

6 June 2023

Weekly Blog

By: Robyn Smith



Finding the balance positive action vs discrimination

Hi hi, it's your lucky lots time to here from me again.

If you are a keen Precept blog follower (which... derrrr.... Of course you are) then you will have noticed that you were due to hear from me last week, however, as I had just got back from my hollibobs our lovely Philip took over the reigns.

Well I'm back in the hot seat and thought I'd give you another little insight into the world of Robyn. Just over a week ago I was very luckily swanning it around in Monaco watching the Monaco Grand Prix. Very fancy I hear you say! My husband, James, is very much a FI superfan and so is his Dad, so his parents very kindly/generously whisked us away for our 1 year anniversary. Now, I am by no means a FI superfan, however, I don't mind myself a little dip in the FI world and particularly don't mind it if it involves going abroad. The experience was amazing, great seats, great views and saw some beautiful places. We were even told by the travel company who had arranged the FI tickets that there were plenty of places to get food whilst at the track and that transport to and from the track was as easy as pie.

So all things were looking pretty peachy.. Welllll... weren't we lulled into a false sense of security?! On the first day we very merrily went on our way, no food or drink in tow and ready for our easy transport. We spent 2 hours queuing for food and then around 3-4 hours trying to get back to the hotel, which should have been just over an hour trip. So our feet and legs were absolutely done in by the second day- BUT we learnt our lesson and for the race day we were absolute pros- taking all the food and drink needed and making sure that all we needed to leave our seats for was to go to the loo. We also, which was some of my top moments of the hols, saw a few famous people – Kylie Minogue basically touched my arm, I saw dreamy Lucien Laviscount (for all the Emily in Paris fans out there) and actually spoke to the comedian Kathryn Ryan who was so lovely. So all in all it was a really super trip, despite the food and transport palava! Andddd most importantly the hubby and father in law were very happy with their FI experience – definitely one ticked off the bucket list for sure!

Now I am back though, and wow isn't getting back into the grind of work the hardest thing after a holiday? I don't know about you, but I am the worst for holiday blues so definitely felt slightly grumpy the first day back. But I've managed to pull my big girl pants up now and am back into the routine of things.

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Having now fully got back into the swing of things I thought I would give you some food for thought on an area that will forever be a huge legal topic and one that will always require carefully treading- that of equality, diversity and inclusion. I will specifically be looking at how employers can get the fine balance right between taking positive action to work towards better awareness vs discrimination.

So what are the stats?

As we continue to hope for, one of the key priorities employers should strive for is improving equality, diversity and inclusion (EDI). We are very aware that getting EDI right can promote greater innovation, talent, productivity and workforce wellbeing. Studies over recent years have consistently found that businesses that are successful in enhancing EDI are more successful generally.

But what do the stats say about how employers in the UK are doing with EDI?

- In 2022, Deloitte reported that, in the UK, only 30% of board seats are held by women (www2.deloitte.com/uk/en/pages/press-releases/articles/gender-diversity-in-uk-boardrooms-struggles-to-keep-up-with-european-counterparts.html).
- In 2021, 76% of working-age white people were in employment, compared with 67% of people from all other ethnic groups combined.
- Only around 50% of disabled people aged 16 to 64 years in the UK were in employment in 2021 compared with around 80% of non-disabled people.

So as you can see, employers still have a long way to go.

What do we mean when we say positive action?

You are most likely thinking, what do we even mean when we use the words 'positive action'? Well positive action involves taking lawful steps to improve equality for a group of people who share a protected characteristic. An employer can adopt special measures to achieve balance and equal opportunities within its workforce.

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There are two types of positive action: general positive action, and positive action in recruitment and promotion:

1. General positive action

Under section 158 of the Equality Act 2010 (EqA) (section 158), the general positive action provisions apply where an employer reasonably thinks that a protected group either:

- a. Suffers from a disadvantage that is connected to the protected characteristic (section 158(1)(a)).
- b. Has different needs (section 158(1)(b)).
- c. Has disproportionately low participation in an activity (section 158(1)(c)).

Where this is the case, employers can take proportionate action to:

- a. Enable or encourage the protected group to overcome or minimise that disadvantage (section 158(2)(a))
- b. Meet those different needs (section 158(2)(b)).
- c. Enable or encourage participation in that activity (section 158(2)(c)).

2. Promotion and recruitment

Employers that wish to take positive action in promotion and recruitment must rely on section 159 EqA (section 159) rather than the general positive action power in section 158. Section 159 allows employers to go one step further in a recruitment and promotion context where there is a so-called "tie-breaker" situation.

