

Shifting the starting blocks: an exploration of the impact of positive action in the UK

Chantal Davies and Muriel Robison

INTRODUCTION

Despite laws in Britain permitting positive action to combat disadvantage faced by minority groups in employment since the mid-1970s, the subject has notoriously been a neglected and highly controversial area in the UK. In 2010, the existing positive action provisions for the individual protected characteristics were to some extent transposed into the Equality Act 2010 (section 158 Equality Act 2010). Whilst the previous legislation had been based on an accepted 'equality of opportunity' approach, the new section 158 could be seen as a broadening out of positive action moving towards an 'equality of results' paradigm (Burrows & Robison, 2006). More recently, with the implementation of section 159 of the Equality Act 2010 in 2011, positive action in the UK has moved into new territory permitting organisations to utilise preferential treatment (using McCrudden's taxonomy of positive action) in the form of 'tie-break' provision in recruitment and promotion. Although sections 158 and 159 are voluntary provisions, it may be that the Public Sector Equality Duty could arguably require public bodies at least to have due regard to positive action initiatives pursuant to the section 159 obligation.

Notwithstanding the potential provided by sections 158 and 159 of the Equality Act 2010, it still appears that organisations prefer to steer clear of this opportunity to address disadvantage suffered by protected groups. One notable exception is the recent announcement of the Judicial Appointments Commission regarding their intention to use the 'equal merit provision' in recruitment exercises from 1 July 2014 in order to seek to ensure diversity within the judiciary (Judicial Appointments Commission, 2014; Malleson, 2009). Work carried out for ASLEF (Robison, 2012) has indicated that unions in male dominated sectors are seeking to encourage employers to engage with positive action initiatives. Whilst there is a body of work considering the theoretical importance of positive action in the UK (see inter alia Barmes, 2011; Burrows &

Robison, 2006; Johns et al, 2014; McCrudden 1986; Noon, 2010), there is a lack of empirical exploration of the practical implications of these provisions. Qualitative study to determine the utility of the positive action provisions is considered both timely and necessary as we approach the fifth anniversary of the Equality Act 2010.

This paper will briefly explore the theoretical context of the current positive action provisions in Britain. It will also discuss the design of a small-scale qualitative study currently being carried out by the authors looking at the experiences of a purposive sample of public, private and voluntary sector employers in England, Scotland and Wales in light of the potential for positive action.

POSITIVE ACTION AND THE EQUALITY ACT 2010

Sections 158 and 159 of the Equality Act have extended the circumstances in which positive action may be taken in respect of protected groups. European law permits a wider scope for positive action measures than those contained in the antecedent equality legislation, although it is also framed in terms of positive action and does not extend to permit positive discrimination. The Explanatory Notes to the Equality Act 2010 (paragraphs 517 and 521) indicate that the intention is that these provisions will allow all action which is permitted by European law (see Burrows and Robison 2006).

Positive action: general provisions

The positive action provisions of section 158 of the Equality Act permit employers (and other organisations covered by the 'work' provisions of the Act in Part 5) to take action targeted at the protected groups, so long as it is a proportionate means of achieving certain stated aims. The stated aims are:

- a) enabling or encouraging persons to overcome or minimise disadvantage;
- b) meeting the different needs of the protected group;
- c) enabling or encouraging persons in protected groups to participate in an activity (section 158(2)).

Thus proportionate measures to alleviate disadvantage experienced by people in protected groups, to meet their particular needs or to address their under-representation in the workplace in relation to particular activities are permitted, but only where:

a person (P) reasonably thinks that –

- a) Persons who share a protected characteristic suffer a disadvantage connected to that characteristic,
- b) Persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
- c) Participation in an activity by persons who share a protected characteristic is disproportionately low. (section 158(1)).

While some evidence or objective justification will be required to support the employer's belief that one of these conditions applies, the parliamentary debate during the passage of the Equality Bill would suggest that the threshold for proof is relatively low. A proposal to replace 'reasonably thinks' with 'can demonstrate' when this clause was debated in the House of Lords was rejected because it would suggest that undisputable statistical evidence is required, and could deter employers who had identified a need to tackle disadvantage or under-representation from contemplating positive action measures (Hansard, 2010). Instead, the Equality and Human Rights Commission (EHRC, 2011) Code of Practice on Employment (paragraph 12.14) suggests that it will be sufficient for an employer to rely on the profiles of their workforce and knowledge of other comparable employers in the area or sector, or national data such as labour force surveys for a national or local picture, or qualitative data such as consultation with workers and trade unions.

