

Positive Discrimination



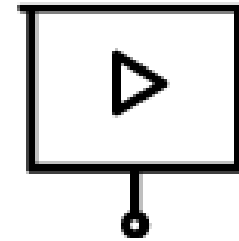
Zoom Etiquette



**This webinar is
being recorded**



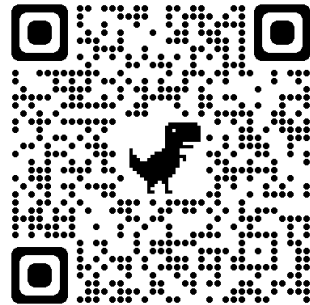
**Use chatbox
function**



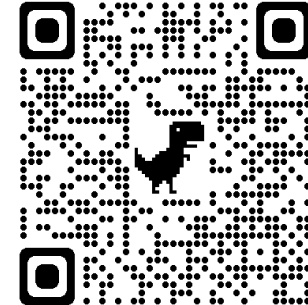
**Presentation slides will
be sent to you**



Introduction & Connect with Us



David Rushmere
Partner | Employment



Philip Bain
Solicitor | Employment

1. Open the LinkedIn app on your mobile device.
2. Tap the QR code in the Search bar at the top of your LinkedIn homepage.
3. Tap the Scan tab.
4. Hold your mobile device directly above the LinkedIn member's QR code that you'd like to connect with.

Agenda

1. Why good intentions are irrelevant
2. Tribunal claims and compensation
3. Occupational Requirements
4. General Positive Action
5. Positive action in recruitment and promotion
6. Case studies
7. Practical steps for improving D&I
8. Questions

Discrimination

- Protected characteristics include:
 - age;
 - disability;
 - gender reassignment;
 - marriage and civil partnership;
 - pregnancy and maternity;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.
- No qualifying period of service – *Applicable during recruitment!*
- Uncapped compensation
- Direct, indirect, harassment, victimisation (characteristic specific claims)

Good intentions

- Conduct which amounts to discrimination will be unlawful.
- It can be rendered lawful where an exception applies.
- Examples:
 - Justification of indirect discrimination
 - Mens/Womens sports teams
 - Organised religion (*although very limited application*)
 - Occupational requirements
 - Positive action
- Well intentioned discrimination is still unlawful.
- Actions seeking to increasing diversity and inclusion could well result in claims of discrimination.

Occupational Requirements

- Occupational requirement defence applies to all protected characteristics, including disability.
- Promotion of disabled people would not generally breach EqA.
- Only applies to direct discrimination – “*Because of a protected characteristic*”.
- To apply:
 - Occupational requirement;
 - Proportionate means of achieving a legitimate aim; and
 - Does not meet it, or has reasonable grounds for not being satisfied that the person meets it.

Occupational Requirement (example)

A local council decides to set up a health project which would encourage older people from the Somali community to make more use of health services. The council wants to recruit a person of Somali origin for the post because it involves visiting elderly people in their homes and it is necessary for the post-holder to have a good knowledge of the culture and language of the potential clients. The council does not have a Somali worker already in post who could take on the new duties.

- Could the Council rely on the occupational requirement exception to recruit a health worker of Somali origin?
- Consider Somali origin vs knowledge of Somali culture and language

General Positive Action

- Action that is beneficial to one group but creates less favourable treatment for another (*typically because of the absence of the benefit*).
- The EqA does not prohibit the taking of positive action in respect of persons who share a protected characteristic:
 - who suffer a **disadvantage** connected to the characteristic;
 - who have **different needs** from those who do not share it;
 - where **participation** in an activity by them is disproportionately low.
- Evidence of the disadvantage, different needs or low participation is required.
- Action is not prohibited if it is a proportionate means of:
 - overcoming a disadvantage,
 - meeting needs; or
 - enabling participation.

General Positive Action (examples)

Examples where an employer may be able to rely on positive action as a defence include:

- Providing bursaries to members of a particular group to help them obtain a relevant qualification.
- Providing mentoring to a woman returning from maternity leave.
- Working with local schools to invite students from groups whose participation in the workplace is disproportionately low to spend a day at the company.
- Creation of a specific workplace support group for exclusive use of members of staff who share a particular characteristic.

Positive Action – Recruitment and Promotion

- Applies where people with a particular protected characteristic are at a disadvantage or are under-represented.
- Allows an employer to take a protected characteristic into account when deciding whom to recruit or promote.
- Significantly limited in application.
- Operates only where the candidates are equally well qualified.
- Does not allow a blanket policy of treating candidates who share a particular protected characteristic more favourably.
- Must be proportionate in the circumstances.
- Pro-disability recruitment excepted.

