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Positive action in the workplace

Arpita Dutt and Amanda Steadman consider the special measures that employers can use to help members of disadvantaged groups overcome obstacles and discrimination in the workplace.

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What is positive action?

The Equality Act 2010 provides protection from discrimination in the workplace and, broadly speaking, requires that workers are treated equally. Yet, simple equal treatment, without consideration of the context in which such treatment takes place, can perpetuate disadvantage since we don't all start from the same position in life.

It is this which has led to the development of laws allowing employers to take positive action to help advance those with certain protected characteristics. There is no statutory definition of "positive action", but it is perhaps best understood in general terms as: "*the use of special measures to assist members of disadvantaged groups in overcoming the obstacles and discrimination they face in contemporary society*" (Colm O'Cinneide, Professor of Constitutional and Human Rights Law at UCL).

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Positive action is different to "positive discrimination" or "affirmative action". Positive action involves special measures to redress disadvantage in order to achieve equality of opportunity. Positive discrimination or affirmative action, on the other hand, moves towards achieving equality of outcome by recognising the disadvantage faced by those with a protected characteristic and then using the protected characteristic as a legitimate criterion in any formal decision making. In other words, positive discrimination is a means of addressing historic disadvantage via reverse discrimination. Indeed, countries which have a tradition of using positive discrimination or affirmative action are typically those seeking to correct historic injustices. For example:

i. in the US, affirmative action was introduced in 1961 by President Kennedy to combat race discrimination by Government employers in recruitment (the rules were later expanded to cover sex) and was a means of correcting the historic disadvantages of slavery and racial segregation; and

ii. in South Africa, affirmative action was introduced after the dismantling of the apartheid regime to redress the resultant injustices and racial imbalances in the country.

Amongst the EU, positive action is favoured over positive discrimination. Below, we discuss the legal framework operating in the EU and the UK, but it's worth briefly pausing to consider whether positive action is, in fact, needed in the UK. To take a just a few examples:

i. **Sex:** women make up just over 53% of the UK workforce, which broadly reflects the population split. This sounds good on its face. However, in 2018, Cranfield University Female FTSE Index[1] reported that women held a mere 9.7% of executive roles within FTSE 100 companies. Only 3 of the FTSE 100 had more than one woman occupying an executive role. The figure for women in non-executive roles was better – standing at 35.4%.

ii. **BAME:** nationally, the working age population includes 16% of people from a BAME background. However, in 2019, the Government's Race Disparity Unit reported that out of 11 public sector workforces that collect data on the ethnicity of their workers, only 4 had workforces which reflected (or exceeded) this percentage.[2] These were: NHS doctors and non-medical staff, children's social workers and non-legal tribunal members. The remainder did not, for example, amongst teachers the BAME workforce was 8.7% and amongst firefighters it was 4.1%. Worse, only the NHS had a BAME senior leadership population in excess of 16%. In addition, the second annual update to the Parker Review reported in February 2020 that only 53 of the FTSE 100 had at least one BAME board member.

iii. **Disability:** in January 2020, the Government reported that 53.2% of people with disabilities were in employment (often part-time) compared to 81.8% of people without disabilities.[3] This is a concern when 19% of the working age population reported that they had a disability in 2019.

These examples provide some insight into the underrepresentation of protected groups at work, which is still prevalent despite decades of equality legislation.

1. https://www.cranfield.ac.uk/som/expertise/changing-world-of-work/gender-and-leadership/female-ftse-index
2. https://www.gov.uk/government/publications/ethnic-diversity-of-public-sector-workforces/ethnic-diversity-of-public-sector-workforces
3. https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7540

The legal framework

EU law

Full equality in practice is an explicit aim of European equality law. In European law the principle of equal treatment prohibits different situations from being treated the same just as much as it prohibits the same situation from being treated differently. As we will see, the difficulty lies in determining when situations are not the same and to what extent different treatment is justified.

The basic legal framework on positive action is established by the Treaty on the Functioning of the European Union and a number of different Directives, as well as the related case law from the Court of Justice (**CJEU**). EU member states cannot allow positive action which exceeds the limits established by this framework, but nor are they obliged to legislate to allow the maximum scope for positive action. Rather, EU law provides member states with a policy choice.

For many years, EU law only addressed non-discrimination (and, in turn, positive action) with regards to gender:

i. Article 157(4) of the Treaty on the Functioning of the European Union and Article 3 of the Recast Equal Treatment Directive 2006/54/EC (and its predecessor Directives) permit the use of proportionate positive action measures in order to prevent, or compensate for, disadvantages related to gender in vocational activities or professional careers, and which are pursuing the legitimate aim of achieving full equality in practice.

ii. Article 23 of the Charter of Fundamental Rights of the European Union also provides that the principle of equality: "*does not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex*".

This changed with the incorporation of the Treaty of Amsterdam in 1999 which led to competence to take action to combat discrimination on the grounds of:

i. Race and ethnic origin (Article 5 of Directive 2000/43/EC (the **Racial Equality Directive**)).

ii. Religion or belief, sexual orientation, age and disability (Article 7 of Directive 2000/78/EC (the **Employment Equality Directive**).

iii. Gender reassignment, marriage and civil partnership and pregnancy and maternity (Article 3 of the Directive 2006/54/EC (the **Recast Equal Treatment Directive**).

Despite this widened scope, the case law to date has concerned positive action in relation to gender only. There follows a brief survey of the handful of cases in this area and what they tell us about the CJEU's approach to positive action.

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In 1995 in ***Kalanke v Bremen*** C-450/93; [1995] ECR 1-13051 the Court held that measures which gave an *absolute and automatic* employment preference to the recruitment of equally qualified (i.e. to men) female candidates in underrepresented sectors went further than permitted by EU law.

This approach was finessed by the Court in 1997 in the case of ***Marschall v Land Nordrhein Westfalen*** C-409/97; [1997] ECR I-6363. Like Kalanke, preferential treatment was given to the recruitment of equally qualified female candidates in underrepresented sectors. However, here, the preferential treatment was not absolute and automatic, but was triggered in a tie-break situation to decide between the final candidates. Further, there was a so-called "savings clause" in place which allowed the employer to override the gender preference following an objective assessment of the candidates. This distinguished it from *Kalanke* since it did not guarantee absolute and unconditional priority to the women. The Court, stressing the importance of the "savings clause", said this approach was lawful.

In 1997 the Court also considered positive action measures adopted before the point of recruitment or appointment. In the case of ***Badeck*** C-158/97; [2000] ECR I-1875 the Court was prepared to permit the imposition of strict quotas prior to the point of appointment to a role. Here, public sector departments were required to adopt a women's advancement plan which contained targets of reserving at least 50% of training places for women and requiring at least 50% of all candidates invited to interview to be women.

In 2000 in ***Abrahmasson v Fogelqvist*** [2000] IRLR 732 the CJEU followed its earlier decisions in Kalanke and Marschall, finding that measures which gave an automatic preference to the recruitment of "sufficiently qualified" female candidates in underrepresented sectors were unlawful. The Court said that a rule which required an underrepresented group to be promoted over the other was only justified if the two candidates were of equivalent or substantially equivalent merit *and* there was a Marschall-style savings clause permitting an objective assessment of their personal situations.

