

Discrimination and Positive action

Positive discrimination means treating one person more favourably than another on the ground of that individual's sex, race, age, marital status or sexual orientation. While, in this situation, the individual's characteristic is being taken into account to benefit that individual, typically because that individual belongs to a group that is often treated unfairly or under-represented in the workforce, this is nevertheless unlawful discrimination. An exception to this principle is in the context of disability discrimination where it is permissible and, in some circumstances even necessary, to treat disabled employees more favourably than non-disabled staff. Another exception is where positive discrimination can be justified as a "genuine occupational requirement" or "qualification".

Genuine occupational requirements

Under discrimination legislation relating to sex, race, religion or belief, age and sexual orientation, an employer can discriminate in recruitment, transfers, training or dismissal if the employer is able to prove that a genuine occupational requirement ("GOR") or, in the case of sex or race, genuine occupational qualification ("GOQ") exists. This limited defence applies where the nature of the role makes it unsuitable for individuals with particular characteristics. For example, the GOQ defence may be available where the essential nature of a job requires that it be carried out by a person of a particular sex – for example, a male role in a theatrical production. The defence may also be available where, for example, a role involves physical contact with another individual and issues of decency or privacy may arise. Similarly under the Race Relations Act, an employer may be able to justify employing only individuals of a particular racial background for the purposes of "authenticity" in a particular setting, such as a restaurant or in an acting role.

However, there are very strict conditions that must be met in relation to this defence, and the burden is placed on the employer to prove that those conditions have been satisfied. The discriminatory characteristic must be a genuine and determining requirement of the job; it must be proportionate to apply that requirement in the particular case, and either the prospective employee must not meet the requirement or the employer must be satisfied that the person does not meet it.

Positive action

As with previous equality legislation, the Equality Act allows you to take positive action if you think that employees or job applicants who share a particular protected characteristic suffer a disadvantage connected to that characteristic, or if their participation in an activity is disproportionately low. In addition, for public-sector employers there are now much broader positive duties under sex, race and disability discrimination legislation.

The Equality Act 2010 allows you, if you want to, to take a protected characteristic into consideration when deciding who to recruit or promote. However, you can only do this when you have candidates who are "as qualified as" each other for a particular vacancy. This does not mean they have to have exactly the same qualifications as each other, it means that your selection assessment on a range of criteria rates them as equally capable of doing the job. You would also need some evidence to show that people with that characteristic face particular difficulties in the workplace or are disproportionately under-represented in your workforce or in the particular job for which there is a vacancy. In these circumstances, you

can choose to use the fact that a candidate has a protected characteristic as a 'tie-breaker' when determining which one to appoint.

You must not have a policy of automatically treating job applicants who share a protected characteristic more favourably in recruitment and promotion. This means you must always consider the abilities, merits, and qualifications of all of the candidates in each recruitment or promotion exercise. Otherwise, your actions would be unlawful and discriminatory

Positive action EXAMPLE 1

Marina and Co are manufacturers of bathroom taps and showers. They notice that they have no female sales representatives compared to men and find out that female employees are put off because of the apparent 'all male environment' in the sales team, many of whom are former plumbers. Marina reckons from its market research that the sales team will be more profitable with female representatives because the purchasers of taps and showers are often women who would appreciate a more representative sales team.

The company sets up a programme of training and development for female employees where they can develop their skills and knowledge to become proficient in this area. At the subsequent recruitment of sales representatives, nearly half of new recruits were female and early sales returns for the last quarter are up.

Positive action in recruitment and selection EXAMPLE 2

Loughton on Sea, a London commuter town and seaside resort has a population of some 75,000 of which around 15% at the last Census were from minority ethnic groups. The local high School has 1500 pupils that reflect the Census demographics and 80 teachers. The school has clear equality policies in place and has trained staff in these issues including the Equality Act 2010. Furthermore it has robust anti bullying policies for all staff to identify and tackle inappropriate harassing behaviour.

The school is recruiting for a new head of Department. none of the existing 10 departmental heads are from minority communities. The school runs an interview selection process where all candidates are scored against a range of job based questions. The selection panel also objectively assess the experience and qualifications of each candidate.

At the end of the selection process, two candidates have equal scores. Both are women. One of the women is black. The head thinks it important that the School's senior leadership reflects the population of Loughton and the school, and so decides to use this provision in the Equality Act to appoint the black candidate. The head gives feedback to the unsuccessful candidate and explains the position the School has taken and why

Interview questions and discrimination

At interview do not ask questions of a personal nature – eg about marital status, sexual orientation or gender identity

Some points to remember on Disability Discrimination

It is unlawful to ask health related questions before making a job offer (whether condition or unconditional), except in order to:

- determine if a candidate can carry out a function which is essential to the job
- ask whether candidates need special arrangements for any part of the application process
- anonymously monitor whether candidates are disabled
- take positive action to assist disabled people
- check that a candidate has a disability where this is a genuine requirement of the job.