Diversity in the workplace and positive action

We have noticed a number of queries from employers recently seeking advice on the positive action provisions in the Equality Act 2010. These provisions have replaced more generalised provisions in the previous anti-discrimination legislation in the UK. Although employers have felt increasingly comfortable with the need to eradicate discrimination, whether direct or indirect, there is less familiarity with the provisions permitting positive action.

There may be a number of reasons for the recent upturn in enquiries. First of all, the issue of diversity has become a significant political topic in the UK, particularly in relation to the number of women at senior management level. It is not simply a case of looking at the number of women on boards of companies; this is merely the most visible manifestation of the concern. Secondly, in these more difficult trading times, companies may well feel that it is important that they are able to present themselves as diverse and inclusive, as a way of attracting particular clients or selling particular products.

The purpose of this note is to look at the options for employers who are considering positive action and to identify the pitfalls associated with it, given that it is very easy for positive action to cross the line and become direct, and therefore unlawful, discrimination. Since the law does not allow an employer to defend direct discrimination in any circumstance, it does not matter whether the directly discriminatory behaviour was committed with the best of motives.

This note will start off by looking at the general steps which are permitted to redress inherent discrimination, before considering the specific issues which arise in relation to recruitment and promotion. For the sake of simplicity, in this note we will refer to the employer taking steps to benefit women. However positive action will apply equally to men if they were underrepresented in the workforce or disadvantaged because of their gender. Moreover, the provisions are not limited to gender discrimination but cover all areas of unlawful discrimination, such as race and age discrimination.

Positive action is an umbrella term, describing an action which is lawful for an employer to take to favour women to increase their representation in, or membership of, a particular group. It is very easy to see that positive action may tip over into negative stereotyping, since it is an action which is expressly being taken on the basis of gender.

There is no duty on a private sector employer to take positive action in any context. Positive action is always a voluntary matter and so, despite occasional scare stories to the contrary, employers are a long way from having to face quotas which they have to fill e.g. by recruiting a set number of women to a workforce.

Private sector employers are under a duty to make sure that there are no directly or indirectly discriminatory provisions or practices which disproportionately impact adversely on women. To put it another way, an employer is under a duty to make sure there is a level playing field for men and women. However, if, despite the existence of a level playing field, women are still underrepresented, an employer is permitted to take positive action to tilt the balance in favour of women to improve their representation.

Although there is no duty on a private sector employer to take positive action, UK companies have over the past year faced increasing pressure on addressing the underrepresentation of women on boards. In February 2011, a report was published in response to the Government's concerns about the low percentage of women holding executive positions. The report made a number of recommendations to help address the imbalance. Among these recommendations, Chairmen of all FTSE 350 companies were asked to announce targets for the percentage of female directors they intend to have in 2013 and 2015. Since the publication of the report, almost 100 women have been appointed to the boards of FTSE 100 and FTSE 250 companies,

and 27 per cent of all board appointments have been women. In addition, the Financial Reporting Council has proposed making changes to the UK Corporate Governance Code, which would require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing such a policy, and disclose annually the progress made in achieving these objectives. It is anticipated that an updated version of the UK Corporate Governance Code will be published this year and changes on boardroom diversity will apply to financial years on or after 1 October 2012.

General positive action

There are general statutory provisions in the Equality Act which deal with an employer's ability to take positive action. These are contained in Section 158. Where women are underrepresented or suffer disadvantage at work by virtue of being women, employers may take "proportionate" steps to enable women to overcome or minimise that disadvantage, or to encourage them to put themselves forward for membership of the group in which they are underrepresented. It is probably easiest to give two examples. An employer who felt that there were too few women at senior management level would be entitled to provide training for women, aimed at enabling them to compete on a level playing field with male candidates who wish to be considered for those same senior levels. Similarly, if an employer felt is was losing too many women, for example, to career breaks for family reasons, the employer could look at offering advice or assistance to help women identify options for them to stay in the workforce, so that they do not feel compelled to give up work because of their parental responsibilities.

The key is to make sure that all steps taken are "proportionate". This will involve balancing the discriminatory impact against the benefit of achieving overall equality.

