



Positive Action in the Workplace

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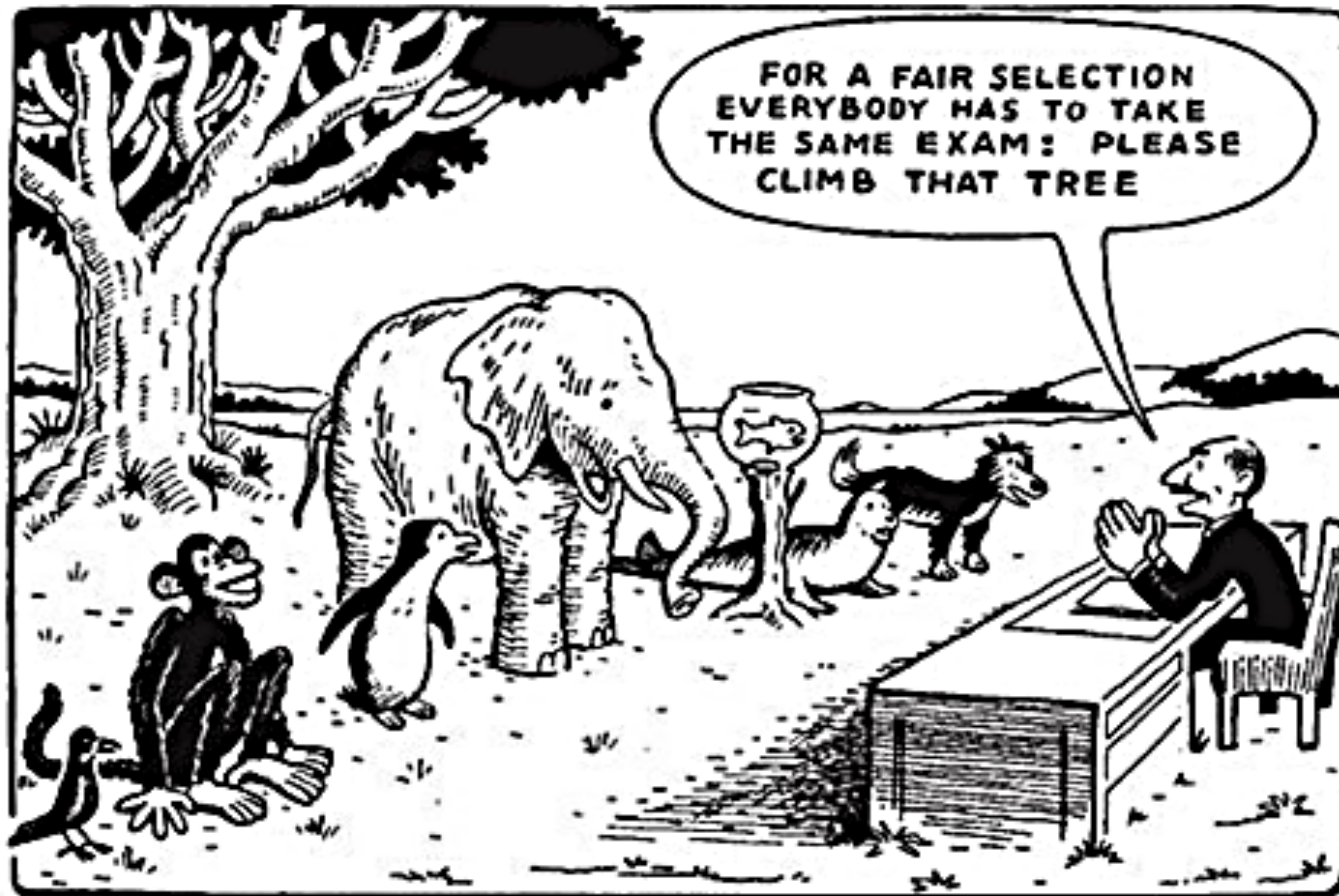
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What are we going to cover?

