



## For and against: Employers have the legal tools they need to address the diversity problem

By **Hannah Mahon & Raoul Parekh** - 30 November 2018

**For and against: "Employers have the legal tools they need to address the diversity problem - they just need to get on with it."**

In a new feature, two GQ|Littler lawyers take opposing sides on the above question. The issue came up this month after leading advertising agency JWT faced claims of discrimination from white, straight, British men. The [press reports](#) suggest that the claims arose after a senior manager publicly pledged to "obliterate" the company's alleged reputation as an agency full of white, British, privileged, straight men. A redundancy exercise shortly followed, and some of those fitting that description found themselves in the frame for dismissal.

### For: Hannah Mahon, Partner at GQ|Littler

A lack of diversity in employment is a problem that has been centuries in the making and it's not going to be fixed overnight. However, the time has long past for employers to sit idly by and wait for change to appear. Employers have many tools at their disposal and most, if not all, have shown that they have the appetite to use these to put diversity at the top of the agenda and do what they can to shift the norms we have seen for far too long.

One such tool is the ability to take positive action under the Equality Act 2010. This is quite a limited power, true, but not entirely toothless. Put simply, the general positive action provisions come close to legitimising reasonable adjustments outside the disability field, allowing actions such as targeted networking opportunities, mentoring or training opportunities where people who share a protected characteristic (e.g. sex or race) suffer a disadvantage, have particular needs or are unrepresented. It's fair to say that employers are using this power extensively.

Then there are the recruitment and promotion positive action provisions. Admittedly they only work in relation to a tie break situation, but given all the steps employers are now taking to try and ensure a diverse recruitment pool, this could prove a useful tool.

There are lots of steps beyond positive action that employers can and are taking to address their diversity record. These are not what the law would consider positive action, but simply ways employers are challenging how unconscious biases from recruitment to promotion affect diversity .

Blind CVs are something more and more employers are using to improve diversity. Ensuring that shortlists and interview panels are themselves diverse also lowers the risk of unconscious bias creeping into the recruitment process. Some employers go further. Ernst & Young in 2017 dropped its minimum requirement for a 2:1 degree and saw recruitment of state school educated candidates increase significantly.

Flexible working and generous family-friendly rights can also go a long way to promote gender diversity in the workplace. Setting up specialist groups (such as the Women in Finance Awards, which showcase the achievements of women in financial services) can also help – part of the problem is that certain sectors are perceived as unfriendly to people from certain groups.

The problem does go deeper than something employers alone can fix, but just because employers alone can't fix the problem entirely doesn't mean they should do nothing. Just watch and see as employers utilise the legal tools available to them – change is coming.

Against: Raoul Parekh, Partner at GQ|Littler

It is almost agreed that a diverse workforce is better overall for everyone. Diversity drives better performance – see, for example, this Harvard Business Review article.

But being better for everyone doesn't mean it's better for each one. Some aspects of diversity are a zero sum game: if you promote a female candidate, that usually means you won't promote a male one. This creates a real problem where companies are trying to bring change – or some measure of equality – to a workforce or business that reflects the power structures and prejudices of the past. Organic change and churn replacement will only get you so far.

You can't make an omelette without breaking eggs, and you can't address historic structural gender equality without bruising a few male egos along the way.

And this is where the law doesn't help the ambitious equality-minded employer. The Equality Act 2010 introduced some very limited "positive action" provisions that the Government was very keen to distinguish from the bogeyman of "positive discrimination", but which still proved controversial at the time.

In short, employers can lawfully favour someone from a disadvantaged race/gender etc. in relation to recruitment if (and only if) the alternative candidate is "as qualified as" the other. In short, in the vanishingly unlikely situation where an employer is faced with two identically good candidates for a role in (say) a strongly male dominated industry, they are permitted to prefer the female candidate.

The provision could hardly be weaker and it could hardly be less useful. Employers have barely relied on it, because it never comes up. In the meantime, there is very little that employers can do to effect real change in the inequalities that persist in the modern workplace without risking the sort of issues that JWT have seen recently.