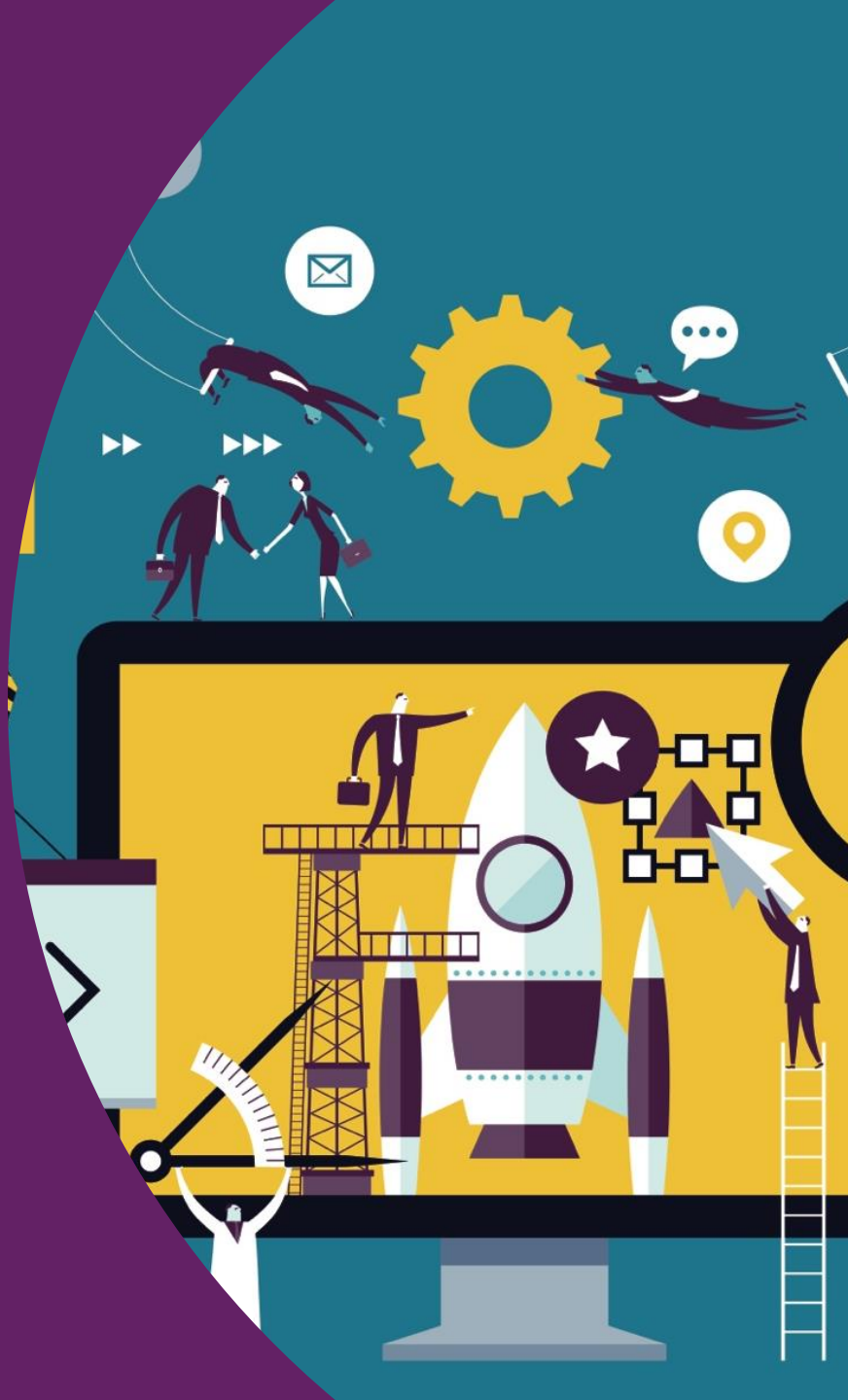
Discrimination and Positive Action

By Simon Tovey



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An Insight into Discrimination and Positive Action

