Positive action or positive discrimination?

An overview of the distinction between positive discrimination and positive action and a detailed look at practical examples of lawful positive action.

Introduction

The recent spotlight on representation of women in senior management in the financial services sector has meant that many people have been refocusing on the distinction between unlawful positive discrimination and positive action (which can be lawful).

The Equality and Human Rights Commission Report: Inquiry into fairness, transparency and diversity in FTSE 350 board appointments specifically notes that there is little knowledge of the positive action provisions allowed by the law and little use of the “tie-breaker” provision. The Commission’s Guide How to improve board diversity: a six-step guide to good practice specifically suggests that companies should consider using positive action measures to encourage individuals from underrepresented groups to apply for roles or to help them gain skills which will enable them to compete on merit on an equal footing with others.

The law allows for:

- general positive action to increase the talent pool, and
- positive action in relation to recruitment and promotion (the tie-breaker).

Positive discrimination

Positive discrimination is generally unlawful:

- unless a statutory exception applies, or
- except in relation to disability discrimination.

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.
The Equality and Human Rights Commission's Employment: Statutory Code of Practice (the Code) gives as an example:

"An LLP seeks to address the low participation of women partners by interviewing all women regardless of whether they meet the criteria for partnership. This would be positive discrimination and is unlawful."

Voluntary not mandatory

In most circumstances, positive action is voluntary. Exceptions apply in relation to:

- the public sector single equality duty, or
- reasonable adjustments in relation to disabilities.

Positive action - information or evidence

In both cases of positive action (both general and the tie-breaker), positive action is allowed where a company reasonably thinks that a protected group is underrepresented or faces disadvantage. As the EHRC notes "Some information or evidence will be required to show the existence of disadvantage or disproportionately low involvement – but not necessarily sophisticated statistical data or research. It may simply involve looking at the profiles of your contractors or making enquiries of others in the sector." The EHRC’s Code of Practice suggests:

“Additionally, it could involve looking at national data such as labour force surveys for a national or local picture of the work situation for particular groups who share a protected characteristic. A decision could be based on qualitative evidence, such as consultation with workers and trade unions.”

Positive action for encouragement and development - increasing the talent pool

When is it allowed?

An employer can take positive action if the employer reasonably thinks that people with a particular protected characteristic suffer a disadvantage connected to the characteristic, have different needs, or are disproportionately under-represented.

What action can be taken?

An employer can take any action provided that it is a proportionate means of achieving the aim of:

1. enabling or encouraging people who share the protected characteristic to overcome or minimise that disadvantage
2. meeting those needs, or
3. enabling or encouraging people who share the protected characteristic to participate in that activity.

Proportionate action

The action must always be a proportionate means of achieving the aim. The EHRC’s Code of Practice notes that:

"Proportionate” refers to the balancing of competing relevant factors. These factors will vary depending on the basis for the positive action - whether it is to overcome a disadvantage, meet different needs or address under-representation of a particular group. Other relevant factors will include the objective of the action taken, or to be
taken, including the cost of the action.

The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups.

Organisations need to consider: Is the action an appropriate way to achieve the stated aim?

If so, is the proposed action reasonably necessary to achieve the aim; that is, in all of the circumstances, would it be possible to achieve the aim as effectively by other actions that are less likely to result in less favourable treatment of others?"

The EHRC’s “How to improve board diversity: a six-step guide to good practice”: suggests that “to be "proportionate" you must balance the need for action against its impact on people with other protected characteristics, taking into account factors like:

- how long the under-representation has lasted
- the type of barriers experienced by the under-represented group
- the success or failure of other action taken to tackle those barriers, and
- whether there are any alternative ways to address the under-representation which are less likely to disadvantage other protected groups."

Positive action - practical examples

Provided that the conditions above are fulfilled, the employer can take any action.

