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Positive action

Briefing note

July 2009

The Equality and Human Rights Commission

The Equality and Human Rights Commission (the Commission), established on 1st October 2007 is working to eliminate discrimination, reduce inequality, protect human rights and to build good relations, ensuring that everyone has a fair chance to participate in society.

Our approach to equality, opportunity and human rights builds on the achievements of our predecessors, the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC). We are here for the 60 million people of Britain and Parliament has set us the task of:

- Protecting and promoting equality
- Protecting and promoting human rights, and
- Ensuring good relations.

Introduction

Why do we need positive action?

Many employers recognise the value of a diverse workforce that reflects the community it serves. Employing a diverse range of people allows an organisation to draw on the full range of talent in the community; to possess a wider understanding of its customer base; to make more effective decisions and avoid groupthink; and to cultivate its reputation as a good employer.

Positive action is a tool available in law to help achieve greater diversity, allowing employers to target training and encouragement at under-represented groups.

The Equality Bill, which has been debated in Parliament this year, is set to change the law on positive action, helping employers to recruit a more representative range of people. This briefing note sets out what positive action is and tackles some of the myths that surround it. It outlines the current limits on positive action in British law, and explains why the new legislation is necessary if we are to create fairer, more efficient workplaces in the future.

What is positive action?

Positive action can be taken in two main areas: in service provision and in employment. Organisations that provide services can take positive action to meet the special needs of particular communities. For example, a counselling centre might provide a separate service specifically for women.

This briefing note will focus, however, on the second area: how positive action can be used by employers. In this context, the term describes a range of practical measures an organisation can take if it wishes to diversify its workforce to make it more representative of wider society.

These measures can be used when a particular **racial group** or **gender** is under-represented, either in the particular organisation or more broadly within a skill group or profession. For more details on what constitutes under-representation, please see the Q&A section at the end of this booklet. These measures can also be used to redress disadvantage experienced by groups on the basis of **religion or belief, sexual orientation or age**.

Positive action is **not** used in relation to **disability**. Extensive powers for addressing the under-representation of disabled people in the workplace are already enshrined in British law under the Disability Discrimination Act (DDA). The DDA operates differently from other anti-discrimination legislation because of the unique obstacles faced by disabled people entering the workplace, and the same approach will continue under the new Equality Bill.

Currently, an organisation can take positive action by providing training and encouragement exclusively for disadvantaged or under-represented groups. For example:

- A construction firm runs a mentoring scheme in which female recruits have regular support meetings with a senior member of staff.
- A newspaper offers a bursary to student journalists from an ethnic minority.
- A police force holds recruitment open days specifically for potential female and ethnic minority applicants.
- A local planning authority creates a trainee scheme for ethnic minority or female town planners.
- A law firm states on its recruitment advertising that it welcomes applications from women and ethnic minority candidates.

Measures like this are voluntary, and will remain so under the new legislation. It is up to individual organisations to decide whether or not they need or want to take them.

The difference between positive action and positive discrimination

Positive action is not the same as positive discrimination, which is unlawful. Positive action is currently limited to training and encouragement for disadvantaged and under-represented groups. Positive discrimination means that applicants from these groups receive preferential treatment in the recruitment process. So, for example:

- A fire service cannot advertise jobs specifically for women and ethnic minority recruits, even if white men make up 97 per cent of its workforce.
- A police service cannot 'deselect' applicants from a shortlist on the basis that they are white males.
- A retail chain is not allowed to actively recruit a workforce in which the majority of staff are aged over 60 – even if its customers have expressed a preference for being served by older people.

Positive action in current British law

The law allows positive action to be voluntary on the part of the employer. Positive action is intended to provide equality of opportunities, not outcomes. The law permits training and encouragement because they provide access to job opportunities, but disallows selection for a job or promotion on grounds of race, gender, age, sexual orientation, religion or belief.