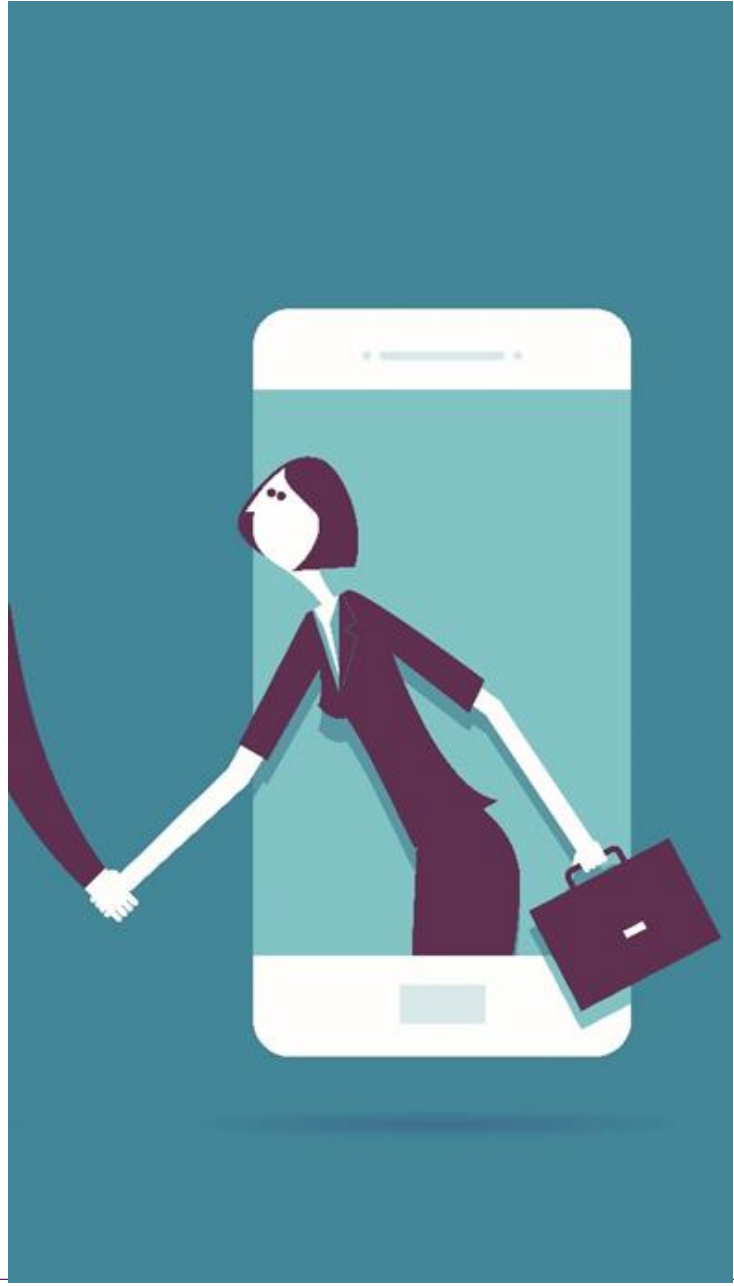
Supporting Equality and Diversity is a phrase that features prominently in modern workplace relations. What is generally not mentioned is the fact that those aims can be contradictory.

Improving diversity is not just an admirable aim. A diverse range of opinions and experience has the potential to improve decision making in virtually any business.

Calls for improvements to be made in workplace diversity, particularly at senior levels, have increased in recent years. The make-up of boardrooms was called into question after the financial crisis, with it being said that having more women on boards would improve the quality of decision making. Since then many companies have committed to improving the proportion of women on their board, and/or announced wider diversity targets focusing on improving representation from BAME and LGBT+ groups.

Similarly, organisations such as the Police have sought to recruit a more diverse workforce in order to better represent – and potentially understand – the communities they serve.

There is also a greater focus on the impact of unconscious / inherent bias, which can in part be negated by exposing people within an organisation to greater diversity. One way to dramatically improve diversity is through positive action.



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Under the Equality Act 2010, if the reason why a person is chosen for a role or for promotion is a protected characteristic e.g. because they are black, or female, or younger, or have a disability, that is direct discrimination.

However, there are provisions which allow decisions to be based on a protected characteristic by way of positive action, but only to a limited extent.

Where recruitment and promotion is concerned, it will not be discriminatory to treat a person more favourably on the grounds of a protected characteristic where it is reasonably believed that:

- Someone who holds that protected characteristic suffers a disadvantage related to that protected characteristic; or
- Participation in an activity by someone who shares a protected characteristic is disproportionately low.