The 2003 case of ***Serge Briheche v Ministre de l'Interieur, Minstre de l'Education Nationale and Ministre de la Justice***, provided a good review of previous case law and the current thinking on positive action (in particular, see the Advocate General's Opinion). In Briheche French law prohibited recruitment into the Civil Service of anyone aged over 45 (save where the applicant was a widow who was obliged to work). The measure was intended to give priority to women in recruitment into the Civil Service. Was this unlawful positive action? The Court considered the nature of the obligation of "full equality in practice" under the applicable treaties at the time and held that whilst the law looked beyond formal equality to substantive equality, it was not possible to say how far this goal could be achieved where positive action for a woman might create a claim of unlawful discrimination by a man. Again, they highlighted that measures must not automatically and unconditionally give priority to women. There must be an objective assessment which takes account the specific personal situations of all the candidates. The Court went on to hold that the French law was not consistent with the limits of permissible positive action.

> **" [The Court] highlighted that measures must not automatically and unconditionally give priority to women. "**

Taken together, these cases indicate that the CJEU's approach is that positive action measures are an exception to the principle of equal treatment and must be interpreted narrowly because they permit more favourable treatment of particular groups. In order for positive action to be lawful - at least in relation to gender -

there are four requirements

i. there must be underrepresentation;

ii. the candidates must be equally qualified (sufficiently qualified is not enough);

ii. the preferential treatment must not be automatic; and

iv. there must be an objective assessment of all criteria specific to the candidates.

It remains unclear whether the Court would take the same approach to positive action involving other protected characteristics.

The fact that there is scant case law on positive action is revealing. Indeed, in 2005 the European Commission's Network of Legal Experts in the Field of General Equality carried out a survey of positive action provisions across EU member states. They found that positive action was not seen as a priority by either legislatures or employers. Whilst every member state had provision for some form of positive action, there was very little evidence available on the impact or effectiveness of such provisions.

UK law

How has the UK approached positive action? When equality law was brought together under the Equality Act 2010[4] it was recommended that rules on positive action be brought into line with EU law, as reflected in the developing CJEU case law.

This led to the inclusion of two positive action provisions in the Equality Act 2010:

i. **General positive action under s.158:** this was broadly in place before the Equality Act 2010 came into force, although the Act extended the scope of the measures that could be taken. Previously, positive action had been limited to the provision of training for underrepresented groups and encouraging them to apply for posts. The new rules permitted employers to take action to overcome disadvantages and/or to meet specific needs. This effectively permits a wide range of reasonable adjustments in respect of protected characteristics other than disability (albeit on a voluntary basis). Section 158 came into force with the majority of the Equality Act 2010 in October 2010.

ii. **Positive action in recruitment and promotion under s.159:** this was introduced for the first time by the Equality Act 2010 and permitted preferential treatment in recruitment and promotion in certain circumstances. Section 159 came into force on 6 April 2011.

The Equality Act 2010 is supported by the statutory EHRC Code of Practice on Employment (the **EHRC Code**). This contains a chapter on general positive action under s.158, but it does not cover positive action in recruitment and promotion under s.159. On 31 March 2014, a supplement to the EHRC Code was published addressing positive action under s.159 (almost 3 years after the law came into force) (**Supplement to the EHRC Code**).

As well as the Equality Act 2010 itself and the EHRC Code, other non-binding guidance is available

4. The Equality Act 2010 does not form part of the law Northern Ireland (save for minor exceptions). The position on positive action in Northern Ireland is not discussed in detail in this paper.

to aid our understanding of positive action. In 2011, the Government Equalities Office published a *Quick Start Guide and a Step-by-step Practical Guide* for employers on how to use positive action in recruitment. In 2014, the EHRC published a guide to *Board Appointments and Equality Law,* which discusses how positive action may be used.

It is important to note that taking positive action in the workplace is entirely optional for employers, save in the following cases:

i. Public sector employers may have a duty to consider taking positive action measures as part of the public sector equality duty (the **PSED**) under s.149 of the Equality Act 2010. This requires them to have regard to the need to advance equality of opportunity, which means they must consider: (i) removing or minimising disadvantages; (ii) taking steps to meet differing needs; and (iii) encouraging participation where it is disproportionately low. Indeed, as we will see, the use of positive action has been most prevalent amongst public sector employers.

ii. All employers have a positive duty to make reasonable adjustments for disabled people, which, as the House of Lords ruled in ***Archibald v Fife Council*** [2004] UKHL 32, may require an employer to treat a disabled person more favourably in order to remove the disadvantage. In *Archibald* the House of Lords concluded that the duty to make reasonable adjustments could include automatically transferring a disabled employee to an alternative role without requiring her to pass a competitive interview.

iii. It could also be said that the prohibition on unjustified indirect discrimination is designed to promote equality in practice since it forces a measure of positive action by requiring the employer to remove obstacles which are disproportionately disadvantaging particular groups.

Unsurprisingly, the EHRC Code also makes it clear that positive discrimination is not permitted by the Equality Act 2010. It offers as an example an LLP seeking to address the underrepresentation of women at partnership level by interviewing all women regardless of whether they meet the criteria for partnership. It says this would amount to unlawful positive discrimination. However, the EHRC Code reminds us that it is not unlawful for employers to treat a disabled person more favourably compared to a non-disabled person (EHRC Code 3.35).

The UK's departure from the European Union on 31 January 2020 paves the way for our domestic equality law to diverge from EU rules. Could we see Britain adopting a more radical approach to equality in practice, perhaps permitting positive discrimination? In theory, yes, but it seems doubtful that a Conservative Government will seek to diverge from EU rules by introducing more robust equality laws. Rather, it's more likely that divergence will come in the form of paring back EU workplace rights. Indeed, the EU Withdrawal Act 2020 (compared to the earlier drafts of the Bill) gives the Government freedom to reduce protections (i.e. the removal of the lock on EU-derived workers' rights and the ability for all Courts and Tribunals to overturn decisions of the ECJ or domestic decisions on EU-derived rights).

> **" The EHRC Code reminds us that it is not unlawful for employers to treat a disabled person more favourably compared to a non-disabled person. "**

General positive action under s.158

The general positive action provisions contained in s.158 apply can be used in both the employment and the non-employment context (e.g. education, healthcare, housing etc). In the context of this paper, we primarily consider its application in the employment context.

Section 158 can be used where an employer reasonably thinks that persons sharing a protected characteristic:

i. suffer a disadvantage connected to the characteristic;

ii. have needs that are different from the needs of persons who do not share the characteristic; and/or

iii. have disproportionately low participation in an activity.

Where this is the case, then the employer may take action which is a proportionate means of achieving one or more of the following aims:

i. enabling or encouraging the affected persons to overcome or minimise the disadvantage identified;

ii. meeting the needs of the affected persons; and/or

iii. enabling or encouraging the affected persons to participate in that activity.

The threshold for use of positive action is thought to be relatively low (i.e. demonstrating that the employer "reasonably thinks" the action is needed). While some evidence will be required to show the disadvantage, different needs or low participation, the EHRC Code says this does not need to be sophisticated statistical data or research (EHRC Code 12.14). It suggests that sufficient evidence could be gathered in the following ways: (i) looking at the profiles of the workforce; (ii) making enquiries with other comparable employers in the area or sector; and/or (iii) through consultation with workers or trade unions.