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Under section 159, where an employer reasonably thinks that people with a protected characteristic are disadvantaged or have disproportionately low participation in an activity, it can treat people with that protected characteristic more favourably than others in recruitment or promotion, provided that:

- a. Both candidates are “as qualified” to be recruited or promoted; and
- b. The employer does not have a blanket policy of automatic preference for people who share the protected characteristic over people who do not; and
- c. Taking the action in question is a proportionate means of achieving the legitimate aim of minimising the disadvantage or encouraging participation in that activity.

OK, so what is positive discrimination then?

Positive discrimination is unlawful in the UK. If any action that an employer takes in treating a particular group more favourably does not fall within one of the two specific sections of the EqA above, then it's likely to be deemed to be direct discrimination, regardless of the employer's underlying motives.

So for example, if you were to set a quota (as opposed to a target) to recruit or promote a particular number or proportion of people with certain protected characteristics regardless of merit then that would fall outside of section 159 and would be discriminatory.

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What happens if you get it wrong?

Now, taking into consideration the above summary on positive action, you are probably now realising why it might be quite difficult distinguishing between positive action and positive discrimination. This really can be a difficult line to tread, as shown in the below examples:

1. Furlong v The Chief Constable of Cheshire Police,

- a. Mr Furlong was successful in his employment tribunal claims for direct discrimination on the grounds of race, sexual orientation and sex.
- b. He was a white, heterosexual man with no disabilities.
- c. His application to be a police constable with Cheshire Police failed, despite him receiving positive feedback in his interview.
- d. Cheshire Police was using positive action to recruit more police officers from underrepresented groups. Candidates who were female, non-heterosexual or from minority ethnic groups were given automatic preferential treatment provided that they achieved a pass mark.
- e. The tribunal found that this fell outside the scope of the tie-breaker provision, as data showed that not all of the candidates who passed were equal. Cheshire Police's actions amounted to unlawful positive discrimination, rather than lawful positive action.

2. In 2022, the Royal Air Force's head of recruitment

- a. Resigned after refusing to implement what she considered to be an unlawful order to favour women and ethnic minorities in recruitment and selection.
- b. Her identification of around 160 alleged cases of discrimination against white men attracted widespread media coverage and public scrutiny.

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3. In February 2023 at Cambridge University...

- a. While not employment-specific, it was reported that Cambridge University came under pressure to reverse a ban on white working-class students from applying to one of its postgraduate courses.
- b. After concerns were raised, the University opened up the course to a wider group that was defined by socio-economic factors rather than race, therefore including white working-class students.

It really can be a tricky tightrope to walk can't it?!

Practical tips

You might now be feeling a bit at a loss, in between a rock and a hard place and like there isn't really a correct route to take. Well don't worry, below I have popped some of our nifty tips which will hopefully make you feel a bit more confident in the actions that can be taken:

1. Be proactive and confident- given the benefits of increased EDI, employers should be encouraged to take a proactive and confident approach to positive action.
2. Remedy any lack of understanding- employers will not be able to do point 1 above if they do not make sure they have a clear understanding of how the legislative framework actually works or at least make sure they get advice on how it works. We have done training on this topic for many of our clients now and it is always a huge success. Do get in touch with us if you think it would be beneficial to you too.
3. Try drawing up a positive action plan- this can include matters such as the evidence relied on (whether that's in identifying under-represented groups or assessing whether all candidates are equally qualified), objectives, measurable indicators of progress, the relevant time period and periods for review.

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4. Use set criteria- employers that are considering using the tie-breaker provision during recruitment should establish set criteria with which to assess and compare candidates. This can take into account a candidate's overall competence, ability for a job, relevant experience, qualifications and any other qualities that are essential to the job.

5. Contribute to meaningful change- employers need to take bold, decisive action in order to create meaningful change in relation to EDI. However, given the difficult tightrope to tread between positive action and positive discrimination, any action should be planned and documented carefully, and employers may wish to consider taking specialist legal advice- pssstt just call us at Precept!

6. Get ahead of the game- don't dwell on things until it is too late. Be sure to get your policies, practises, training and communication up to date and in place now. This will put you in a stronger position when it comes to being prepared, meaning that you will be ready to take on anything should it arise.

I am aware the above is a bit of a whistlestop tour and that because it's been brief it might leave you quaking in your boots - but please try not to worry. This a HUGE area that does require some further digging and continuous education. However, the point of the blog is because I am just wanting to flag all of this so you can keep it on your radar and so that you can start getting a game plan in place.

As always, if in doubt then you know where we are.