In those circumstances it is possible to take steps with the aim of overcoming or minimising that disadvantage or assisting a person to participate in that activity (the "legitimate aim"), but only where:

- The person with that characteristic is as qualified as the other person to be recruited or promoted;
- The organisation does not have a policy of treating someone with that protected characteristic more favourably than someone who does not share it; and
- The action is a proportionate means of achieving the legitimate aim.

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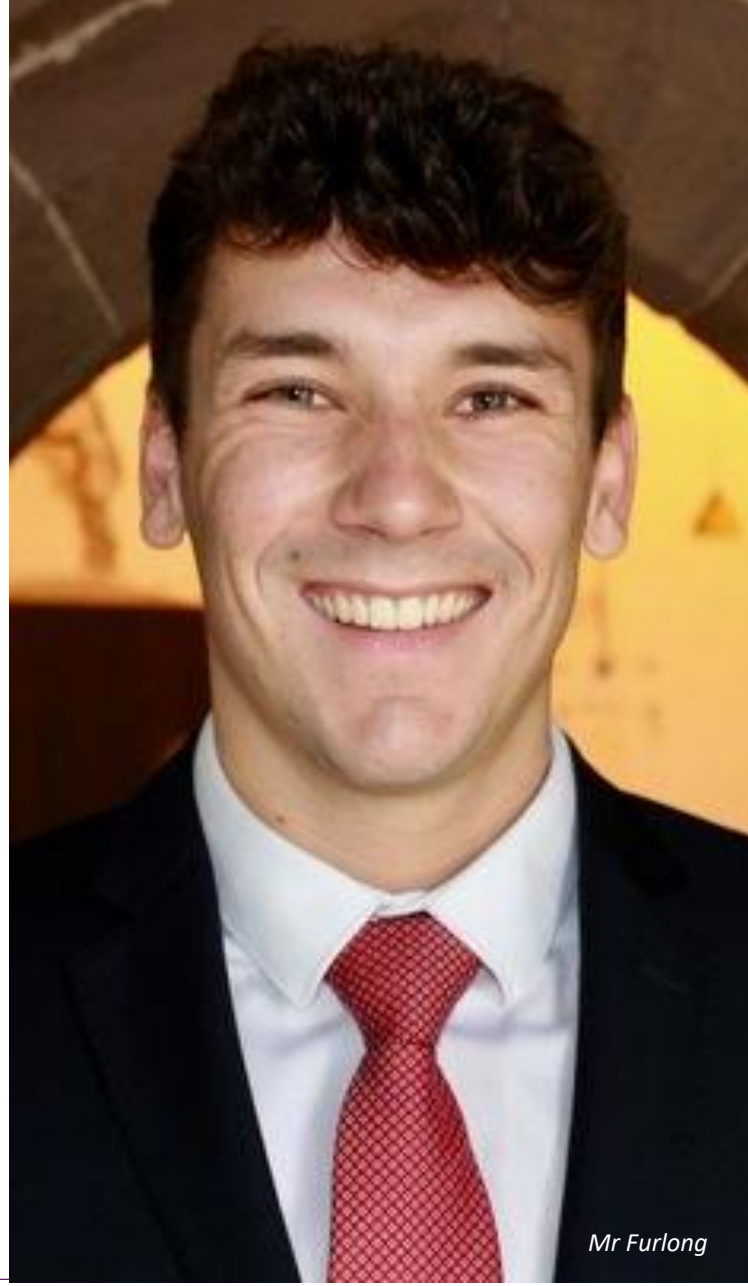
Example

The recent decision in *Furlong v Chief Constable of Cheshire Police* (2019) is an example of an organisation seeking, for legitimate reasons, to improve diversity through a form of positive action, but doing so in a discriminatory way.

Mr Furlong is a white heterosexual male who applied to become a police officer with Cheshire Constabulary. He successfully passed the assessment centre and panel interview stages, and received very positive feedback on his performance at interview, but shortly afterwards was told that his application had been unsuccessful as there were not enough vacancies for all of those who passed the interview stage. Mr Furlong's father, who is a serving Police Inspector, filed a complaint on his behalf. Subsequently, Mr Furlong presented claims for direct race, sex, and sexual orientation discrimination.

Unusually, the Cheshire Constabulary defended the claim on the grounds that it had applied "positive action measures" within the scope of s.159 of the Equality Act 2010 with a view to achieving the legitimate aim of improving diversity in its workforce.