Employers may feel this guidance glosses over some obvious difficulties in gathering such evidence. For example, using workforce profiles to justify positive action is, to some extent, predicated on employees voluntarily declaring diversity data such as ethnicity, disability or sexual orientation. Public sector bodies are required to publish equality information to demonstrate their compliance with the PSED. Yet how many private sector employers regularly and systematically gather this kind of data? Even where data is gathered, how do employers (whether public or private sector) get around the problem of employees being unwilling to share this information? Is the profiling safe to rely on if it is incomplete?

Below we consider the three situations in which s.158 positive action is justified and the types of remedial action that can be taken.

Remedying disadvantage

The first situation in which positive action can be taken is where the employer reasonably thinks that persons with a protected characteristic suffer a "disadvantage" connected to that

characteristic. "Disadvantage" is not defined in the Equality Act 2010, but the EHRC Code tells us that it may include: "*exclusion, rejection, lack of opportunity, lack of choice and barriers to accessing employment opportunities*". It is also said that disadvantage may be obvious in relation to: "*some issues such as legal, social or economic barriers or obstacles which make it difficult for people of a particular protected characteristic to enter or make progress in an occupation, a trade, a sector or workplace*". (EHRC Code 12.16).

The Equality Act 2010 places no limit on the types of action that can be taken to overcome or minimise the disadvantage. Possible actions include:

i. Targeting advertising at specific disadvantaged groups (e.g. advertising roles in media outlets likely to be used by the target group).

ii. Making a statement in adverts that the employer welcomes applications from the target group (e.g. "older people are welcome to apply").

iii. Providing opportunities exclusively to the target group to learn more about particular types of work with the employer (e.g. internships or open days).

iv. Providing training opportunities in work areas or sectors for the target group.

For example, the Metropolitan Police is currently running recruitment campaign on Facebook targeting women.

Meeting needs

The second situation in which positive action can be taken is where the employer reasonably thinks that persons with a protected characteristic have needs that are different from the needs of persons who do not share the characteristic. Again, there is no statutory definition of "different needs", but the EHRC Code says that a group of people may have "different needs" if, due to past or present discrimination or disadvantage or due to factors relevant to that group, they have needs that are different from other groups. The needs don't have to be unique. Needs may be different because, disproportionately compared to the needs of other groups, they are not being met, or because the need is of particular importance to that group.

Again, the Equality Act 2010 does not limit the possible remedial actions that can be taken. An example might be the provision of IT training to the over 60s. All groups of workers will need IT training to some degree, but older workers who have not grown up with the current technology may have a particular need for more extensive training than is offered to other groups. You may have heard of the recent case of Eileen Jolly against The Royal Berkshire NHS Foundation Trust[5] where this very issue was highlighted. Eileen was an 89-year-old medical secretary who was dismissed from her job because of a "*catastrophic failure in performance*". The Trust said that she was stuck in "*old secretarial ways*". Eileen said was fired because she could not use a computer, and this was unfair and amounted to age discrimination. She was successful and ended up being awarded £200,000. In the judgment, the Tribunal Judge said that the IT training that had been given to Eileen was inadequate and that it would have been appropriate to offer her further training to help her upskill. Perhaps the dismissal could have been avoided if the Trust had taken positive action.

5. https://assets.publishing.service.gov.uk/media/5c541da9e5274a49487aef5b/Mrs_E_Jolly_v_Royal_Berkshire_NHS_Foundation_Trust-3324869-2017-Judgment.pdf

Other examples of possible actions could be the provision of support or mentoring (e.g. to a member of staff who has undergone gender reassignment) or the creation of a work-based support group for members of staff who share a protected characteristic and who may have workplace experiences or needs that are different from other staff (e.g. women's networks).

Remedying disproportionately low participation

The employer will need to have some reliable indication or evidence that participation is disproportionately low compared with that of other groups or compared with the level of participation that could be reasonably expected for people with that protected characteristic. It may be enough to show that participation is low compared with the proportion of people with that characteristic nationally, locally or within the particular workforce.

The EHRC Code provides the following example of local underrepresentation: an employer has one factory in Cornwall and one in London. Each factory has 150 workers. The Cornish factory employs 2 BAME workers and the London factory employs 20 BAME workers. On the face of it, the Cornish factory clearly looks worse. However, if the ethnic minority population is 1% in Cornwall and 25% in London, things look different. In the Cornish factory, the employer would not be able to meet the "disproportionately low" threshold (since 2 / 150 = 1%, which is reflective of the local population). Despite employing significantly more BAME workers in the London factory, the number employed is disproportionately low compared to the BAME population in London (since 20 / 150 = 13%, which is not reflective of the local population).

However, some care needs to be taken with this approach. In the case of ***Hughes v Hackney London Borough Council*** (unreported, 1986) – a pre-Equality Act 2010 case – the employer sought to encourage applications from ethnic minority groups for gardening roles. The Employment Tribunal said that the Council had failed to prove that the proportion of ethnic minority workers doing relevant work was small in comparison with the proportion of people of that group among the population from which the Council normally recruited. Although it was true that there was a smaller proportion of black gardeners than black residents in Hackney, the Tribunal noted that only 58% of the Council's recruits actually came from Hackney, with the remainder coming from outside the borough. Therefore, the area should not have been restricted to Hackney and the Council had provided no evidence from where outside Hackney the remaining recruits came from and the ethnic minority members within that population.

Once an employer is satisfied as to underrepresentation, there is no limitation on the remedial measures that can be taken. A wide range of actions could be covered including:

i. Setting aspirational targets for increasing participation within a particular timescale.
ii. Providing bursaries to obtain qualifications in a profession.
iii. Outreach work such as raising awareness of roles within the community and educational establishments.
iv. Reserving places on training courses.
v. Targeted networking opportunities.
vi. Working with local schools and colleges inviting students from the underrepresented groups to spend a day at the company.
vii. Mentoring.

The insurance company Axa provides a good example of an employer adopting many of these kinds of section 158 measures (whether or not they are badged as such). They operate two types of development programme, targeting women and focusing on female progression in the business. They run a networking group, which is open to both men and women, but which has the objective of fostering the professional development of women. They ran an annual Women's Conference (now known as the Inclusion Conference) which was centred around sharing knowledge on gender diversity. Axa also has aspirational targets for gender balance at Group Senior Executive level and locally at other levels. Finally, they deploy gender balanced shortlisting for senior roles.

Is the proposed action proportionate?

Identifying disadvantage, need or underrepresentation and the proposed remedial action is not the end of the story. The employer must also ensure that the proposed action is a proportionate means of achieving the relevant aim. Here, the requirement for proportionality corresponds to the test of justification found elsewhere in the Equality Act 2010 (e.g. in respect of indirect discrimination).