All our anti-discrimination laws allow for employers to take positive action. These laws include the Race Relations Act, the Sex Discrimination Act and the Regulations on Employment and Sexual Orientation, Religion and Belief and Age. The only exception is the Disability Discrimination Act, which allows employers to discriminate in favour of a disabled person if they wish to do so.

Case study

Taking action I: Knowsley Housing Trust / Fusion

21 Skills

Knowsley Housing Trust (KHT) in Merseyside is using positive action to redress the gender imbalance in its maintenance division. Currently, all the construction jobs in the department are taken by men, with women providing administrative support. Last year, KHT asked the social economy business Fusion 21 to recruit five female trainees. 'In the past we have taken on the odd woman here or there, but they were on their own among our 200 tradespeople, and most of them dropped out,' says Maggi Howard, KHT's director of regeneration. 'It wasn't working because the women were isolated. Our aim is to create a critical mass which is self-sustaining.'

The trainees are not guaranteed a job at the end of the process: recruitment operates purely on merit. The female trainees are, however, offered extra support through a mentoring programme run by Howard. 'That's to make sure that there isn't anything going on that makes people feel uncomfortable – any harassment or other issues,' she says. 'If there is any kind of problem they can tell me and I can try to resolve it.' Of the five original female apprentices, three are still in the programme, which, says Howard, is a much better retention rate than ever before.

Plumber Sara Kilgannon, 22, is one of the new trainees. Until 2007 she was unemployed and living on Jobseekers' Allowance. She wanted a long-term career but, with few qualifications, she was offered a succession of short term 'dead end' jobs. When she saw the Fusion 21 advertisement offering apprenticeships in the construction industry, she decided to apply. She is now on the way to achieving her NVQ Level 2 in plumbing, and wants to develop her career in management with KHT, where she hopes to recruit more women into construction.

'When I first started, I wondered how my new colleagues might react to me, but everyone's been great. I can honestly say I haven't had to change

how I am to fit in,' she says. 'Like most trades in maintenance, plumbing is a hard physical job but it's a career that gives you plenty of variety and no two days are the same.'

For Howard herself, Sara's success points the way towards a more balanced construction industry. 'People like Sara are challenging some people's long held beliefs about women's roles in construction and, I believe, will pave the way for even more opportunities and more varied roles for women in construction in the future.'

Knowsley Housing Trust has received feedback from many customers saying that they feel more comfortable with women coming into their homes for maintenance jobs. As a result, they hope to recruit more women in their next batch of apprentices.

The benefits of positive action: the ‘diversity dividend’

In Britain today, all of us want a fair chance to fulfil our potential. As a society we have made great progress in tackling the kind of overt discrimination to which women, racial minorities and other disadvantaged groups were subjected in the past. However, it is important to recognise that these groups continue to be extremely poorly represented in many of this country’s most important institutions. For example:

- Only 11 per cent of directors in our top companies are women.
- Only 8 per cent of university chancellors are women.
- 96 per cent of journalists are white.
- There is only one High Court Judge from an ethnic minority.
- Just 4.1 per cent of Senior Civil Servants are from an ethnic minority.

Many organisations want to take action to redress the balance. There are many sound business reasons why they need to be able to do so:

- A more diverse range of employees may give businesses greater insight into new markets – for instance it may help them to identify the needs or preferences of certain sectors of society that they had not perhaps previously catered for, or adequately catered for.
- A more diverse workforce may attract a wider range of customers. For instance, taxi companies that employ women drivers may appeal more to female customers travelling on their own.
- A number of studies have suggested that more diverse decision-making groups tend to make better decisions. Such groups have different experiences, values, attitudes, and cognitive approaches, which help identify a broader range of options and critique the options in a more rounded way.[1] The studies also found that conflict and miscommunication may compromise this process, and that some group members risk being marginalised because of their differences. [2] This evidence points to the importance both of cultivating a diverse workforce, and the importance of cultivating a workplace culture which values and exploits this diversity.
- Many employers recognise the reputational benefits of a representative workforce.

The aim of positive action is to enable these organisations to work towards a representative workforce, while continuing to select candidates on the basis of their individual merits.