The Equality and Human Rights Commission gives extensive guidance in its Employment: Statutory Code of Practice. The Code of Practice does not have the force of law but can be taken into account by tribunals when considering relevant claims before the tribunal. The Code of Practice suggests that such action could include identifying through monitoring, consultation or a review of policies and practices any possible causes of the disadvantage and then:

- targeting advertising at specific disadvantaged groups, for example advertising jobs in media outlets which are likely to be accessed by the target group
- making a statement in recruitment advertisements that the employer welcomes applications from the target group, for example "older people are welcome to apply"
- providing opportunities exclusively to the target group to learn more about particular types of work opportunities with the employer, for example internships or open days
- providing training opportunities in work areas or sectors for the target group, for example work placements
- reserving places on training courses for people with the protected characteristic, for example, in management
- providing exclusive training to the target group specifically aimed at meeting particular needs, for example, English language classes for staff for whom English is a second language
- the provision of support and mentoring, for example, to a member of staff who has undergone gender reassignment
- creating a work-based support group for members of staff who share a protected characteristic who may have workplace experiences or needs that are different from those of staff who do not share that characteristic
- setting targets for increasing participation of the targeted group
- providing bursaries to obtain qualifications in a profession such as journalism for members of the group whose participation in such profession might be disproportionately low
Outreach work such as raising awareness of public appointments within the community
- targeting networking opportunities, for example, in banking
- working with local schools and FE colleges, inviting students from groups whose participation in the workplace is disproportionately low to spend a day at the company, and
- providing mentoring.

It gives as an example:

"Research shows that women in Britain experience significant disadvantage in pursuing careers in engineering, as reflected in their low participation in the profession and their low status within it. Some of the key contributing factors are gender stereotyping in careers guidance and a lack of visible role models. A leading equalities organisation, in partnership with employers in the engineering sector, offers opportunities exclusively to girls and women to learn more about the career choices through a careers fair attended by women working in the profession."

It can include, for example, reserving places for a protected group on training courses, targeting them for networking opportunities or providing mentoring and sponsor programmes aimed at increasing representation at a particular level or in a type of role.

The Code of Practice gives as an example:

"A large public sector employer monitors the composition of their workforce and identifies that there are large numbers of visible ethnic minority staff in junior grades and low numbers in management grades. In line with their equality policy, the employer considers the following action to address the low numbers of ethnic minority staff in senior grades:

- reviewing their policies and practices to establish whether there might be discriminatory criteria which inhibit the progression of visible ethnic minorities
- discussing with representatives of the trade union and the black staff support group how the employer can improve opportunities for progression for the under-represented group
- devising a positive action programme for addressing under-representation of the target group, which is shared with all staff, and
- including within the programme shadowing and mentoring sessions with members of management for interested members of the target group. The programme also encourages the target group to take advantage of training opportunities such as training in management, which would improve their chances for promotion."

Another example given by the Code is:

"National research shows that Bangladeshis have low rates of participation in the teaching profession. A local school governing body seeks to tackle this low participation by offering open days in schools to members of the Bangladeshi community who might be interested in teaching as a profession. This would be a form of positive action to encourage participation."

The EHRC’s Guide “How to improve board diversity: a six-step guide to good practice” suggests that actions which could be taken could include:

- reserving places on leadership and training courses to prepare individuals to apply for leadership roles
• providing programmes for people in particular under-represented groups to help individuals manage the specific barriers faced by that group
• providing opportunities for individuals to observe board meetings or to join networks that might expose them to board opportunities, and
• offering flexible working at all levels of the company and flexible career paths to help retain people from under-represented groups.

In Thinking outside the box: Supporting the television broadcasting industry the EHRC gives examples of:

• A casting agency has data showing that older women artists on its books receive fewer bookings than younger women and similarly aged men. The agency decides to increase the visibility of older female artists by displaying a higher proportion of their profiles in its marketing literature and on the homepage of its website.

• An agency which provides sound and lighting engineers posts all of its work opportunities on a web-based bulletin board. The agency discovers that some of its female contractors with young children find it difficult to be posted on multi-day shoots far from home so it decides to also send an email detailing work within a particular geographical radius to its female contractors who have recently returned from having a baby.

• A production company has employed very few people from ethnic minorities in the past decade. It establishes a paid internship scheme to provide experience and training for ethnic minority applicants aspiring to work in certain roles, so that they are able to compete on merit when roles become available.