The EHRC Code says that proportionality involves the balancing of competing relevant factors. The kinds of questions the employer will need to consider are:

i. How serious is the disadvantage, need or underrepresentation?

ii. Is the action appropriate to achieve the stated aim?

iii. If so, is the proposed action reasonably necessary to achieve the aim, or would it be possible to achieve the aim as effectively by other means less likely to result in less favourable treatment of others?

iv. If there is an adverse impact on others, what steps are being taken to mitigate that adverse impact?

v. Does the measure rely on objective and transparent criteria?

vi. Is there a procedure in place for reviewing the impact of, and need for, the measure? Here, the EHRC Code cautions against taking positive action indefinitely without review since the steps taken may remedy the situation meaning it is no longer proportionate to continue the action (EHRC Code 12.30).

Recent examples of s.158 in practice

There are very few reported cases involving the use of s.158 measures in the employment sphere. However, there are two very recent examples of the impact of s.158 arising in the housing and educational sectors.

The case of ***R v (1) Hackney London Borough Council (2) Agudas Israel Housing Association [2019] EWCA Civ 1099*** [6] concerned the use of s.158 in the allocation of housing. Z was a non-Jewish woman living in the borough of Hackney and was near the top of the Council's housing priority system. She had been living with her children, two of whom were autistic, in temporary accommodation for 16 months, because their previous home had been ruled unsafe. Z saw a property listed on the Council's housing system by a Housing Association which stated:

6. https://www.bailii.org/ew/cases/EWCA/Civ/2019/1099.html

"*Consideration given only to the Orthodox Jewish community*". Applicants had to say whether they were strictly orthodox, in terms of observing the sabbath and dietary laws, as well as stating whether they were Ashkenazi or Sephardi.

Z made an application for judicial review of the policy. Her application was dismissed in the High Court, which ruled that the Housing Association was within its rights to take positive action in favour of Orthodox Jews. The Court found that the evidence demonstrated disadvantage (in terms of anti-Semitic harassment and attacks) and particular need (in terms of requiring properties to accommodate larger-than-usual families) in the Orthodox Jewish Community. The Court also found that the measure was proportionate. The decision was upheld by the Court of Appeal in 2019. The decision has been appealed to the Supreme Court (permission was granted in December 2019). This will be the first time the Supreme Court considers positive action.

Another s.158-related story which recently hit the headlines concerned the proposed donation of over £1 million to fund bursaries for impoverished white boys to attend two of Britain's top private boys' schools. The philanthropist Sir Bryan Thwaites offered to donate £400,000 to Dulwich College and £800,000 to Winchester College to fund scholarships reserved for white students from disadvantaged backgrounds (on the basis that poor white boys are one of the lowest academic achieving groups compared to other groups). Had the schools accepted the funding, then they would have had to ensure that the requirements of s.158 were met, or potentially risk discrimination claims from non-white students. This would, in theory, have been possible, provided there was supporting evidence that white students were disadvantaged (race being the protected characteristic), had different needs or were underrepresented at those Colleges – this seems rather unlikely. The socio-economic status of the students would not be a relevant factor in assessing whether positive action was justified.

In the end, both colleges turned down the money, primarily because of the optics of accepting the donations, rather than from fear of breaching equality law. Winchester College said: "*Notwithstanding legal exceptions to the relevant legislation, the school does not see how discrimination on the grounds of a boy's colour could ever be compatible with its values*". The Master of Dulwich College said: "*I am resistant to awards made with any ethnic or religious criteria. Bursaries are an engine of social mobility, and they should be available to all who pass our entrance examinations, irrespective of their background*".

Sir Bryan Thwaites said that he thought the schools had made a "*strategic mistake in their interpretation of the legislation*". He pointed to the fact that Cambridge University was willing to accept a donation from the British rapper, Stormzy, to fund scholarships for black students to attend the University in 2018 and 2019.[7] Perhaps a key difference is that the underrepresentation of black students at Cambridge University was already well-established by data. Between 2012 and 2016, it was revealed that some colleges had failed to admit a single black student. By 2017, only 58 black undergraduates were admitted across the whole University, out of total population of around 3,500. This equates to about 1.6%, compared to the black population in the UK of around 3.3%.[8] In other words, the groundwork for relying on s.158 had been done. The University was

7. https://www.bbc.co.uk/news/newsbeat-45206266
8. https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/national-and-regional-populations/population-of-england-and-wales/latest#by-ethnicity

already pursuing measures to increase the representation of black students at the time it accepted Stormzy's donation. Indeed, it would have seemed slightly perverse for them to have turned it down given their stated objectives.

Positive action in recruitment and promotion under s.159

Before the Equality Act 2010, employers were not permitted to take any kind of positive action in relation to selection of a candidate for a role. The Labour Government was concerned that the old positive action provisions were not wide enough to tackle the kind of disadvantage faced in modern society. For example, in the 2007 publication *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*[9] the Government identified that ethnic minority job applicants may be as well or better qualified than the majority of the population but were still underrepresented across certain sectors.

The Equality Act 2010 heralded the introduction of positive action in recruitment. In this context, "recruitment" specifically means the offering of employment. Beyond that, any broader recruitment arrangements and initiatives are covered by s.158. The rules cover traditional employees, apprentices, workers, partners and LLP members, pupils and appointments to a personal or public office.

In a nutshell, s.159 allows an employer to take positive action in recruitment where it reasonably thinks that persons who share a protected characteristic either

i. suffer a disadvantage connected to that characteristic; or
ii. have disproportionately low participation in an activity.

Where this is the case the employer may take proportionate action with the aim of enabling or encouraging persons with the protected characteristic to overcome or minimise the disadvantage or to participate in the activity. Although this is termed as "positive action", some commentators view the offering of a role based, ultimately, on a candidate's protected characteristic to be a form of positive discrimination. Yet, provided s.159 is applied in right way, employers will not commit unlawful discrimination under the Equality Act 2010.

The first step will be to identify the disadvantage or the underrepresentation by reference to evidence. The approach outlined above in relation to s.158 positive action applies equally here.

Once the disadvantage or underrepresentation has been identified, an employer may use s.159 provided that:

i. candidate A (from the target group) is as qualified as candidate B to be recruited or promoted;
ii. the employer does not operate a blanket policy of positive action; and
iii. the action is a proportionate means of achieving the legitimate aim.

9. https://webarchive.nationalarchives.gov.uk/20120919212654/http://www.communities.gov.uk/documents/corporate/pdf/325332.pdf

Are the candidates 'as qualified' as each other?
It is worth noting that Parliament chose the wording "as qualified as" instead of "equally qualified" because they wished to avoid the exercise being solely about the equality of qualifications. The Equality Act 2010 doesn't elaborate on the meaning of "as qualified as". However, the Explanatory Notes to the Act say that the question of whether one candidate is as qualified as another is "*not a matter of only academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job which could include matters such as suitability, competence and professional performance*" (paragraph 518).

Nevertheless, this restriction is a significant limitation on the scope of the provision. It means that if an employer recruits or promotes someone from a target group in preference to a better qualified candidate they will be committing unlawful positive discrimination. The fact that the employer has a benign motive won't excuse the discrimination.

The result is that the s.159 can only be used in relatively limited circumstances. The Supplement to the EHRC Code puts it as follows: "*This provision essentially allows positive action in recruitment and promotion in relation to a tie-breaker. It allows an employer making a choice between two or more candidates who* ***are of equal merit*** *to take into consideration whether one is from a group that is disproportionately under-represented or disadvantaged within the workforce*" (page 8).

