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It's Black History Month – so let's talk about positive discrimination (UK)

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To its critics positive discrimination is a set of benefits and privileges reserved for minorities. BAME inclusion events and initiatives designed to encourage BAME job applicants are frequently found in the firing line. It's a pretty dynamite topic which evokes feelings of victimisation, unfairness and inequity and can stunt enthusiasm for diversity in the workforce.

Is it lawful?

This is all a great shame given that contrary to popular belief as evidenced from the twittersphere and tabloid newspapers, positive discrimination is both uncommon and unlawful. The Equality Act 2010 section 159 did introduce a new concept of positive *action*, on the other hand, and the distinction is more than semantic. In short, where an employer runs a recruitment exercise and:

1. is faced with a choice between equally qualified candidates; where
2. one or more of the candidates possesses a "protected characteristic" (which includes, but is not limited to, being black); and
3. where people with the relevant protected characteristic are underrepresented in the role they are recruiting for

the employer may lawfully (but NB does not have to) prefer the black applicant. In other words, these provisions allow the protected characteristics of a person to act as a tie-break. However, it is, in any other context, blatant race discrimination against the unsuccessful candidate.

It will be seen from this that the scope for positive action in the recruitment process is narrow. How often do you arrive at the final two or three candidates and genuinely have no preference at any level between them? Bear in mind that "qualified" is not just an issue of GCSEs, NVQ and degree levels but takes into account also their soft skills, interests, health, personality, and so on. So arguing later that these candidates were "equally qualified" can put you on some potentially quite dangerous waters because you may be seeking to show equivalence between hard skills on the one hand and less competence but a nicer nature on the other. It is also still to be decided definitively whether "equally qualified" is an issue of objective fact or the employer's subjective opinion, so reliance on those softer aspects may be risky at the best of times. It may be because this hypothetical tie-break is so rare in practice that employers feel nervous or unentitled to rely on these provisions. This is

reflected in, or rather in the absence of, case law. From 2010 to date, there has been only one single reported case on positive action in the recruitment process:

In ***Furlong v Chief Constable of Cheshire Police [2019]*** a well-intentioned police force strayed from lawful positive action into unlawful positive discrimination. White heterosexual Mr Fulton who had applied unsuccessfully for a job claimed that he had been treated unfavourably because of those characteristics of his. Instead of using positive action in a tie-break situation, in broad terms, the differences between candidates were ignored. Numerous candidates who were not white, heterosexual or male were "deemed" by the Police to be equally qualified. On this basis, Cheshire Police preferred other candidates in the genuine belief it was effecting positive action and so doing the Right Thing. The Employment Tribunal disagreed and upheld Furlong's claim for direct discrimination. To the extent that a lesson can be taken from a single ET case, it is that the employer's assessment of "equally qualified" must be a detailed, reasoned and individual one, not based on a blanket "deeming" or broad equivalence.

In the context of Black History Month

As it's Black History Month, let's consider positive action in that context for a moment. Pre-empting the response – "but we already have legal equality" – Black History Month is about more than that. It seeks recognition for the contribution to society and achievements of black people. Mention of civil rights in the UK takes many minds across the Atlantic to thoughts of Abraham Lincoln, emancipation, Jim Crow, Rosa Parks and Martin Luther King. Whereas we should *also* be thinking of the Oval Four, the Bristol Bus Boycott and the 19th century Lancastrian textile workers who refused to work with textiles that had touched the slave trade.

Implementing lawful positive action in 2010 was encouraging for the acknowledgment it signalled. As a piece of law it may have its issues, as above, but the thinking behind it is unimpeachable. However, a reality to confront is that minority job applicants can face disproportionate struggles throughout their lives. Employers are making a visible effort to encourage applicants from a broader range of backgrounds. Nevertheless, this only goes so far towards levelling the uneven playing field. To achieve radical change, employees need to consider making fundamental changes in how they score job applicants whilst keeping up the current emphasis on encouraging applications from untraditional backgrounds.

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