1. What is positive action?
2. The legal framework
3. Positive action in general
4. Positive action in recruitment
5. What's happening in practice?
6. How could the framework be improved?

What is positive action?

Equal treatment



What is positive action?

“The use of special measures to assist members of disadvantaged groups in overcoming obstacles and discrimination they face in contemporary society”

- Professor Colm O’Cinneide, UCL

Is it needed?

Women make up 53% of UK workforce but only 9.7% of FTSE 100 have a female executive board member

Only 4 out of 11 public sector workforces had BAME workforces reflective of the population

Only 53 of the FTSE 100 have at least 1 director from a BAME background

53.2% of disabled people are in employment compared to 81.8% of non-disabled people

The legal framework

EU law permitting positive action

PC?	Where?
Sex	<ul style="list-style-type: none">• Article 157(4), TFEU• Article 3, Recast Equal Treatment Directive (2006/54/EC)• Article 23, Charter of Fundamental Rights of the EU
Race and ethnic origin	<ul style="list-style-type: none">• Article 5, Race Equality Directive (2000/43/EC)
Religion or belief, sexual orientation, age and disability	<ul style="list-style-type: none">• Article 7, Employment Equality Directive (2000/78/EC)
Gender reassignment, marriage / civil partnership and pregnancy / maternity	<ul style="list-style-type: none">• Article 3, Recast Equal Treatment Directive (2006/54/EC)

CJEU's approach

- **Key requirements for lawful positive action in recruitment in relation to gender:**
 1. Must be underrepresentation
 2. Candidates must be equally qualified
 3. Preferential treatment must not be automatic
 4. Objective assessment of the candidates

UK law

- Equality Act 2010 (ss.158-9)
- Employers **may** take positive action:
 - **In general** - to overcome disadvantage, meet specific needs and/or combat underrepresentation
 - **In recruitment** - to overcome disadvantage, and/or combat underrepresentation

UK law

- But employers **must**:
 - Consider positive action measures as part of the public sector equality duty
 - Make reasonable adjustments for disabled people
 - Remove obstacles which are indirectly discriminatory and cannot be justified

Positive action in general (s.158)

	If the employer <u>reasonably thinks</u> that persons sharing a PC...	...the employer may take action to achieve one or more of these aims
1.	Suffer a disadvantage connected to the PC	Enable or encourage the affected persons to overcome or minimise the disadvantage
2.	Have needs that are different from those without the PC	Meet the needs of the affected persons
3.	Have disproportionately low participation in an activity	Enable or encourage the affected persons to participate in that activity

“Reasonably thinks”



- Relatively low threshold?
- EHRC Code suggestions:
 - Look at your workforce profile
 - Compare yourself with peer employers in area / sector
 - Consult with workers / unions

(1) Remedying disadvantage


- **Examples of positive action:**

- ✓ Targeted advertising in specific media outlets
- ✓ Stating in job ads that applications from target group candidates are welcome
- ✓ Providing internships / open days for the target group
- ✓ Providing training opportunities for the target group

Example of targeted advertising on Facebook

**Metropolitan Police Service**
Sponsored · 




How I do the job: "I stay honest and true to myself, but I'm also not afraid to ask for help and learn from others." PC McSweeney, Specialist Firearms Command





**"PUSH YOURSELF
AND YOU'LL EXCEED
YOUR EXPECTATIONS"**

METPOLICECAREERS.CO.UK
DO SOMETHING REAL



[Apply Now](#)



 Like  Comment  Share



Why you're seeing this ad

You're seeing this ad because your information matches **Metropolitan Police Service's** advertising requests. There could also be more factors not listed here. [Learn More](#)

 Metropolitan Police Service is trying to reach **females, aged 18 to 57.** 

 Metropolitan Police Service is trying to reach people whose primary location is **London, England.** 