In practice, how can an employer determine whether two candidates with different qualifications and experience are "of equal merit". The GEO Guide says employers should do three things to establish whether candidates of equal merit:

i. establish a set of criteria against which candidates will be assessed in the course of their job application (for example, the candidate's overall ability, competence and professional experience, together with any formal or academic qualifications, as well as other qualities required to carry out the particular job);

ii. be aware of indirect discrimination within the criteria selected (e.g. an unjustifiable requirement to work shifts could put women at a disadvantage); and

iii. ensure that the candidates are of equal merit in relation to the particular job.

Employers thus have some leeway to make a case that a candidate is as qualified as another according to their chosen criteria. The more demonstrably objective the assessment the less open to challenge the ultimate selection will be. However, employers are told that they should not consider two candidates to be of equal merit just because they have both passed the same test or assessment. The GEO Guide gives the example of an assessment with a pass mark of 70%. If candidate A from the target group gets 71% and candidate B gets 91% it would be wrong to say that because they both have passed the minimum threshold they are of equal merit.

> **" The result is that the s.159 can only be used in relatively limited circumstances. "**

At what stage in the recruitment process should s.159 be used?
The GEO Guide says that s.159 can be used at any stage in the recruitment process e.g. it could be used at the long-listing and/or short-listing stages.

However, the provision cannot be used without evidence that the candidates are "as qualified as" each other. Given that only limited information about candidates will be available at the very early stages of the recruitment process, using s.159 at this point could render an employer vulnerable to challenge. This is an issue that recruitment agencies need to note, since they will be acting as the employer's agent and will be liable for any acts of discrimination committed with their express or implied authority. For example, this could arise where an employer asks a recruiter to only put forward candidates of a particular gender for their longlist. The EHRC says on the topic: "*we do not believe that it is lawful to address underrepresentation by longlisting or shortlisting only female candidates to the detriment of male candidates*" (although, of course, if the women are objectively the best candidates then an all-women longlist or shortlist would be lawful).

Guidance from both the GEO and EHRC says that in the vast majority of cases s.159 should be used in a tie-breaker situation at the end of the recruitment process. The logic here is that by this stage of the process the employer should know enough about the candidates to decide if they are truly as qualified as each other. On the other hand, it is arguable that the end of the process is too late as, by this point, subjective preferences will usually be bedded in.

Is the employer operating a blanket policy?
The CJEU's case law makes it clear that positive action is not lawful if the employer is operating a system of automatic and unconditional preferences. This is reflected in s.159, which provides that the employer must not apply a blanket policy prioritising certain groups. This represents another important limitation on the practical scope of s.159, since it means there must be an objective assessment of each of the candidates' qualifications.

Interestingly, Baroness McGregor-Smith, former CEO of the Mitie Group and author of the Government's 2017 *Race in the Workplace* review said in November 2019 that companies needed to take more robust action to improve the position for BAME workers and, failing that, then some form of positive discrimination may be needed.

Is the action proportionate?
Finally, as with s.158, the proposed positive action has to be a proportionate way of achieving the legitimate aim. The considerations outlined above would apply equally here.

Recent example of s.159 in practice
Until 2019, there were no decided cases in England and Wales on the application of s.159. Then in February 2019, the Liverpool Employment Tribunal handed down its judgment in the case of ***Furlong v The Chief Constable of Cheshire Police, ET 2405577/18***.[10] As the sole authority on the issue, it is worth considering in some detail what happened.

In 2016, various Government reports highlighted the lack of diversity in the police force. In 2015, 5.5% of police officers were from a BAME background, compared to 14% of the population and 11.4% of the workforce. Cheshire Constabulary was a particularly bad offender. In 2015 out of 1498 police constables (**PCs**), 1468 were white, 5 were Asian and 0 were black (the rest were unknown).

10. https://assets.publishing.service.gov.uk/media/5c66abfd40f0b61a1e93a27a/Mr_M_Furlong_v_The_Chief_Constable_of_Cheshire_Police_2405577.18_judgment_and_reasons.pdf

A similar picture was seen in relation to Cheshire's female and disabled PC workforce with 484 female PCs and 17 disabled PCs. And out of a workforce of c2000 police officers (a wider group than PCs), Cheshire had 32 identifying as gay and 8 identifying as bisexual.

Cheshire worked hard to redress this and put in place a Positive Action Plan. This was driven by the Deputy Chief Constable at the time, Jeanette McCormick, who was described by the Tribunal as a "trailblazer". The Plan covered a wide variety of s.158 positive action measures such as:

i. encouraging applications from BAME and female applicants;
ii. familiarisation events to encourage interest;
iii. an insight programme designed to support and develop applicants from diverse communities;
iv. rebranding of marketing materials and social media campaigns;
v. a buddy and mentor scheme for new recruits to provide support for development;
vi. monitoring of all BAME and female officers to ensure that they all had a personal development plan in place; and
vii. leadership development for senior female officers.

Progress was made, but it was extremely slow. By 2017 the number of black PCs had gone from 0 to 3. In 2018, Cheshire decided that more radical action was needed. It decided to utilise s.159 to redress the underrepresentation of these different groups

Cheshire operated a three-stage recruitment process:

i. a competency-based questionnaire;
ii. an assessment centre, including written assessments; and
iii. a panel interview.

After the third stage, the candidate passed or failed. If they passed, then a job could be offered to them. It was at this final stage that Cheshire proposed to use the tie-breaker provisions.

Matthew Furlong was a white, heterosexual man. His dad was a policeman with Cheshire and Matthew wanted to follow in his footsteps. He undertook voluntary police work whilst at University and after he finished University he applied for a job as a PC with Cheshire. He did very well at all stages of the process – so much so that at the end of the panel interview, one of the panel members said it was "*refreshing to meet someone as well-prepared as him*". Unsurprisingly, he left the interview thinking the job offer would be forthcoming. However, the offer never came.

> **" Cheshire Constabulary decided that more radical action was needed. It decided to utilise s.159 to redress the underrepresentation of these different groups. "**

Matthew was told that he had passed the interview stage but there was no role available for him and his application was to be put on hold until a role became available. What happened?

There were 85 positions available. Of 180 candidates who made it through to the third stage, 127 passed. It was at this point that Cheshire applied the tie-breaker provision. It treated those 127 as equal in merit with the result that anyone in the pool of 127 who was a woman, from a BAME background, identified as LGBT or who was disabled was made an offer. This meant that Matthew was pushed down the list and lost out.

He brought claims of direct sex, sexual orientation and race discrimination. Although disabled candidates were also prioritised he did not bring a claim about this given the special position relating to the treatment of disabled candidates (i.e. s.13(3) of the Equality Act 2010 which allows employers to treat disabled persons more favourably than non-disabled persons including at any stage in the recruitment process). He was successful.