What will the Equality Bill mean for positive action?

The Equality Bill, which has been debated in Parliament this year, is expected to take positive action a step further by broadening the voluntary measures employers can take to the full extent allowed by EU law.

This would mean that, for the first time, employers choosing between two equally-qualified candidates for a job or promotion would be able to select the successful candidate on the grounds that they are from an under-represented or disadvantaged group. In other words, the fact that a candidate is from one of these groups would lawfully be considered as a ‘tipping factor’ in a tie-break situation. For example:

- A primary school head teacher choosing between equally capable male and female applicants to a teaching post would be able to select the male candidate on the basis that overwhelming numbers of primary school teachers are female.
- A law firm wants to promote one of its members to become head of department. There are two equally-qualified candidates, one white and one black Caribbean. The firm will now be allowed to choose the black Caribbean candidate, on the basis that black Caribbean people are under-represented in the legal profession.

The ‘tipping factor’ considerations could only lawfully be made by employers after the relevant candidates have been through a proper selection process. The candidates in question would have to have been judged to be equal after that process according to an objective and rigorous assessment of their abilities, skills, experience and personal circumstances. In other words, each candidate’s skills, qualifications and aptitude would continue, rightly, to be the most important factors in deciding who to employ.

The new legislation promises to considerably improve the ability of employers to diversify their workforces. There are often several applicants for a post who would be equally able to do the job. Employers often naturally tend towards choosing people in their own image, or from a group they have become accustomed to. Now, those who want to break this cycle will no longer be limited to taking positive action through training and encouragement – they will be able to consider issues of workforce balance as part of the recruitment process.

Case study

Taking action II: Avon Fire and Rescue Service

Avon Fire and Rescue Service hit the headlines in 2008 when it organised a series of recruitment open days aimed at women and people from ethnic minorities. Nationwide, the Fire Service currently has approximately 97 per cent white male employees. The events run by Avon were an opportunity for potential recruits to meet firefighters, use firefighting equipment and find out how to apply to join the service. They did not affect the recruitment process itself, which continued to operate purely on merit.

Some Avon staff, however, felt that the open days discriminated against white men. The local paper ran a story, which was picked up by the Daily Express in a front page piece headlined 'White Men Banned', and other national papers including the Guardian, the Sun, the Daily Mail, and the Daily Telegraph, which reported that Avon Fire Service was 'accused of positive discrimination'.

In the aftermath of the news stories, Chief Fire Officer Kevin Pearson received a barrage of hostile emails from around the country. 'People believed what they read in the papers; that we were discriminating against white men,' he says. 'We were not and we never would. There was no understanding of the difference between encouraging applications from under-represented groups and active discrimination.'

In fact, the open days were very successful in attracting diverse applicants. Of 1500 applications, the Service received 240 from women and people from ethnic minorities.

Pearson remains determined to diversify his workforce, which he says is essential if the Fire Service is to operate effectively. 'We do much more than simply put out fires – we do a lot of community safety work, so we need to understand and reflect the communities we serve,' he says. 'I genuinely believe there is a business case for greater diversity. But it is difficult to implement these initiatives because positive action is so misunderstood by the public and the media.'

Avon Fire and Rescue Service is about to embark on its second year of positive action, by getting back in touch with those who applied unsuccessfully last year. 'I prefer to call it "active encouragement",' says Pearson. Already, Pearson has received a complaint about perceived discrimination, and fears that the story will end up in the press again. 'It gets frustrating,' he says. 'But I've got to keep trying.'

Q&A

i. Is it possible to have two 'equally qualified' candidates?

There are often two or more applicants for a job who would be able to do it equally well – although they may do it differently depending on their skills and qualities. Clearly, no two candidates are exactly the same and employers will need to both use their discretion and show that they have conducted their evaluations fairly.