Mr Furlong

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Example continued

Historically the number of police constables in in Cheshire Constabulary who were identified as BAME, LGBT, female, or with a disability, was disproportionately low. Steps had therefore been taken to improve representation in relation to the protected characteristics of race, gender, sexual orientation and disability. Cheshire Constabulary had put in place a positive action plan to attract, recruit and develop BAME and female officers. This had various strands, including a two day insight programme familiarisation events to encourage interest from underrepresented groups, and a social media campaign. By the time Mr Furlong's case was heard this included a 3% target for BAME officers, a 50/50 male/female target, a 4.5% LGBT target, and a 6% disability target. These efforts appear to have been working, with representation across each of those groups increasing gradually by 2018.

The pass mark for the assessment centre, consisting of an interview, numerical and verbal reasoning tests, and written and interactive exercises, was 50% (reduced from 60%). The interview stage was marked pass or fail. Cheshire Constabulary took the view that all candidates who passed the interview were of "equal merit".

127 candidates were successful at interview. Cheshire Constabulary then selected candidates from this group on the following basis:

- Candidates with an identified protected characteristic (e.g. female, BAME, LGBT, or a disability);
- Candidates who speak English as a second language;
- Candidates already employed as a Special Constable or similar;
- Search assessment score.

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Example continued

As a matter of practical common sense, 127 candidates were inevitably never going to all be of equal merit. The Tribunal had little difficulty in concluding that if a straightforward scoring system had been applied, Mr Furlong would have been successful in his application. The Tribunal was critical of the pass/fail mechanism applied at interview, which had effectively been designed to artificially "deem" candidates who passed the interview as being equal when that was plainly not the case based on the information collected during the interview. The fact that Cheshire Constabulary had utilised performance scoring after applying positive action measures inevitably undermined the suggestion that candidates were equal to begin with.

Also unsurprisingly, the Tribunal concluded that Cheshire Constabulary had a policy of treating people with certain protected characteristics more favourably than those who did not hold them.

There was evidence to support the conclusion that individuals holding the protected characteristics of race, sex, sexual orientation and disability were under-represented, and the decisions taken were with the legitimate aim of enabling persons with those protected characteristics to participate as police constables. However, as the candidates who were given preferential treatment were not all of equal merit to Mr Furlong, the positive action defence could not apply.

The Tribunal went on to conclude that applying positive action to a large volume exercise in this manner was not reasonably necessary, and the blanket approach taken was not a proportionate means of achieving the Cheshire Constabulary's aim of improving diversity. That was particularly true in circumstances where other measures being taken by the Constabulary were having a positive effect on diversity, albeit slowly.

Accordingly Mr Furlong had been discriminated against on the basis of each protected characteristic.

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Comment

Seeking to radically change the diversity of an organisation through positive action has the potential not only to fall foul of discrimination legislation, but it can also lead to resentment and division. To quote from the Tribunal's judgment:

"The knock on effect of discontentment and disillusionment may lead to a lack of confidence in the ability of appointees to the role of police officer and the organisation in general. This would be counter-productive and not in the public interest if public confidence in the respondent were undermined."

One of the main reasons why the s.159 'positive action' defence has almost never been used since it came into force is that having two candidates of genuinely equal merit is rare. Another reason is that the employer is required to admit that it has treated the individual less favourably by reason of a protected characteristic and hope that the narrow exception is made out. Given the inherent risks in taking that approach, most organisations have preferred to take steps designed to increase the number of applications and the overall pool of candidates from more diverse groups, but not favour specific candidates at the recruitment stage (at least not openly).

Organisations who have publicly stated their aim of improving diversity and who are perhaps the most likely to wish to consider positive action may be at a disadvantage by virtue of having a stated policy of treating persons with those protected characteristics more favourably. Previous success in improving diversity through other means is also a factor that can be held against them when assessing whether it was necessary to apply positive action at the recruitment stage.

Barring a genuine "tie-breaker" situation, the positive action provisions are difficult to utilise in practice. However, there does seem to be greater interest in this area now than at any time since section 159 of the Equality Act 2010 was brought into force.

The decision in the *Furlong case* is a cautionary message for anyone considering positive action to improve diversity. However, we will have to wait for more cases to see if organisations are willing to sacrifice the risk of losing a discrimination claim at the altar of diversity.

Have you applied positive action measures or are you thinking about doing so in order to try to improve diversity in your business or profession?

If so, please contact us for advice on how best to minimise your discrimination risk.

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