The need for proportionality in this regard is a principle derived from European law which requires:

that derogations must remain within the limits of what is appropriate and necessary in order to achieve that aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued (*Briheche v Ministre d l'Interior, de l'Education and de la Justice*, 2004 at paragraph 24).

In assessing whether positive action measures are proportionate in the particular circumstances, the Explanatory Notes (2010) state that this will depend, among other things, on the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering the disadvantage (paragraph 512).

Regulations can be made setting out action which does not fall within the scope of the proportionality principle, according to the Explanatory Notes (2010), in order 'to provide greater legal certainty about what action is proportionate in particular circumstances' (paragraph 513).

The EHRC's Code of Practice on Employment (2011) (paragraphs 12.13 to 12.36) includes a number of examples of the types of action which employers can take and these include targeting advertising at specific disadvantaged groups, providing training opportunities in work areas or sectors for the target and the provision of support and mentoring.

Positive action in recruitment and promotion

The antecedent legislation did not allow for positive action in recruitment and promotion. Section 159 introduces limited provisions which can be relied upon at the point of recruitment. The effect of section 158(4) is that employers cannot rely on the general provisions in relation to recruitment and promotion, but must rely on section 159. This exception allows employers to take a candidate's protected characteristic into account when offering employment or a promoted post, if certain conditions are met. A candidate in a protected group can therefore be favoured over another candidate in certain circumstances.

The conditions are:

- 1) the candidate is 'as qualified as' another candidate to be recruited or promoted (section 159(4)(a)); The Explanatory Notes (2010) explain that:

...the question of whether one person is as qualified as another is not a matter only of academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job which could include matters such as suitability, competence and professional performance. (paragraph 518).

This means then that consideration is required in the context of an objective selection process which assesses skills, qualifications and experience overall.

- 2) The employer 'reasonably thinks' that the protected group is at a disadvantage or is under-represented (section 159(1));
- 3) The action is with the aim of enabling or encouraging protected groups to overcome or minimise the disadvantage or participate in that activity (section 159(2));
- 4) The action is a proportionate means of achieving those aims (section 159(4)(c));
- 5) The employer does not have a policy of automatically treating persons in the protected group more favourably in connection with recruitment or promotion (section 159(4)(b)), that is, according to the Explanatory Notes, 2011 (paragraph 526) that each case must be considered on its merits.

Where these conditions are met, employers can give "weight" to a particular protected characteristic, in order to increase the proportion of their workforce belonging to the protected groups, and take it into account when making the decision, in a tie-break situation, to recruit or promote a candidate.

One example given in the Explanatory Notes (2010 at paragraph 521) is of a police service giving preferential treatment to a candidate from an under-

represented ethnic minority background where other candidates not from that background were as qualified. In the parliamentary debates on clauses, the example of a primary school with only female teachers was used, where this allows a male teacher who is as qualified as a female teacher to be appointed in preference to address the under-representation.

The indications are however that employers prefer to avoid the use not only of these measures in the recruitment and selection procedure, but also positive action measures in general. Despite attempts by Government to extend the circumstances when positive action measures are utilised in order to achieve 'full equality in practice', and to avoid, as Baroness Thornton put it during the passage of the Bill through the Lords, 'a chilling effect on the willingness of employers to use positive action measures' (Hansard, 2010 Col. 692), it would appear that these provisions are relied on just as infrequently as the more limited provisions of the antecedent legislation.

TIME FOR A NEW APPROACH?