(2) Meeting needs

- **Examples of positive action:**
 - ✓ Training (e.g. extra IT training for over 60s)
 - ✓ Provision of support or mentoring
 - ✓ Creation of a work-based support group



(3) Remediating low participation

■ **Examples of positive action:**

- ✓ Setting aspirational targets for increasing participation within certain timescale
- ✓ Providing bursaries to obtain qualifications
- ✓ Outreach work in community / schools
- ✓ Reserving places on training courses
- ✓ Targeted networking opportunities
- ✓ Inviting students from underrepresented groups to spend a day in the business

Case study: Axa and section 158 measures

Measure	Purpose	s.158 aim
Axa Sponsorship Tandem	Development programme offering mentoring and sponsorship for both men and women but with higher representation of women	Meeting needs
Global Executive Development Programme	Development Programme targeting two thirds of executive women as participants	Meeting needs
Women @ Axa	Networking group for men and women with the objective of fostering the professional development of women	Meeting needs / Remedying low participation
Women's Conference (now known as the Inclusion Conference)	Conference for 100 men and women in the business to network and share knowledge on gender diversity	Remedying low participation
Gender parity targets	Target for gender parity at Group Senior Executive level by 2023 Local targets for representation of women at executive committee and executive level	Remedying low participation
Gender balanced shortlists	Gender balanced shortlists for senior roles	Remedying low participation



Is the action proportionate?

- How serious is the need, disadvantage or underrepresentation?
- Is the action appropriate to achieve the aim?
- Is it reasonably necessary? Is there an alternative?
- How are any adverse effects to be mitigated?
- How will the measure be reviewed?



What do the
London Borough
of Hackney, two
top UK private
schools and
Stormzy all have in
common?



Do you think this was lawful?

**Property listing by a Housing Association on
Hackney Council's Housing System**

***“Consideration given only to the
Orthodox Jewish community”***

Applicants asked to disclose:

- *Whether they observed Shabbath and dietary laws
 - * Whether they were Ashkenazy or Sephardic
- *Details of their synagogue and children's schools

What's the difference?



**£1 million to fund
scholarships for poor
white boys to attend
Dulwich and
Winchester Colleges**



**Fully funded
scholarships for black
students attending
Cambridge University**

Positive action in recruitment (s.159)

	If the employer <u>reasonably thinks</u> that persons sharing a PC...	...the employer may take action in recruitment to achieve one or more of these aims
1	Suffer a disadvantage connected to the PC	Enable or encourage the affected persons to overcome or minimise the disadvantage
2	Have disproportionately low participation in an activity	Enable or encourage the affected persons to participate in the activity

Limitations

- May only use s.159 where:
 1. Candidate A (from target group) is as qualified as candidate B to be recruited or promoted
 2. The employer does not operate a blanket policy of positive action
 3. The action is a proportionate means of achieving a legitimate aim

The story of Matthew Furlong...



Strengths and weaknesses of our current framework

Strengths

- Represents progress
- Flexible

Weaknesses

- Voluntary / no sanctions
- Upfront work needed
- Significant limitations to s.159

Positive action in practice

In the public sector

- Positive action measures have typically been used by public sector / similar bodies:
 - Police
 - BBC
 - NHS
 - Fire Service
 - Universities

In the private sector

- Could gender pay gap reporting drive change amongst large private sector employers?
- Measures on the increase:
 - ✓ Targeted recruitment
 - ✓ Gender-balanced shortlists
 - ✓ Setting aspirational gender targets
 - ✓ Returnship programmes

**How could the framework
be improved?**

Our thoughts

1. Better research and a model for employers to identify and evaluate measures
2. Raise awareness of positive action
3. Use public procurement to promote greater use of positive action
4. Require employers to monitor recruitment, retention and progression by PC to aid identification of disadvantage and underrepresentation
5. Require employers to report on workforce diversity and publish a forward-looking strategy
6. Consider positive discrimination post-Brexit?

Questions

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