

# One, two, three, four? How many women are on your board?

## The new rules

Lord Davies issued his report about female representation on corporate boards in February 2011. That report led to the Department of Business, Innovation and Skills publishing *A new structure for Narrative Reporting in the UK* (together with draft regulations snappily entitled 'The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013') in October 2012.

Quoted companies will be required to prepare a strategic report each financial year showing the number of persons of each sex who are directors, managers and employees of the company. Greater transparency of board make-up analysed by gender is intended to put pressure on companies to increase the number of women occupying senior roles. Clearly this will have a consequential impact on recruitment.

An equally qualified man and woman each compete for the same role. The woman is

offered the position – what would the man do?

Under the Equality Act 2010 sex is a protected characteristic. Pursuant to sections 13, 19, 27, 39(1) and 39(3), sex discrimination in the context of recruitment is unlawful.

If the man were to find out that a woman had been offered the place he would be quick to point out that he had been discriminated against as a man. He would probably allege direct and indirect discrimination. In this scenario, direct discrimination occurs where a man is treated less favourably, eg, by not being hired, because he is a man. Indirect discrimination occurs where an employer applies to a person a provision, criterion or practice which is discriminatory in relation to his being a man.

## Does an employer have a defence?

Disadvantaged groups need to be treated differently in order to achieve equality. The framework equality legislation

takes account of this necessity. For the recruitment scenario this right is enshrined in section 159 of the Equality Act.

Positive action in the context of this recruitment scenario would be permissible where an employer reasonably thinks that:

- (i) Women suffer a disadvantage connected to being a woman; or
- (ii) Women's participation in senior roles within listed companies is disproportionately low.

Such positive action entails treating a woman more favourably in connection with recruitment or promotion than a man because the woman has the protected characteristic and the man does not. (Being a man is a protected characteristic, but in the context of disadvantages and lower representation in senior roles the protected characteristic would usually refer to females. In the context of recruitment of primary school teachers, on the other hand, the protected characteristic would probably be male.)

The aim of such positive action must be to encourage women to overcome or minimise disadvantage and to participate in senior executive roles. This positive action defence only applies where: (i) the woman is as qualified as the man; (ii) the employer does not have a policy of treating women more favourably in recruitment; and (iii) taking such action is a proportionate means of achieving the

legitimate aims set out previously.

In practice it should be relatively easy for an employer to demonstrate the 'disadvantage' and 'disproportionately low' number of women represented within senior roles: (i) by virtue of their own company data, the information presented in Lord Davies' report, the government's stated aims, and the terms of the draft regulations; and (ii) because an employer only needs to show reasonable belief.

## Drafting job specifications

One hurdle is the assessment of whether one candidate is 'as qualified as' another. The expression 'candidates of equal merit' is used in guidance published by the government. This is a broader concept than 'equally qualified' or 'holding the same qualifications'.

There are two approaches employers can take regarding job specifications: (i) make them very brief; or (ii) make them very detailed by setting out all of the requirements and ranking them in order of their importance.

Brief job specifications give an employer greater flexibility. Where certain skills and experience differ significantly between candidates, it might be easier for an employer to decide that the skills and experience exhibited by one candidate are more relevant and desirable for the role than those exhibited by the other. The downside is that an employer's decision may

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be easier to challenge. This is particularly the case where a disproportionately low barrier to apply for the role has been set. It is easier to rely on the positive action defence where the candidates have comparable qualifications and experience.

Very detailed job descriptions, on the other hand, tend to give rise to paper trails demonstrating objectivity. The downside is that qualitative differences between candidates will not necessarily be captured.

## Quotas

The positive action argument cannot be relied upon to justify a general policy of hiring women rather than men in order to reach a certain quota: the Equality

Act clearly states that there cannot be a policy for treating persons who share the protected characteristic more favourably. The positive action defence is more appropriate for an allegation of direct discrimination than indirect discrimination.

Accordingly we are advising employers not to adopt a 'hire women not men whenever possible so that we achieve a target quota' policy. The existence of such a policy would be evidence of a discriminatory provision, criterion or practice on which a claim for indirect discrimination could be based.

It is unfortunate that the objective of the draft regulations does not fit comfortably within the operation of existing

discrimination law. Employers are bound to bear in mind their soon-to-be-published female representation statistics when devising their recruitment policies.

Legislation aside, the issue facing companies seeking to recruit more diverse boards is the pool of available talent. If a small number of women apply for top jobs, an even smaller number of women will have a chance of securing the position. By ensuring a greater number of women apply for senior roles, eg, through advertisements in journals likely to be read by women, an employer need not engage in overt positive action, it may simply appoint the best candidate applying for the job and it is more likely this person will be a woman.



## About the author

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