The Equality Act 2010 debate has generally focussed on theoretical discussion around the legal and policy consequences of the legislation. In recent years important decisions around the development of the equality legislation have increasingly been based on anecdotal evidence provided during consultation processes, limited quantitative analysis or more general theoretical exploration. As Sir Bob Hepple states in relation to the Government's move towards deregulation in the employment sphere, such measures are 'based not on independent impartial research, but instead rely on anecdotal 'evidence' and pressures from business organisations that have an interest in the results' (Hepple, 2013, p. 213). The authors argue that evaluation of the equality legislation must be based upon rigorous empirical evidence and qualitative analysis. The efficacy of supporting legislative development through solid socio-legal study can be seen most keenly in the recent work commissioned by the Equality and Human Rights Commission in relation to caste discrimination (Dhanda et al, 2014). The importance of empirical study for the development of law, practice and policy was recognised by Bradney (2010) who expounds:

Quantitative and qualitative empirical research into law and legal processes provides not just more information about law; it provides information of a different character from that which can be obtained through other methods of research. It answers questions about law that cannot be answered in any other way (p.1033)

The only way to engage in any meaningful discussion of the utility or development of positive action within the UK and indeed Europe is to consider how the current provisions of the Equality Act 2010 in this regard are utilised in practice. As a non-mandatory provision, section 159 in particular can only really be analysed in light of how the law is being utilised by employers across the UK. If it is the case, as articulated by Johns et al, (2014), that there is a 'muted' response to the tie-break provisions in recruitment and promotion, surely there needs to be further exploration as to why this would appear to be the prevailing attitude. We can speculate as to the reasons why organisations are not utilising such provision. Is it simply related to the lack of publicity the provisions have received? Is it due to a lack of understanding of the provisions by most organisations? Or is it something more fundamental such as a distrust of the new paradigm of equality in the UK which may be suggested by the application of section 159 (Noon, 2012)? Anecdotal accounts suggest that any reticence in this area may be down to a lack of obligation on employers to take such measures, no matter how under-represented a particular group is within the particular workforce. Equally, the administrative burden of implementing a robust system of positive action may be considered unworthy of pursuit particularly given the fear of a challenge from the unsuccessful candidates.

Without exploring the ground level attitudes of those responsible for recruitment and promotion practice in the UK, it is impossible to fully analysis the possible new dawn of positive action as a social phenomenon. Ultimately, whilst doctrinal analysis is often well suited to finding a solution to legal problems (Hutchinson, 2013), in many circumstances a socio-legal approach is the only way to determine how the law applies in practice.

It is often easier to wrestle with difficult theoretical questions via the doctrinal approach. At most, we make conjectural reference to the more embedded use of positive action and permissive equality in other parts of the world such as the

USA, Australia, Canada and South Africa. Even within the European context, we comfortably refer to the case law from the ECJ against member states who have sought to introduce a new paradigm of positive action (see inter alia: *Kalanke v Bremen*, 1995; *Badeck v Landesanwalt beim Staatsgerichtshof des Landes Hessen*, 1999). Comparative study thus provides important evidential implications for practice. However, when faced with a recognised lack of quantifiable evidence on the attitudes of employers in GB towards positive action (e.g. Noon, 2012), we are unsure how to collect any meaningful data. The difficulties of creating a qualitative study which will answer fundamental questions such as the extent to which positive action is being used and the attitudes of those responsible for recruitment and promotion in GB towards the new approach towards equality, are well recognised. Nevertheless, the authors have attempted to formulate a methodological framework within which to seek an evidential base in order to expand dialogue in this area.

THE METHODOLOGICAL FRAMEWORK

In the long-term, the study proposed by the authors will provide a multi-layered, multi and mixed-method exploration of the awareness, use and perceptions of voluntary, public and private employers towards the existing positive action provisions of the Equality Act 2010 (more specifically the use of sections 158 and 159). Purposive sampling will be used to target specific groups of participants. In particular, human resource professionals within large organisations and owners of SMEs across England, Wales and Scotland will be deliberately targeted. Due to the potential complexity of the subject matter and in order to obtain a fair representation of attitudes, it is believed that participants will necessarily have to be those with responsibility for general employment practice, recruitment and promotion. Initially, a small scoping study will be carried out by utilizing the distribution of a basic questionnaire. This will be disseminated to relevant networks of employers and HR professionals. The questionnaire will allow for both qualitative and quantitative analysis of the relevant data. The aim of the scoping study is to: stimulate debate and provide some early outputs; inform future discussions about the shape, focus and priorities for the development of this work; and be of value to those undertaking research in this area in the future.

