



Black jobs matter: does the law curb positive action?

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It feels like the perfect time for pioneering HR and diversity/inclusion managers to bolster policies that assist BAME people to overcome the inherent challenges they face in the workplace. But they have to take heed of the Equality Act 2010, which puts the brakes on positive action, write Mark Callaghan and Raoul Parekh.

It has been striking to see the number of employers who have made public commitments to improve black and ethnic minority representation in the workplace in the wake of the killing of George Floyd and the ensuing Black Lives Matter protests.

There have been grand gestures. Reddit's co-founder, Alexis Ohanian, resigned, and urged the company's board to replace him with a black candidate; Jack Dorsey, Twitter CEO, declared Juneteenth (19 June) a corporate holiday to commemorate the end of slavery; and Jamie Dimon, chief executive of JPMorgan Chase, took a knee with bank branch staff.

However, it is also notable that even employers in traditionally apolitical industries have been making renewed commitments to improve BAME representation – for example, the allyship demonstrated by tea brands PG Tips and Yorkshire Tea on Twitter.

With the spotlight currently on employers, now feels like a perfect moment for pioneering HR and D&I managers to implement meaningful policies that assist BAME people to overcome the inherent challenges they face in the workplace, and empower non-BAME staff to contribute as well.

The question is: how should they go about doing so, when the default position under the Equality Act 2010 is that positive race discrimination (even where an employer's motivations are good) is prohibited?

Ohanian's proposed hiring policy for Reddit is well-intentioned, but it would fall foul of the UK's discrimination laws, if a competing white candidate were to apply and be overlooked on account of his or her colour.

Race discrimination claims from white employees are uncommon but are certainly not unheard of: last year the Cheshire Police were found to have discriminated against a white applicant who excelled during the recruitment process but was not accepted onto the



force.

Where two candidates for a role are equally qualified for a role, employers are allowed to use positive discrimination as a “tiebreaker”. In the Cheshire Police case, the employer’s policy was to treat all candidates who passed the various recruitment stages (whether they passed with flying colours, or just scraped by) as being equally qualified for the job. They then prioritised BAME candidates. The white applicant’s complaint concerned this practice, because he felt he had been an especially high performer. The decision effectively confirmed that the force was wrong to treat the candidates as equally qualified in the circumstances.

The most obvious answers lie in the provisions set out in section 158 of the Equality Act, which permit positive action (not discrimination) where: the employer reasonably thinks that persons sharing a protected characteristic suffer a disadvantage, or have different needs from other persons, or have disproportionately low levels of participation in an activity, and; the employer takes proportionate steps to remedy that disadvantage, or to provide for those needs, or to boost participation.

The key here is that the action must be “proportionate”. A blanket policy of hiring black candidates by default would not be proportionate, whereas a policy of fast-tracking black candidates to a first round interview, or guaranteeing at least one BAME candidate is interviewed for every new role (akin to the National Football League’s Rooney Rule in the US, which requires teams to interview minority candidates for certain coaching and senior jobs) might well meet the threshold.

Mr Ohanian’s proposed hiring policy for Reddit is well-intentioned, but it would fall foul of the UK’s discrimination laws, if a competing white candidate were to apply and be overlooked on account of his or her colour. How radical can you be while remaining proportionate? There are dozens of examples in the EHRC Employment Statutory Code of Practice, but it’s possible that what would be proportionate right now, in the current political climate, may well go beyond these examples. Employers should think outside the box, and should take comfort in the fact that the positive action provisions are widely defined, and rarely challenged in the tribunals (even if the corollary of that is that their precise legal reach is not fully defined).

The process of showing that a particular group suffers a disadvantage does not necessarily involve the use of sophisticated statistical data or research – the employer must just reasonably think that one of the statutory conditions applies and should be able to point to some evidence (for example, an assessment of the workforce, qualitative data arising out of discussions with the workforce or a union, or national statistics about the employer’s sector).

At the moment, with the wealth of information available online about the difficulties BAME candidates face in the workplace, there will be a backdrop of compelling evidence for many employers to establish that a disadvantage (or different needs, or low participation) subsists for certain sections of the workforce. If employers conduct a form of D&I survey or collect data to measure their ethnicity pay gap (a step that is not currently required by law, but may be soon) then these sources of data may also provide ample justification for the implementation of positive action policies.

It is also arguable that positive action in respect of a person (“A”) will also be justified not only where A overcomes a disadvantage as a result of the action, but also where the action leads to a benefit for a wider group of people (who need not be employees) sharing A’s protected characteristic. For example, if a magazine or newspaper can show that its BAME readership suffers a disadvantage on account of a lack of journalistic diversity, then the benefit to those readers of hiring more BAME writers could be used as a justification to provide for positive action in the hiring process.

The images from the US and the UK are harrowing and serve as a tragic reminder of the disadvantages suffered by BAME people, both inside and outside of the workplace. Now feels like the right time for employers to consider implementing, or bolstering, positive action.

The full article can be found [here](#).