The Employment Tribunal found that the favourable treatment of the target groups was lawful in principle under s.159 and that Cheshire had legitimate aims. However, they had acted unlawfully in practice by simply scoring a pass or fail at the interview stage notwithstanding "*the extensive amount of information which was gathered against each candidate and which would enable some sort of scoring or prioritisation of all candidates to be carried out*". Closer scrutiny would have revealed a wide range of levels amongst the final 127, from extremely strong passes, to borderline passes, to a candidate who failed due to their use of inappropriate language in the interview but who was then remarked as a pass.

Although not the strongest candidate, Mathew was at the upper end (he asserted he had achieved a score of 76%) and would likely have got though had prioritisation been applied (e.g. a candidate scoring 38% was offered a role). Although Cheshire was entitled to assess merit in the round, the problem was that there were very obvious differences in merit as borne out by the data. The Tribunal said that: *"…in using a pass/fail mechanism to assess interview performance at the third stage of the recruitment exercise put forward an artificially low threshold for the recruitment exercise such that substantial numbers were then "deemed equal" when plainly common sense dictates that they could not be so. They did this in order to put in place their action plan of positive action in the recruitment round for PCs*" (paragraph 105). The Tribunal said this approach was disproportionate and amounted to a blanket policy. They had failed to objectively assess the specific personal qualifications of all of the candidates.

The outcome in Furlong can be contrasted with the Bank of England's appointment, in 2018, of a male economist to its Monetary Policy Committee from a shortlist of five candidates, four of whom had been women. When recruiting for the role, the Bank had "actively contacted" 44 women and 43 men to apply for the role. Of those, 19 men and 8 women applied. From this, one man (1/19, so 5% of male applicants) and four women (4/8, so 50% of female applicants) were shortlisted. Against the odds, the male candidate, Professor Jonathan Haskel, was appointed to the role. This appointment drew strong criticism from MPs at the time such as Rachel Reeves and Nicky Morgan.

However, the Treasury said the appointment was made on the basis of merit alone, following the recommendations of the interview panel (comprising two women and a man). What happened here,

it seems, is that the despite reaching the final stages of the process (so perhaps being of similar merit), the candidates were prioritised after the interview stage. The outcome was that no female candidate was of equal merit to Professor Haskel and so was not be appointed. This would have been the legally correct approach.

Strengths and weakness of the UK legislation

The positive action provisions under the Equality Act 2010 represent progress: the protection is wider than that in place before. The protection applies to all of the protected characteristics covered by the Equality Act 2010 (previously only sex, race, religion / belief, sexual orientation and age was covered). Further, s.159 allowed employers to act in connection with recruitment and promotion for the first time.

On its face, the regime is quite flexible. The basis for taking action is not prescribed: the employer doesn't need reams of data to justify reliance on the provisions, albeit some evidence is needed. And nor is the range of possible measures set in stone. The broad drafting of s.158 gives employers the scope to implement a wide range of measures.

However, a key weakness with the regime is the fact that it is voluntary, leaving positive action competing with a raft of ever-changing compulsory employment obligations. There's no direct risk for an employer in simply ignoring positive action – there is no exposure to Tribunal claims for not adopting positive action measures. All of which means that the uptake (at least as far as s.159 is concerned) is low across the board. Research by the University of Chester in 2015 noted that: "*Indications are that the broadening of the positive action provisions has had little, if any, impact on the extent to which these initiatives are utilised*".

Another weakness is that whilst the basis for taking positive action is not prescribed, the employer still has to do some work upfront to justify why the measure is needed and what represents a proportionate response. It is said that sophisticated research or data is not required and that employers can simply look at workforce profiles to understand the problem. However, this approach presents risks where employers are relying on incomplete data sets. Indeed, this has been highlighted as a potential issue in the context of ethnicity pay reporting.

Another significant weakness is the limited nature of s.159. The requirement for candidates to be of equal merit is fraught with difficulty. How can employers make this assessment safely? How can they avoid making subjective assessments of candidates? Even where they are able to do it, how often are candidates truly of equal merit? The lack of judicial guidance on how s.159 works means employers are fearful of getting it wrong. Research by University of Chester suggests that whilst employers are open to the use of s.158 measures, there is degree of wariness about s.159 and a fear of "reverse discrimination" claims. Unfortunately, the outcome of the *Furlong* case is likely to do little to assuage that fear.

> **" A key weakness with the regime is the fact that it is voluntary, leaving positive action competing with a raft of ever-changing compulsory employment obligations. "**

Positive action in practice

Examples of employers using positive action

Having considered the theory in some detail, it's worth thinking about how employers have approached positive action in practice. One difficulty here is that few employers have made use of the positive action provisions (or, at least, few are willing to go public about it). Research carried out by the University of Chester in 2015 highlighted that, despite a few notable anecdotes, there is limited engagement from employers with the positive action provisions, especially s.159. Most of the examples we discuss below involve public sector employers, which are more likely to engage with positive action as a result of the PSED.

The police: funded pre-qualification training

Since 1999 the police have been trying to increase the proportion of BAME officers to match the populations they serve. However, to date, not one out of the 43 police forces in England and Wales has achieved this and it will be 2052 before that happens (on current progress). In response, various police forces have employed positive action including, for example, police forces in Staffordshire, Humberside, Northumbria, Cheshire, Gwent and London. The College of Policing has produced a 35-page guide for police forces on the use of positive action.

In 2016, Gwent Police trialled a mentoring scheme, which included a funded pre-joining qualification training, known as the Certificate of Knowledge in Policing (**CKP**) (which costs around £1000) for BAME recruits. In 2018, the Metropolitan Police introduced extra financial support for female and BAME candidates applying to be PCs. The force covered the entire costs of the CKP, whereas white male candidates only received 50% funding. The concern was that the cost of gaining the qualification so early in the recruitment process was acting as a barrier to recruitment of the target groups.

In 2019, Sara Thornton, the Chair of the National Police Chiefs' Council, said that her personal view was that positive action as it stands is insufficient. Instead, in her view, police forces should be allowed to positively discriminate. She said: "*If you want to do something to give a shock to the system and say we can't wait to 2052… we need to do something different. It is a political judgement…how important is this? If you think it's important… you need a different approach*". Indeed, the latest statistics from the Police Foundation (a think tank) give weight to Ms Thornton's view. They recently reported that the police chiefs managed to increase the number of black police officers across the country by a mere 86 over an 11-year period

The Football League: targets and guaranteed interviews

In 2015, the Football League launched an initiative aimed at increasing employment opportunities for managers and coaches from BAME backgrounds, which were underrepresented. Amongst other things, it proposed to introduce mandatory recruitment practices which would make it compulsory for clubs to interview at least one BAME candidate (where an application had been received) for all youth development roles. The Football League said it intended to set a target of between 10% - 20% of such positions being filled by BAME candidates by 2019.

The Football League perhaps took inspiration from the American National Football League (**NFL**) and the introduction of the "Rooney Rule" (named after Dan Rooney, the former owner of the Pittsburgh Steelers and former chairman of the NFL's diversity committee). The Rooney Rule was

established in 2003 and league teams to interview ethnic minority candidates for head coaching and senior football operation jobs (although there is no preferential treatment in respect of actual hiring). The purpose of the Rooney Rule is to ensure that minority coaches, especially African-Americans, would be considered for high-level coaching positions. However, as of 2020, the NFL has three African-American head coaches – the same number as in 2003 when the rule was first introduced.

