Representation of women: targets, quotas, positive and affirmative action

Answers to key questions being raised in the wake of the Gadhia report.

Introduction

The Gadhia report (Empowering Productivity: Harnessing the Talents of Women in Financial Services), in particular has caused a number of clients to ask questions in relation to:

- the difference between quotas and targets, and
- the difference between positive action and affirmative action.

Set out below are our thoughts in relation to these current issues.

A target or a quota - what is the difference?

A target is a specific measurable objective, generally set by an organisation at their own discretion, with discrete timeframes in which it is to be achieved.

A quota is a mandated outcome that must be achieved. Like targets, quotas are also specific, time-bound measurable objectives, but are usually set externally by a body with authority to impose them on organisations. Establishing quotas usually includes setting penalties for failing to meet them. These are enforced by the external body and are non-negotiable by individual organisations. Quotas and other affirmative action policies aim to improve equality of opportunity and increase diversity by addressing the under-representation of minority groups in a range of different domains.

Positive action and affirmative action - what is the difference?

Affirmative action is the policy of favouring individuals in employment-related decisions, where those individuals share characteristics such that they currently experience or have historically experienced unequal treatment, for example quotas for hiring women and ethnic minorities. This term is typically used in the US.
In the UK, employers may use **positive action** to redress similar imbalances. These are measures taken to tackle the particular disadvantage, different needs or the disproportionately low participation of a particular group who share a protected characteristic for example, gender and ethnicity. In recruitment and promotion decisions, a protected characteristic can be used in certain circumstances as a “tie-breaker”.

**Comparing the US and the European approaches to redressing the balance**

Affirmative action in the US includes adopting a policy or practice of proactively hiring, promoting, or increasing in representation certain protected classes of people, such as women and minorities, who have suffered employment discrimination in the past. There are federal laws that require affirmative action by federal contractors and subcontractors, ensuring they recruit and advance in employment qualified minorities, women, persons with disabilities and protected veterans.

The European approach differs from that taken in the US in two respects:

- There has generally been less recourse to strong forms of preferential treatment of groups, with the exception of disability and, to a lesser extent, gender.
- The European Court of Justice in its case law on gender equality has held that measures which give unconditional priority to the under-represented sex (typically women) at the point of employment selection constitute unlawful discrimination against members of the other sex.

Under the UK's Equality Act 2010 (the “Act”), employers are not obliged to take positive action however:

- Employers may take positive action generally.
- Employers may take specific positive action in recruitment or promotion decisions (see below).
- All employers have a duty to make reasonable adjustments for disabled people, and public sector employers may have a duty to consider it under the public sector equality duty to integrate considerations of the advancement of equality into the day-to-day business of public authorities.
- In redundancy scenarios, where an alternative role is available for potentially redundant employees, it may be necessary to offer that alternative role to an employee on maternity leave in priority to other employees who are also at risk of redundancy. This is a rare example of lawful positive discrimination under English law.

In summary, in the US robust action can and, in some instances, must be taken to advance historically under-represented groups (for example, through the use of hiring quotas), whereas in the UK, (other than in relation to the scenarios listed above), there is no obligation on the employer to discriminate positively in favour of such groups and to do so would be unlawful. In the UK, hiring targets are not unlawful, but hiring quotas would give rise to the risk of unlawful positive discrimination claims.

**Recruitment and promotions: equality as a tie breaker**

Section 159 of the Act enables an employer to use positive action in specified circumstances to address needs or disadvantages shared by members of a protected group specifically in relation to recruitment and promotion. An employer is allowed (but not required) to take a protected characteristic into consideration when deciding whom to recruit or promote where:

- The person in question is "as qualified as" other applicants to be recruited or promoted.
- The employer does not have a policy of treating persons of the particular under-represented or disadvantaged
group more favourably in connection with recruitment or promotion than persons who do not share the relevant protected characteristic, and

- the more favourable treatment is a proportionate means of achieving the aim of overcoming or minimising the disadvantage, or encouraging participation.

In short, the protected characteristics may be taken into account by way of a “tie breaker” in the event that the candidates are otherwise equal on merit and such a step is warranted as a proportionate means to addressing an existing disadvantage or under-representation of persons sharing that characteristic.

**Further detail**

Anne Sammon’s summary of the Gadhia report itself is available [here](#).

If you would like more detail on Targets and Positive Action please do not hesitate to contact Vicky Wickremeratne or your usual Simmons & Simmons contact.

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