Employers that wish to be able to use a preference in a tie-break situation would be well advised to create a formal job description for the post and be able to demonstrate that they have:

- Used an objective, weighted set of criteria for the job description.
- Compared candidates against these criteria formally, objectively and fairly.
- Applied these criteria across the different stages of the recruitment process, from choosing who to interview, to shortlisting and hiring.

ii. What does 'under-represented' mean?

Employers are permitted to take positive action when a gender or racial group, for example, is under-represented – in other words, when the percentage of people from that group is lower in the job or profession than it is in the population as a whole. The under-representation can have occurred either in the particular organisation in question or more generally in the employment sector.

The under-representation can have occurred either at a national, regional or at a local level. Currently the under-representation must have occurred in the last 12 months – although under the new Equality Bill no time limit is given.

iii. Why is positive action such a contentious issue?

Positive action is often misunderstood or confused with positive discrimination by the public and media alike. Some of the most persistent myths about it are:

- **It means ‘white men need not apply’:**

Employers cannot lawfully advertise for ‘non-white male’ applicants. Neither can they discriminate against white men in the recruitment process, or give preferential treatment to a less qualified candidate because they are from an under-represented or disadvantaged group.

Because they are generally over-represented in the work force, white men will usually not be eligible for the training and encouragement given to other groups under positive action schemes. Under the new legislation, the only situation in which employers will be able to consider the gender, race, belief or sexual orientation of an applicant in the recruitment process is when there is a ‘tie-break’ situation between two or more equally-qualified candidates.

- **It means more red tape for businesses:**

Positive action is voluntary – if employers do not want to use it, they do not have to. The new legislation will actually make things easier for employers, many of which are already committed to diversifying their workforces. For employers who wish to take positive action, the new legislation will give them more options and better guidance on how to do so.

iv. Can employers take positive action to address socio-economic disadvantage?

Employers can lawfully give training and encouragement exclusively to people from disadvantaged socio-economic groups. Technically, however, this is not considered to be positive action, as there is no legislation equivalent to the Race Relations Act or the Sex Discrimination Act prohibiting discrimination on the grounds of socio-economic inequality. Some employers already have innovative schemes tackling socio-economic inequality, for example:

- Heathrow Airport supports two employment projects that help local unemployed residents, many from ‘hard to reach’ groups, to access employment at the airport. Routes To Work, managed by Heathrow City Partnership, provides customised training and other support for unemployed local residents who want to work in Heathrow’s retail operation. The workplace co-ordinator helps residents to access jobs within Heathrow’s construction programmes. The co-ordinator works with a range of local charities, Jobcentre Plus and other agencies to identify potential candidates, prepare them for employment and help them develop their skills once in work.
- Walsall-based food distribution and retail company, AF Blakemore & Son Ltd, joined forces with Birmingham-based recruitment consultants Michael Page to deliver a programme aimed at getting homeless people into work. Homelessness Ready for Work operates alongside local homeless organisations and identifies people who are ready for employment but perhaps lack confidence or have been out of work for a long time. Eight senior human resources professionals from AF Blakemore and Michael Page were paired up with homeless clients to develop relevant skills. The coaching session included advice on interview techniques, positive body language and dealing with difficult situations in the workplace.

At the Commission we believe that tackling socio-economic inequality is key to achieving the fair society we all want to live in. Employers should be encouraged to learn from best practice and offer training and encouragement to groups disadvantaged by their socio-economic background.

v. Is it ever lawful for an employer to advertise specifically for a person of a particular race, religion or belief, or gender?

Some jobs need to be done by people of a specific race, gender, age, religion or sexual orientation. This is known in law as an ‘Occupational Requirement’. For example:

- The intelligence services need to recruit more Muslim intelligence officers for counter-terrorism work within Muslim communities.
- Refuges for victims of domestic violence need predominantly female staff.
- An HIV counselling service needs an Asian man to work as a counsellor for Asian men.

In cases like this it is perfectly legal for an employer to advertise specifically for applicants from the relevant age, religion, race or gender group. This is not considered to be positive action as it comes under the legislation on Occupational Requirements.

Endnotes

[1]

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[2]

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