BBC: training and internship opportunities

The Royal Charter, which is the constitutional basis for the BBC, sets diversity targets for the organisation. It stipulates that the BBC must ensure that it reflects the diverse communities of the whole of the UK in the content of its output, the means by which its output and services are delivered (including where its activities are carried out and by whom) and in the organisation and management of the BBC.

In 2015, the BBC ran a campaign aimed at encouraging people with disabilities to apply for a training opportunity on weather presenting on media channels because, at the time, it had no disabled weather presenters. The training was designed to provide an overview of working in the BBC weather centre and give practical experience in presenting weather bulletins to camera.

The BBC has also created internship opportunities for BAME candidates only. In 2017 they advertised a 12-month internship for a trainee broadcast journalist from a BAME background. The BBC faced criticism at the time for excluding white applicants, but they were defiant – they said: "*This training scheme is designed as a positive action scheme to address an identified under-representation of people from ethnic minority backgrounds in certain roles. Such schemes are allowed under the Equality Act and we're proud to be taking part*".

That was not the first time the BBC's diversity strategy has come under fire. In 2016, a BBC presenter criticised their diversity strategy. Jon Holmes was a writer and comedian who appeared on Radio 4's *The Now Show* for 18 years. He claimed he was sacked for being a white male because the show wanted to recast the show with "*more women and diversity*". He said he was in favour of diversity but "*things had gone too far*". The BBC denied the accusation, stating that they always hired on merit and the decision to terminate Jon Holmes was "*a creative not a diversity decision*".

Other organisations which have publicised their use of positive action

The **NHS** supports a variety of positive action measures including the NHS Leadership's Academy Stepping Up Programme, which supports the development of aspiring leaders from BAME backgrounds.

Various **fire services** (e.g. Shropshire, Devon & Somerset, Derby, Cheshire and the West Midlands) advertise their use of positive action measures. For example, Shropshire Fire Service hold taster sessions and open days for members of underrepresented groups and also make statements in job adverts encouraging applications from underrepresented groups.

Many **universities** (e.g. Manchester, Cambridge, Bristol, Warwick, York, UCL, and Keele) advertise their use of positive action measures. For example, Manchester University holds promotion workshops for BAME and female staff and offers work placements to disabled people. Research

carried out by the University of Chester suggests that 40% of Higher Education Institutions have used positive action.

The Women's Engineering Society has produced guidance on positive action measures that employers can take to attract more women engineers. This was produced in response to a number of enquiries - presumably from **engineering businesses** operating in the private sector. The guidance covers things like the presentation of marketing materials, local engagement and establishing women's networks. The guidance contains lots of good suggestions, although they are all focused on general positive action rather than positive action in recruitment.

Positive action and gender pay gap reporting

It is thought that the introduction of gender pay gap reporting may drive an increase in the use of positive action by employers, particularly in the private sector. The gender pay gap reporting regulations came into force on 5 April 2017, with the first reports published on 4 April 2018. In April 2020, the third round of reports will be published. Analysis of the reports reveals a common theme is the higher proportion of men occupying the most senior, highly paid roles. This suggests that the gender pay gap can be understood, primarily, as a representation gap. Positive action could be a useful tool in redressing this gap.

Currently, the only obligation on employers is to publish their gender pay information. There is no requirement to publish an action plan for closing the gap. Research by the EHRC showed that only about half of reporting employers published a narrative and many of these were very broad brush and had little about future remedial action. The research also showed that only 2 employers in their sample of 440 explicitly referred to using or planning to use s.158 positive action measures and no employers had plans to use the s.159 tie-break measures. The EHRC said that this highlighted the "*...need for a better understanding of positive action and how it can be applied to address the gender pay gap*".

Despite the fact that employers do not currently have to publish an action plan, it is likely that, as the regime beds in, employers will come under increasing pressure to materially reduce their pay gap. This may encourage employers to be bolder in their approach to positive action. Indeed, the most sophisticated narratives and action plans produced by larger organisations, especially those in the FTSE 100, reveal that many are already willing to embrace s.158-type diversity measures (even if not branded as such).

What types of action are employers taking?

Targeted recruitment

Targeted recruitment measures were prevalent amongst companies which relied heavily on STEM skills. These companies also tended to pursue outreach initiatives to schools to encourage young women to pursue STEM subjects/careers. For example, Rolls-Royce reported that outreach had helped it increase the proportion of female apprentices and graduates. Other employers highlighted their work with organisations with expertise in sex equality, such as Women in Science and Engineering to help attract and develop female talent.

Ban on all-male shortlists/use of 50:50 shortlists

PwC reported a 43.8% mean gender pay gap in 2018. It decided to ban all-male shortlists for roles in the UK in an attempt to increase the number of women in senior roles. They also announced plans to ban all-male interview panels and also set a 50:50 gender target across all roles.

In 2018, TSB announced it would use a 50:50 gender shortlist for candidates to replace former CEO, Paul Pester. It also confirmed that gender-balanced shortlisting had already been used for external recruitment at senior levels for 2 years and this was to be extended to all roles within the business.

In fact, some banks had already moved towards 50:50 shortlisting before the introduction of gender pay gap reporting. For example, in 2015, HSBC announced that it would introduce 50:50 shortlists for all senior manager roles where externally recruited. Santander also operate 50:50 shortlists for middle and senior management positions.

Setting gender targets

A few organisations were prepared to set aspirational, time-bound gender targets. For example:

i. Channel 4 set a goal of having a 50:50 gender balance in its top earners by 2023 (currently 66:33);

ii. Virgin Media set of a goal of having a 50:50 gender balance at all job levels by 2025; and

iii. SSE aims to increase the number of women earning over £40,000 per year to 25% by 2025.

Interestingly, TSB hit the headlines in December 2019 when it announced that it would dock the bonuses of senior executives for failing to achieve its gender targets. Their target was to raise the proportion of women in senior roles to between 45 and 55 per cent by 2020. Despite the high profile appointment of chief executive Debbie Crosbie, the figure stood at just 38 per cent in 2018, 3 per cent lower than in 2017.

Returnship programmes

A number of employers operate returnship programmes. Whilst not exclusively reserved for women, the purpose is to encourage and assist employees who have taken a career break to return to work. This will typically be women who have taken a break for family reasons. For example, Accenture announced the launch a returnship programme and Goldman Sachs announced that they have extended their programme globally.

Other recruitment-linked measures

Other recruitment-related measures that reporting employer mentioned were:

i. anonymising CVs/application forms;

ii. ensuring language in job adverts did not betray a preference for male candidates; and

iii. ensuring equal number of men and women on interview panels.

Apprenticeships

Apprenticeships are an important route into work offering paid employment, on the job training and a qualification. Whilst there are similar numbers of male and female apprentices in England, female

apprentices are significantly underrepresented in better paid industries and overrepresented in poorer paid sectors such as early years care. BAME candidates are significantly underrepresented: 90% of apprentices in England aged 16-24 are white.

A report published by the EHRC[11] in March 2019 found that few employers were making use of positive action in connection with apprenticeships and work needed to be done to help employers recognise the benefits of using positive action. The research identified a number of reasons for limited use of positive action including:

i. lack of awareness about the ability to take positive action;
ii. lack of confidence to implement effective measures; and
iii. fear of legal liability and straying into unlawful positive discrimination.