Analysis of this initial data from the scoping study will enable the drilling down of specific themes to allow for a further specific broad scale questionnaire to be developed. It is expected that participants at this second stage will again be obtained via collaboration with employer/HR representative bodies. One of the key difficulties anticipated in this regard is ensuring an adequate range of participation based on location, size and sector. Collaborations with representative bodies across the UK will mitigate against this. The final stage of the study will involve a series of individual semi-structured interviews with relevant representatives of a range of organisations. Once again, the format and direction of these interviews will be dictated following analysis and drilling down of the data collected from the questionnaire stage. Data will then be collated and triangulated in order to seek to respond to the core research questions i.e. the awareness, use and perceptions of organisations in relation to the positive action provisions of the Equality Act 2010.

IMPLICATIONS AND CONCLUSIONS

The authors submit that in order to be able to fully evaluate the impact and indeed the necessity for the positive action provisions in the Equality Act 2010, it is vital to have an evidential foundation on which to base any future dialogue around the development of legislative provision for positive action in the UK. In order to truly engage with the model of equality which is most appropriate for the UK (and beyond), we need to understand how existing provisions are perceived and applied and if necessary to determine a relevant business case on which to base future discussion. If, as Barmes (2012) has suggested, we are still at the point of experimentation in relation to positive action in the EU and UK, then theorising can only take the dialogue so far. If we want to locate an appropriate starting line (Noon, 2010), we must ensure the starting blocks are built on solid footings. The authors respectively contend that those foundations must be constructed on ground-level empirical study in the form explored above. The questionnaire for the scoping study can be found at <http://www.chester.ac.uk/fred/research/positive-action>. The authors would welcome further feedback in relation to the above and can be contacted at chantal.davies@chester.ac.uk or FRED@chester.ac.uk.

REFERENCES

Badeck v Landesanwalt beim Staatsgerichtshof des Landes Hessen [1999] ECR I-1875

Barnes, L., 2012. Equality law and experimentation: the positive action challenge. *Cambridge Law Journal*, pp.623-654.

Bradney, A., 2010. The Place of Empirical Legal Research in the Law School Curriculum. In: Cane, P., and Kritzer, H., eds. *The Oxford handbook of empirical legal research*. Oxford: Oxford University Press.

Briheche v Ministre d l'Interior, de l'Education and de la Justice, Case C-319/03 2004 ECR I-8807

Dhanda, M., Waughrey, A., Keane, D., Mosse, D., Green, R. and Whittle, S., 2014. *Caste in Britain: socio-legal review*. Manchester: Equality and Human Rights Commission.

Equality Act 2010. (c.15). London: HMSO.

Equality Act 2010: The Explanatory Notes. (c.15). London: HMSO.

Equality and Human Rights Commission, 2011. *Employment statutory Code of Practice*. London: HMSO

Hansard (2010) House of Lords Debate. (2009-10) 717, Col.691-694.

Hepple, B., 2013. Back to the future: employment law under the coalition government. *Industrial Law Journal*, 42(3), pp.203-223.

Hutchinson, T., 2013. Doctrinal research: researching the jury. In Watkins, D., and Burton, M., eds. *Research Methods in Law*. London: Routledge.

Judicial Appointments Commission, 2014. *Equal merit provision: JAC Policy*. London: Judicial Appointments Commission.

Johns, N., MacBride-Stewart, S, Powell, M., and Green, A., 2014. When is positive action not positive action? Exploring the conceptual meaning and

implications of the tie-break criterion in the UK Equality Act 2010. *Equality, Diversity and Inclusion: An International Journal*, pp.97-113.

Kalanke v Bremen [1995] ECR I-3051

Malleson, K., 2009. Diversity in the judiciary: the case for positive action. *Journal of Law and Society*, pp.376-402.

McCrudden, C., 1986. Rethinking positive action. *Industrial Law Journal*, pp.219-243.

Noon, M., 2010. The shackled runner: time to rethink positive discrimination? *Work, Employment and Society*, pp.728-739.

Noon, M., 2012. Simply the best? The case of using threshold selection in hiring decisions. *Human Resource Management Journal*, pp.76-88.

Robison, M., 2012. *On track with diversity 2012*. Liverpool: Institute of Employment Rights.

Robison, M., and Burrows, N., 2006. Positive action for women in employment: time to align with Europe. *Journal of Law and Society*, pp.24-41.