

Discrimination: Positive action

Published 12 April 2019

THE FACTS

Positive discrimination is generally unlawful. One of the rare exceptions to this is s159 of the Equality Act which permits employers to treat a person who has a protected characteristic more favourably than one who does not in connection with recruitment or promotion where:

1. the employer reasonably thinks that people with the protected characteristic suffer a disadvantage in connection with the characteristic OR that participation in an activity by persons with the protected characteristic is disproportionately low; and
2. the action is taken with the aim of enabling or encouraging the person with the characteristic to overcome or minimise the disadvantage or participate in the activity; and
3. the employee with the protected characteristic is as qualified as the other employee; and
4. the employer does not have a policy of treating people who have that protected characteristic more favourably than those who do not.

The action taken by the employer has to be a proportionate means of achieving the aim at 2 above.

Effectively, s159 of the Equality Act allows positive action in recruitment and promotion to be used as a “tie breaker”. The Cheshire police force conducted a staged recruitment procedure to hire police constables. First, there was an application form. This was followed by an assessment centre, comprising an interview, numerical and verbal reasoning tests, written exercises and interactive exercises. If the candidate reached the pass mark of 50%, they moved onto a third stage of the process. The third stage was a competency-based interview on personal qualities. At the conclusion of this interview stage, the Cheshire police used positive action as a tie breaker, taking the view that all candidates who achieved a pass following the interview were of “equal merit” and giving additional weighting to candidates with protected characteristics in deciding to whom to offer positions. There were 127 candidates who were considered to be of “equal merit”, having passed this interview stage.

Mr Furlong is white, male, heterosexual and does not have a disability. He applied to be a police officer with the Cheshire Constabulary, and was shortlisted. Having attended and passed the assessment centre, he was invited to the interview stage. He passed the interview stage, but despite this he was told that his application was being put on hold as there were not enough vacancies for all who were said to have passed at that stage.

Mr Furlong claimed that he had been discriminated against on the grounds of sexual orientation, race and sex.

The Cheshire Police asserted that it had applied positive action measures, as allowed by s159 of the Equality Act. Mr Furlong believed that Cheshire Police had acted unlawfully because (as is required by s159) the candidates with the protected characteristics were not as well qualified as him and the Cheshire Police had a policy of treating persons with protected characteristics more favourably in connection with recruitment than people without protected characteristics.

The employment tribunal agreed with Mr Furlong, and his claims were successful.

Cheshire Police provided a great deal of evidence that the number of people in the police force with protected characteristics of gender, BME and sexual orientation was disproportionately low. Furthermore, its action in applying positive action to candidates with the protected characteristics was done with the aim of enabling persons who share the characteristics to participate in the role of police constable. However, on the evidence (including comments made about candidates in the interview forms, showing there was a wide range of performance at the interview), the employment tribunal said it was clear that the candidates were not equally suitable for appointment.

The employment tribunal said that it would be a fallacy to describe all the individuals as “equal or deemed equal”. The employment tribunal could not accept that 127 candidates could be said to be equally suitable.

The employment tribunal also held that Cheshire Police’s actions in giving preferential access to candidates with protected characteristics amounted to a policy of treating people with protected characteristics more favourably in connection with the recruitment to the role of police constable, and that Cheshire Police’s actions were not justified.

WHAT DOES THIS MEAN FOR EMPLOYERS?

This case, while only an employment tribunal decision, is the first reported case about positive action on this scale. It demonstrates that employers must think carefully about how they decide, and show that candidates are equally qualified before applying the tie break. Here, the police force had applied the tie break to too many candidates who could not be

shown to be equally well qualified for the job.

[Mr M Furlong v The Chief Constable of Cheshire Police case number 2405577/18](#)

Authors



Zoë Wigan

London - Walbrook

zwigan@dacbeachcroft.com



Ceri Fuller

London - Walbrook

cfuller@dacbeachcroft.com

DAC
DAC BEACHCROFT