The EHRC made a number of recommendations to try to increase the uptake of positive action amongst apprenticeship providers including:

i. using public procurement to promote greater use of positive action. Public bodies could influence the recruitment process in requiring that any successful contractor fulfils the requirements of the PSED – this may encompass positive action;
ii. employers should monitor recruitment, retention and progression by ethnicity, disability and gender and use positive action to address disparities; and
iii. sector bodies should promote use of positive action in apprenticeships.

Positive action in other jurisdictions

There is a dearth of systematic and up-to-date research analysing the positive action framework across the other 27 EU jurisdictions (and beyond) which makes it difficult to provide a full analysis of how it is working.

However, in 2009 (pre-Equality Act), a report[12] was published by EU's Directorate General for Employment, Social Affairs and Equal Opportunities, in conjunction with the University of Bradford, which examined the legal framework for positive action within several EU jurisdictions compared with several non-EU countries. The EU jurisdictions considered were Austria, France, Hungary, Ireland, Netherlands, Slovakia, Sweden and the UK. The non-EU countries considered were Canada, the USA and South Africa. This report provides us with some insight into the framework in other countries, albeit that it is incomplete in terms of EU jurisdictions and it is now 10 years old so things may have moved on in some or all of the jurisdictions.

Is it lawful to use quotas?

France and Austria operated quotas for the employment of disabled persons. In France, public authorities and private employers with more than 20 full-time workers had to ensure than 6% of the workforce consisted of disabled persons. In Austria, employers of more than 25 workers had to ensure that they employed at least 1 disabled employee per 25 workers. In both cases, the employer had the option of paying a fine as an alternative to complying with the quota.

11. https://www.equalityhumanrights.com/sites/default/files/research-report-123-positive-action-apprenticeships.pdf
12. http://ec.europa.eu/social/BlobServlet?docId=2723&langId=en

Ireland's Disability Act 2005 required public bodies to ensure that 3% of their workforce was disabled "*unless there is a good reason to the contrary for not doing so*".

The other main example was the legislation in Northern Ireland designed to help overcome the historical underrepresentation of Catholics in the police force. The law required a quota of 1 Catholic person to be recruited for each non-Catholic person appointed.

Does legislation require public or private sector organisations to take positive action?
There was no statutory obligation in Ireland, the Netherlands or Slovakia. Sweden had various laws requiring employers to promote gender and ethnic diversity. Swedish educational institutions also had to promote diversity on grounds of religion, sexual orientation and disability. In the UK, as we know, public sector organisations have to comply with the PSED, which overlaps with positive action. In Hungary, public bodies with more than 50 employees were required to have an equal opportunities action plan.

There were also examples where more discrete measures were required:

i. In Northern Ireland employers with more than 10 employees were under an obligation to monitor the religious composition of their workforce to ensure fair participation from both the Catholic and Protestant communities. If this was not present, then there was a legal duty to take "affirmative action".

ii. In France employers had to consider age and disability when selecting employees for redundancy.

iii. In Canada the Federal Employment Equity Act 1995 aimed to remedy past discrimination against women, disabled persons, Aboriginal people and members of visible minorities. It applied to federally regulated employers and public authorities and required them to draw up employment equity plans. Plus, any organisation which received a federal contract worth CAD 200,000 was required to sign a commitment to implement employment equity plans in line with the Act.

iv. The US had a similar pattern of imposing obligations on federal contractors to have a written affirmative action programme if they had more than 50 employees and were bidding for contracts worth more than US 50,000.

v. In South Africa the Employment Equity Act applied to public authorities and employers with more than 50 employees. It created a legal duty to ensure that the workforce was representative of the population with specific reference to ethnic origin, gender and disability. Although not expressly stated in the legislation, this was interpreted as implying quotas. Designated organisations were also obliged to report annually or biannually on the composition of their workforce

What forms of positive action are permitted, but not required, by legislation?
There was considerable variation between the EU member states. For example, Austria, Ireland and the UK permitted positive action on all protected grounds, whereas the Netherlands only expressly allowed it in relation to gender, race and disability. In France and Hungary there was no general statutory provision on positive action by reference to discrimination, although a wide range

of measures tackling socio-economic disadvantage were permitted. In Slovakia public authorities could take affirmative measures where these were focused on socio-economic disadvantage and disadvantages linked to age and disability.

In Canada, human rights law permitted affirmative programmes to improve the situation of disadvantaged persons. In South Africa, organisations not bound by the Employment Equity Act could voluntarily pursue positive action under that framework. In the US, the courts could impose positive action where unlawful discrimination was found to have occurred.

How could the positive action framework in the UK be improved?

It would be churlish to deny that the positive action framework has evolved for the better. However, there is still a very long way to go for its use to become embedded into employer diversity strategies. What steps might help employers to embrace positive action?

i. Publication of detailed research on good practice, together with a model for identifying and evaluating proposed measures.

ii. Raise awareness of positive action amongst general public and private sector employers and promote examples of good practice.

iii. Use public procurement to promote greater use of positive action. Public bodies should influence the recruitment process in requiring that any successful contractor fulfils the requirements of the PSED. Provision is already made for this in the **Public Services (Social Value) Act 2012**. The Act requires people who commission or buy public services to think about how they can secure wider social, economic and environmental benefits, rather than considering cost alone. This could include the promotion of a diverse workforce. In 2018 the Government announced plans to extend the Act to ensure that all Central Government major procurements explicitly evaluate social value (rather than just consider it) and to require major Government suppliers to publish data and action plans to address key social issues and disparities (e.g. ethnic minority representation).

iv. Require employers to monitor recruitment, retention and progression by ethnicity, disability and gender (to start with) and be required to use positive action to address disparities. Knowing more about their workforce will help employers understand where groups are disadvantaged and underrepresented and establish a strong evidence base.

v. Require employers to publicly report on workforce diversity and publish a positive action strategy. Greater transparency will help underrepresentation and positive action become a board level issue.

vi. Consider permitting positive discrimination as a viable policy intervention. Although this would have to be done at EU level, it's possible Britain may have the freedom to do this post-Brexit. This will, of course, depend on there being the political will to bring about such a change. Alternatively, bringing into force dormant sections of the Equality Act 2010 could provide employers with the ability to make more nuanced recruitment decisions. Section 1 (**Public sector duty regarding socio-economic inequalities**) of the Act provides for public authorities to have regard to the desirability of exercising its functions in a way that is designed to reduce inequalities of outcome resulting from socio-economic disadvantage. If this were brought into force (and extended to private sector employers)

this would enable employers to also factor in socio-economic disadvantage when considering taking positive action. If section 14 of the Act (**Combined discrimination: dual characteristics**) was also brought into force this would enable employers to consider two protected characteristics at the same time. Enabling employers to take such an intersectional approach and factor in socio-economic disadvantage would help employers lawfully take positive action in a nuanced way. For example, an employer in Tower Hamlets with an underrepresentation of working class Bangladeshi women would be able to redress this by lawfully targeting such candidates (and recruiting them in a tie-break situation).

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