Positive action in relation to recruitment and promotion

Section 159 of the Equality Act has specific provisions in relation to recruitment and promotion. These go further than the general provisions, which are aimed at encouraging and facilitating women to gain appropriate levels of representation; Section 159 permits an employer to treat women more favourably than men if their representation is "disproportionately low." Here the employer can actually take a decision in favour of the woman because she is a woman, provided certain pre-conditions are met. First of all, the woman must be "as qualified as" the man to be recruited or promoted. Secondly, there must be no general policy of treating women more favourably than men in connection with recruitment or promotion and, thirdly, the action in question must be a "proportionate" means of achieving a legitimate objective.

There is little guidance about how to decide whether two candidates are equally qualified for a role, but in our view employers should establish a set of objective criteria against which candidates will be assessed, taking into account competence and professional experience, together with any relevant academic qualifications. It is important that any assessment criteria do not indirectly discriminate against a particular gender, for example, a requirement that staff must work shift patterns might put women, who are more likely to be responsible for childcare issues, at a disproportionate disadvantage. However, it is not clear whether a candidate will be "as qualified" as another candidate if there is parity only on qualifications, or whether an employer must look at all the factors applying to the two candidates, (including any of the softer factors considered appropriate) and only then apply the tie-breaker? This uncertainty causes a lot of employers to feel very wary about relying on the tie-breaker, particularly as employers will have to show that it was "proportionate" to rely on a tie-breaker in those circumstances. It must also be wondered how often two individuals are really so similar that there is a need for a tie-breaker.

Section 159 only came into force on 6 April 2011. There is little evidence that it is being used widely, because of the risks of direct discrimination claims from male candidates who believe that they were better qualified than the successful female candidate. Equally we think many employers may feel that relying on Section 159 would be unfair to the majority. In other words, one should not cure discrimination by discriminating further.

Monitoring

Aside from the above positive action measures, monitoring the gender of job applicants and staff can be a valuable tool for employers to assess the effectiveness of their equal opportunities policy and the extent to which any possible inequalities exist within the workforce. Such monitoring would involve collecting, storing and analysing such data on an anonymised basis. For example, monitoring the gender of staff may reveal the extent to which women are concentrated in certain jobs or departments. Monitoring equal opportunities has been common practice among most large organisations in the UK over the past 10 years. A consensus has certainly developed in the UK that such monitoring can help address equality and diversity issues within a workforce.

Practical Tips

Once an employer has decided that they are going to launch a gender diversity initiative using positive action, the employer must consider what practical steps they should take within the organisation to make sure that it will be successful. If the employer does not already monitor the gender of job applicants and staff, it could combine the proposed gender diversity initiative with the launch of such monitoring. This would help the employer to assess the effectiveness of its proposed initiative.

Employers should make every effort to ensure that their staff are aware of the gender diversity initiative. Organisations should compose a written gender diversity policy, which ought to explain their gender diversity goals and the procedures that will be put in place to meet them. In addition, all employees should be encouraged to attend gender diversity training sessions, which should explain how the organisation's gender diversity initiative will affect them. As well as a written policy and regular training, other ways of communicating the initiative include email bulletins, placing a notice on the company's intranet, speaking about the initiative at team meetings and making reference to it in the employee handbook.

For any such initiative to be successful, it is also vital that there is a demonstrable commitment to gender diversity from the most senior employees in the organisation. Senior employees should be openly seen to support and advocate the gender initiative so that the more junior employees can follow their lead. Organisations might also look at how they recruit their employees, as using internal recruitment only may perpetuate the existing gender imbalance in the workforce. Job adverts should encourage applications from both male and female applicants and should be placed in publications likely to reach all potential candidates.

Conclusion

These provisions are clearly important, and likely to be the focus of attention. We think a number of employers will want to consider whether to explore positive action, to show that they are taking what action they can to address areas where women are underrepresented. In all cases the employer must be aware of the legal pitfalls, and ensure that the positive action programme is fully supported by the most senior management, properly resourced and carries the support of the majority of their employees.

If you have any questions or require specific advice on the matters covered in this update, please contact your usual Mayer Brown contact or:

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