Positive Action – Recruitment (example)

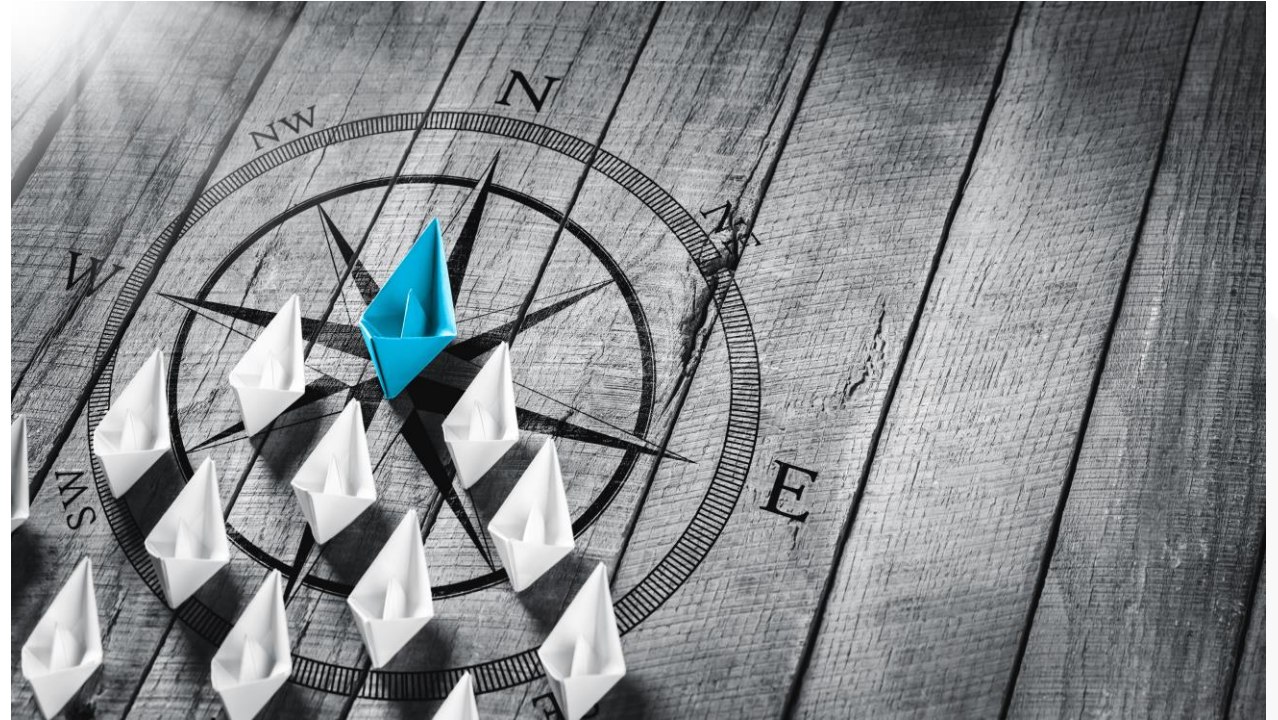
A police service employs disproportionately low numbers of people from an ethnic minority background. It identifies a number of candidates who are as qualified as each other for recruitment to a post, including a candidate from an under-represented ethnic minority background. Giving preferential treatment to that candidate, provided the comparative merits of other candidates were also taken into consideration, may be rendered lawful as positive action in recruitment.

- What is “disproportionately low”?
- What is “equally qualified”?

Case Study 1

A and B are being interviewed for a position with the Company. A is disabled and is far less qualified than the other candidate.

As the Company wants to maintain its record for employing those with disabilities in the community, A is offered the position.



Case Study 2



During a redundancy consultation, the decision is made to retain a BAME employee who is underperforming in his role compared to the other employee in the redundancy pool. They have both scored equally in the redundancy exercise and the retained employee's race is used as the "tie-breaker" for the redundancy.

The Company make this decision in order to try and address the imbalance in representation of minority groups in this area of the business.

Case Study 3

There is an opportunity for promotion within the business and two employees decide to apply (one male and one female). Both employees are equally qualified and both joined the company as graduates at the same time.

As the majority of the existing managers in the Company are female, the hiring manager decides to promote the male to increase the diversity of the team.



Practical steps for improving D&I

- Positive Action in recruitment and promotion is high risk
- Openly favouring a particular group can expose the employer to claims of discrimination
- Consider initiatives that provide support but without treating one group more favourably
- Review your business/policies to identify barriers
- Consider whether there is a problem with your recruitment process
- Provide training/coaching for current staff
- Consider appointing a D&I champion
- Lead culture change from the top

Any Questions?



What's coming up...

From January 2023 our webinar programme will be extended to monthly presentations.

- **Employment Law Roundup – 23 January 2023**
- **Recruiting your first employee – 22 February 2023**



Sign up here - <https://www.machins.co.uk/events/>

Get in touch!

David Rushmere – david.rushmere@machins.co.uk

Philip Bain – philip.bain@machins.co.uk

01582 514000

www.machins.co.uk



[@machinslaw](https://twitter.com/machinslaw)



[/machins-solicitors-llp](https://www.linkedin.com/company/machins-solicitors-llp)



[@machinslaw](https://www.instagram.com/machinslaw)



[machinssolicitorsllp](https://www.facebook.com/machinssolicitorsllp)