

EQUALITY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11: Advancement of Equality

Chapter 2: Positive action

Section 159: Positive action: recruitment and promotion

Effect

518. This section permits an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. This can be done only where the candidates are as qualified as each other. 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. The section does not allow employers to have a policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not have it in these circumstances; each case must be considered on its merits. Any action taken must be a proportionate means of addressing such disadvantage or under-representation.
519. The section defines recruitment broadly, so that for example offers of partnership or pupillage, or tenancy in barristers' chambers, are included.
520. The section is intended to allow the maximum extent of flexibility to address disadvantage and under-representation where candidates are as good as each other, within the confines of European law.

Background

521. This section is new. While previous legislation allowed employers to undertake a variety of positive action measures, for instance offering training and encouragement for certain forms of work, it did not allow employers to take any form of positive action at the actual point of recruitment or promotion. This section extends what is possible to the extent permitted by European law, and applies in relation to all protected characteristics.

Examples

- A police service which employs disproportionately low numbers of people from an ethnic minority background 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. It would not be unlawful to give preferential treatment to that candidate, provided the comparative merits of other candidates were also taken into consideration.

*These notes refer to the Equality Act 2010 (c.15)
which received Royal Assent on 8 April 2010*

- An employer offers a job to a woman on the basis that women are under-represented in the company's workforce when there was a male candidate who was more qualified. This would be unlawful direct discrimination.