Specific examples in relation to appointments and recruitment

In “How to improve board diversity: a six-step guide to good practice” the EHRC gives more detailed guidance in relation to the appointment process. It gives the following examples of lawful positive action:

• companies and executive search firms creating networks for executive women who aspire to non-executive board positions, and using these to identify potential candidates for specific board roles
• executive search firms providing development opportunities for under-represented groups to help them build and demonstrate attributes companies look for in board candidates
• companies and executive search firms looking for potential candidates from other sectors, for example from the professions, such as law or accountancy, or the public, not-for-profit or academic sectors, and
• companies specifying in adverts that candidates from under-represented groups are encouraged to apply.

The paper makes it clear that companies can ask an executive search firm to achieve a diversity target that supports the company’s diversity commitments. For example, the company may want to secure a longlist which contains a certain proportion of candidates from under-represented groups.

However, when setting such targets, the company must ensure that they are realistic and make clear to the executive search firm that it must not unlawfully discriminate against potential or actual candidates in trying to achieve them. Such diversity targets:

• should be based on a realistic, evidence based assessment of available talent that could apply for the particular role
• must be supported by a fair selection process where suitably qualified candidates are compared on merit against the criteria set out in the role description, and
• must not lead to candidates from under-represented groups being preferred over other better qualified candidates.
Steps executive search firms can lawfully take to try to meet diversity targets include:

- extending their search into sectors or industries where, for example, women are well-represented in high-level roles
- broadening their understanding of the criteria to include candidates with relevant expertise and experience from less traditional backgrounds, and
- conducting a review process to check the quality of decision making before finalising long and shortlists where candidates from under-represented groups have been unsuccessful disproportionately at particular stages of the appointment process.

It would be unlawful for:

- a company to instruct an executive search firm to find a female non-executive director to improve the gender balance on the board, or to provide an all-women shortlist, as this would require potentially discriminating against better qualified men, and
- an executive search firm to include women on a longlist to fulfil a target by treating equally qualified male candidates less favourably, unless there is enough evidence to enable use of the tie-break provision.

**Time-limited action**

The EHRC makes it clear that positive action should be time-limited.

“If positive action continues indefinitely without any review, it may no longer be proportionate, as the action taken may have already remedied the situation which had been a precondition for positive action. This could make it unlawful to continue to take the action.

Therefore, when undertaking measures under the positive action provisions, it would be advisable for employers to indicate that they intend to take the action only so long as the relevant conditions apply, rather than indefinitely. During that period they should monitor the impact of their action and review progress towards their aim.”

**Drawing up an action plan**

The Code suggests that when considering positive action measures, employers might consider drawing up an action plan which:

- sets out evidence of the disadvantage, particular need and/or disproportionately low levels of participation, as appropriate, and an analysis of the causes
- sets out specific outcomes which the employer is aiming to achieve
- identifies possible action to achieve those outcomes
- shows an assessment of the proportionality of proposed action
- sets out the steps the employer decides to take to achieve these aims
- sets out the measurable indicators of progress towards those aims, set against a timetable
- explains how they will consult with relevant groups such as all staff, including staff support groups and members of the protected group for whom the programme is being established
- specifies the time period for the programme, and
- sets out periods for review of progress of the measures towards the aim to ensure it remains proportionate.

**Positive action - recruitment and promotion; the tie breaker**
The law allows a specific provision (the tie-breaker) to be applied in relation to recruitment and promotion. Where the statutory conditions apply, an employer can treat “A” more favourably in relation to recruitment or promotion than “B” because “A” has a protected characteristic but “B” does not. In other words, the employer can use the protected characteristic as a “tie-breaker”.

Again the Equality and Human Rights Commission has given guidance in its Supplement to the Employment Statutory Code of Practice. The Supplement specifically states “This supplement does not form part of the statutory Code of Practice. It is intended to assist those using the Code by identifying developments in the law since the Code was approved and is a statement of the law as at 31 March 2014. It should be read alongside the Code.”

