour.

OVERALL SUMMARY

To answer the original question, the position in the UK is different from the US. Affirmative action would not be permitted in the UK. In terms of its closest UK equivalent, positive action, there is no requirement for UK employers to use it but, as mentioned, doing so can provide employers with an effective means of increasing DEI and tackling inequality in their organisation.

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