

ACT POSITIVELY BUT DO NOT DISCRIMINATE

From April the Equality Act 2010 introduced provisions which allow employers to take positive action in recruiting and promoting candidates. The provisions are optional but an employer can favour a person who is a member of a group that is under-represented in its workforce, provided that the candidates are of equal merit and the action is justified. Anthony Thompson explains what implications this has for the care sector.

For some time employers have been able to seek to address the imbalance in employment opportunities experienced by members of particular groups (usually women and members of different ethnic minorities) by taking 'positive action'. Positive action is voluntary and lawful and has included providing training opportunities and/or placing adverts encouraging applications from disadvantaged groups where there has been an underrepresentation of such groups within the workforce. Positive action is distinct from 'positive discrimination' which is unlawful. The latter involves the preferential treatment of minority groups irrespective of the qualifications, skills and experience needed to fulfil a particular role.

The Equality Act 2010 ('the Act') came into force in October 2010. One of its most controversial changes is the extension of positive action to recruitment and promotion. In essence, as long as an employer can meet statutory conditions, it can favour a person from a minority group over someone who is not a member of that group, i.e. a woman over a man, provided that it is a proportionate means of overcoming or minimising disadvantage or underrepresentation of the group in the workforce.

What does the law say?

From 1 October 2010, the 'grounds' on which it is unlawful to discriminate have been renamed 'protected characteristics'. There are nine protected characteristics namely: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.

The general rules relating to prohibiting discrimination in the employment field still apply. Therefore it is still unlawful for employers to discriminate in the recruitment process in deciding who should be employed and who should be promoted.

Since 6 April 2011, the option to take positive action has been extended. Now, if an employer 'reasonably thinks' that: persons who share a protected characteristic suffer disadvantage connected to that characteristic; or participation in an activity by persons who share a protected characteristic is disproportionately low, it can treat a person (A) 'more favourably' in connection with recruitment or promotion than another (B) because A has the protected characteristic but B does not. Such action is only permitted in order to overcome or minimise the disadvantage or increase participation in that activity.

However, the treatment given to A is only allowed if: A is as qualified as B to be recruited or promoted; the employer does not have a policy treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it; and taking the action is a proportionate means of overcoming or minimising the disadvantage or underrepresentation.

In theory, a care home owner (which has no black employees) who is seeking to recruit a registered manager, can favour a black candidate over a white candidate in filling that role in order to overcome the disadvantage or underrepresentation. However, the right to take that action is not absolute and the employer must jump through a number of hoops if it wants to avoid potential claims.

What does the law mean?

The Act is accompanied by the Commission for Equality and Human Rights Code of Practice ('the Code') which provides guidance as to how the Act should be applied. The Code has no legal force but can be taken into account by the employment tribunals if it is considered that any of its provisions are relevant. Unfortunately, the Code was drafted before the specific provisions on positive action in recruitment and promotion came into force and are therefore not covered by the Code. Therefore, little guidance can be offered by the Code on how employers should apply the new law.

Employers must 'reasonably think' that the candidate suffers discrimination by having a protected characteristic or that there is underrepresentation of the minority group. There is no definition of the phrase in the Act. However, the Government Equalities Office (GEO) guidance suggests that the threshold is low and the test will be satisfied provided that employers provide some information or evidence indicating that one of the conditions exist. Employers do not have to provide elaborate statistical evidence. They can simply look at

profiles of their workplace or by making enquiries of local employers within the sector to determine whether disadvantage or underrepresentation exists.

However, employees need to exercise caution in assuming that there is underrepresentation in particular groups. Some characteristics, such as gender or race, are more easily identifiable than others, like sexual orientation. Therefore, employers need to ensure that proper monitoring is undertaken to identify disadvantaged groups before deciding to take positive action.

How does justification factor?

The need to take positive action must be a 'proportionate' means of addressing the disadvantage or the underrepresentation. In short, this means that employers must justify the decision to favour the candidate from the disadvantaged group. As the GEO puts it, 'an employer will need to balance the seriousness of the disadvantage suffered or the extent to which people with a protected characteristic are underrepresented against the impact that the proposed action may have on other people'.