**When can action be taken?**

1. An employer can use the tie-breaker if the employer reasonably thinks that:
   a. people who share a protected characteristic suffer a disadvantage connected to the characteristic, or
   b. participation in an activity by persons who share a protected characteristic is disproportionately low.

2. The employer can take action with the aim of enabling or encouraging persons who share the protected characteristic to:
   a. overcome or minimise that disadvantage, or
   b. participate in that activity.

3. However, this only applies if:
   a. A is as qualified as B to be recruited or promoted
   b. the employer does not have a policy of treating people who share the protected characteristic more favourably in connection with recruitment or promotion than people who do not share it, and
   c. taking the action is a proportionate means of achieving the aim.

This provision does not allow an employer to do anything that it otherwise unlawful.

**What does this mean in practice?**

The Supplement to the Code gives an example:

"A counselling service for teenagers has no Muslim employees, but is in an area with a high Muslim population. Where a vacancy arises, two candidates of equal merit are in a tie-breaker situation with the employer having to find some way to choose between them. One candidate is Muslim and the other candidate is not. The service manager could choose to offer the job to the Muslim candidate. This would be allowed under the positive action provisions (provided that taking action is a proportionate means of achieving the aim of increasing the number of the under-represented group employed and the employer does not have a policy of treating that group more favourably in connection with recruitment or promotion), so the non-Muslim candidate could not claim discrimination.”

**Equal merit**
The Supplement to the Code notes that employers should establish a set of criteria against which candidates will be assessed when applying for a job. This can take into account a candidate’s overall ability, competence and professional experience together with any relevant formal or academic qualifications, as well as any other qualities required to carry out the particular job. It gives as an example:

"A retailer advertises for a trainee fashion buyer. One applicant has a degree in French. None of the other applicants has a degree in any subject. The fact that one candidate has higher academic qualifications than the others does not automatically make that person better qualified for this particular job. The employer will need to decide if that qualification is a relevant factor in assessing who might be best for the job.

Employers must consider whether candidates are of equal merit in relation to the specific job or position they are applying for. While two candidates may be considered to be of equal merit for one particular post, the same two candidates might not be equally suitable for another job."

Where candidates have different but comparable skills, the focus should be on the specific requirements of the role.

**At what stage can the tie-break provision be used?**

The tie-break can be used at any stage of the recruitment or promotion process. This means that it can be used both at shortlist and selection stage.

The EHRC does caution that if used at the earlier recruitment stages, care should be taken that sufficient information is known about the candidates’ ability, competence, professional experience and formal qualifications to assess whether they are of equal merit. Employers will want to be clear whether and, if so, by what criteria an authentic determination of equal merit can be made from the information supplied by candidates.

It also goes on to note that it is not lawful to adopt artificially low thresholds to allow more candidates into a tie-break position. (Thinking outside the box: Supporting the television broadcasting industry)

**Information and evidence**

As with positive action to increase the talent pool, the EHRC makes it clear that “before considering whether to use the tiebreak provision, an employer would need up-to-date information which indicates the scale of underrepresentation, what other action has been taken to address it and any progress made”.

It also suggests that employers should keep a record of how you assessed candidates and how you reached your decision. (Thinking outside the box: Supporting the television broadcasting industry)

**Key resources**

Positive action general: Section 158 of the Equalities Act 2010

Positive action: recruitment and promotion: Section 159 of the Equalities Act 2010

EqA 2010’s explanatory notes (the explanatory notes).

Equality and Human Rights Commission - Employment: Statutory Code of Practice
Equality and Human Rights Commission - Supplement to the Employment Statutory Code of Practice

The Supplement specifically states “This supplement does not form part of the statutory Code of Practice. It is intended to assist those using the Code by identifying developments in the law since the Code was approved and is a statement of the law as at 31 March 2014. It should be read alongside the Code.”

Report: The Equality and Human Rights Commission: Inquiry into fairness, transparency and diversity in FTSE 350 board appointments


Thinking outside the box: Supporting the television broadcasting industry: The Equality and Human Rights Commission

This document (and any information accessed through links in this document) is provided for information purposes only and does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action as a result of the contents of this document.