Therefore, employers need to consider whether the stated aim can be achieved by other means. Favouring a candidate in normal circumstances fuels the emotions of the unsuccessful candidate. However, when the justification is based on the particular sex or race of the other candidate, it is imperative that all options are explored. It may be that an employer in a rural area wants to recruit more gay people to make the workforce more balanced from a sexual orientation perspective. However, it is necessary for the employer to address whether favouring a gay candidate is the most appropriate way of overcoming or minimising the disadvantage within its workforce. The employer needs to ask itself whether there are other options available which should be adopted rather than recruiting a gay person. It is a difficult issue to tackle. Whether the action is 'proportionate' will depend on the circumstances of each particular case including the seriousness of the disadvantage, the degree of low participation and the relative impact of the proposed action and the needs of other groups.

Are the candidates equally qualified?

The option to treat A more favourably is further restricted by the fact that A must be 'as qualified as' B. Again, the Act offers no assistance as to what amounts to 'as qualified as'. It is implied that the candidates must be of 'equal merit' as the Act does not use such language. What appears from the guidance is that an employer cannot favour A if objectively, B is the

better person for the job, or example, if B has better academic qualifications and more relevant practical experience. Apart from in a clear cut case, how do you decide whether someone is 'as qualified as' another? In the care sector it is not uncommon for employees to be recruited on the basis of their practical experience with academic qualifications being acquired in the future. Alternatively, to perform specific roles candidates need to have particular academic qualifications. However, recruitment decisions are rarely based purely on academics. In the main, it will be the subjective assessment of the candidates' other qualities including experience, personality, people and other skills that will tip the balance.

The GEO favours a broad interpretation of 'as qualified as' and recommends that employers analyse candidates' ability, professional experience, competence and other qualities required to perform the role, as well as formal qualifications, before deciding on the merit of the candidates.

Positive action can be taken at any stage of the recruitment process. However, it is envisaged that these specific provisions will be adopted as a 'tie-breaker' after the employer has been presented with all applications for a role and will be in the best position to assess the relative strengths and weaknesses of all of the applicants.

Before deciding to favour a candidate, it will be increasingly important to ensure that employers have clear ideas as to the criteria needed to fulfil any role. In addition, employers should undertake structured and transparent interviews and ensure that managers are trained on the process and directed to treat all candidates on a fair and consistent basis. Comprehensive and contemporaneous notes should be taken of all interviews as employers' decisions will be more susceptible to challenge from the disgruntled candidate and the decision will need to be justified.

Practical effect?

Positive action is voluntary and there are commercial benefits in having a diverse workforce. An employer can choose whether or not it wants to address inequalities in its workplace. If it elects to take positive action when presented with candidates of 'equal merit' it must be able to justify its decision by balancing the need to remedy the disadvantage or underrepresentation of a member with a protected characteristic against the needs of other people who are not members of that group.

Favouring an individual, of a minority group is laudable but fraught with difficulties. There will be a tendency for employers to overlook compliance with the statutory conditions and simply recruit or promote someone because they are a member of a particular group. Employers must still recruit the best person for the job otherwise they run the risk of discrimination claims.

There is uncertainty as to how the new provisions will be interpreted. The Code will eventually be updated and this will provide the necessary guidance to ensure that employers apply best practice.

In the meantime, employers can protect themselves by reviewing and implementing their equal opportunities policies. Any policy should contain a recruitment procedure that embodies the spirit of the new provisions. Managers should be trained on how to conduct a fair and equal interview process. Employers should monitor its workforce to ascertain whether there is underrepresentation of specific groups in order to avoid making assumptions. Positive action should be part of the policy and should be used to compliment other diversity measures. It is important that the recruitment and promotion procedures are thorough and consistent as employers may have to objectively justify their decisions to unsuccessful candidates. If proper procedures are not adopted employers run the risk of expensive and potentially damaging claims for unlawful discrimination.

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