

Diversity and positive action

Briefing note for Fire and Rescue Services



Introduction

This briefing note has been produced following extensive research by the authors and supports the findings from four AFSA workshops in 2018 which engaged with a wide range of FRS HR, Equality and Diversity and AFSA members. One product that has been consistently requested during the workshops and was a core recommendation of the AFSA report, "Smoke and Mirrors", was clear guidance on positive action. This guidance note has been produced by Jagtar Singh OBE, national advisor and founder member of AFSA and Andrew Rowland and Nicola Green from Capsticks LLP who attended and supported the Smoke and Mirrors workshops in 2018.

AFSA is convinced that equality, diversity and inclusion are matters which are key to the success of Fire and Rescue Services (FRS) in delivering excellent services and ensuring a positive workplace culture that respects and values all staff. We know from research that an inclusive workforce which embraces diversity leads to staff who perform well, which in turn improves the experience and outcomes of the service user. The business case for positive action is supported by AFSA, the Smoke and Mirrors report and many other reports that are documented in that report. Smoke and Mirrors identifies that improvements in the diversity of many FRS workforces has been limited to date. The most recent data released by the government shows that 94% of firefighters are male and 96% are white. AFSA has held a number of workshops recently centred on the use of positive action by FRS to improve on these figures so that FRS better reflect the communities they serve. We have produced this briefing note as a resource for those who wish to utilise positive action.

The Smoke and Mirrors report can be found here:

<http://ht.ly/JlqD30oADA3>



"It was an honour and a privilege for me to work with Roger Kline to research and write the Smoke and Mirrors report. I am hopeful our clear succinct recommendations have an opportunity to drive progress. With the support of The Fire Service Research Trust and AFSA executive, we will use the report to drive change"

Diane Dunlevey, Vice chair AFSA and Equality Diversity Lead Staffordshire FRS

Positive action: section 158 and 159

Positive action was introduced by the Equality Act 2010 but many employers have been slow and cautious about using this tool to make a difference to date: we are aware that some have been concerned that they will face discrimination claims. With a lack of case law, we are not surprised that some are unwilling to push the boundaries as there can be a fine line between positive action and positive discrimination. Positive discrimination occurs where an individual is treated more favourably because of a protected characteristic, and the treatment does not comply with the positive action provisions set out in the Equality Act. Positive discrimination is generally prohibited but employers should be aware of two exceptions under the Equality Act: first, where there is an occupational requirement that a person has a protected characteristic; and second, the duty to make reasonable adjustments in relation to disabled employees.

There are two strands to positive action under the Equality Act. Section 158 allows for positive action generally where it is reasonable for an employer to think that:

- those with a protected characteristic suffer a disadvantage connected to the characteristic;
- those with a protected characteristic have needs which are different to those who do not share it; or
- participation in an activity by persons with the characteristic is disproportionately low.

FRS do not need sophisticated statistics to justify their use of positive action; they simply need to have a reasonable belief that there is a disadvantage, that needs differ or that participation in an activity is low.

Section 159 permits the selection of a candidate with a protected characteristic for **recruitment or promotion** in a tie-break scenario if certain conditions are met and we will look at this further below and discuss the recent Employment Tribunal decision on section 159.

An important point to note is that any steps taken must be proportionate to the employer's aim of improving diversity. An FRS needs to consider whether the proposed action is reasonably necessary to achieve the aim, or would it be possible by other means that are less likely to result in less favourable treatment of others? Essentially, a balancing act needs to be carried out by the employer.

Examples of positive action

The following steps can be taken as positive action which falls under section 158:

- Targeting advertising at specific disadvantaged groups, for example advertising jobs in media outlets such as radio stations which are likely to be accessed by the target group or attending social settings which will provide access to specific disadvantaged groups
- Internships
- Reserving places for protected groups on training courses prior to interviews and shortlisting
- Support for those with protected characteristics who have failed stages of the recruitment process (as opposed to training which is part of the recruitment process)
- Establishing and supporting staff networks
- Mentoring and sponsorship programmes
- Providing opportunities for underrepresented groups to attend national events
- Secondments for those with protected characteristics
- Development courses for those with protected characteristics focused on career progression
- Graduate entry schemes

Engagement

One of the key reasons identified as to why BAME candidates and women do not apply for roles in the FRS is lack of awareness of the FRS as a career opportunity and a lack of connections that provide positive support for applicants. We look below at three FRS which have adopted outreach programmes and new initiatives to help raise awareness and provide ongoing support for diverse candidates in order to improve diversity and inclusion in the FRS.

South Yorkshire FRS

Communications

The role of the communications team at South Yorkshire FRS has been critical to raising awareness of FRS as a career for all. The team has created a number of videos focusing on female firefighters which have been received very well. South Yorkshire FRS can directly link an increase in the number of women who registered an interest to the time a video was released where children talked about their firefighter mums. The video can be viewed here: <http://ht.ly/vTOY3OoADfb>

This video and a number of others which raise the profile of female and BAME firefighters, have been circulated through Facebook and Twitter which have provided a very useful source of feedback from the public.

Leaflets and attendance at groups/clubs

South Yorkshire FRS undertook leaflet drops and put up posters in wards with high diversity. These leaflets/posters were put up in shops, career advice centres, community centres, libraries and community hubs. These links allowed South Yorkshire FRS to attend events and utilise the groups'/clubs' text and social media messaging to promote vacancies and provide information about the role of the FRS.

South Yorkshire FRS has targeted the following:

- Sheffield taxi association
- Female rugby clubs
- Female football clubs
- Boxing gyms
- Thai boxing clubs

South Yorkshire FRS found that word spread and that individuals who weren't members of these clubs attended after discussing the event with a friend.

Greater Manchester FRS

Internal positive attraction event

When it started the positive attraction programme, Greater Manchester FRS had not recruited for seven years. One of the problems they faced with adopting a positive action approach was reluctance on the part of the existing workforce and so they held an internal event to explain to current employees why improving diversity is so important. They found that many had not considered this issue before and so it was a case of raising awareness and allaying any fears people had that positive action was about reducing the standards for recruits. The benefit of this event was two-fold. It brought about cultural change within the FRS but also assisted existing firefighters in providing a greater understanding of the communities they serve. In order to deal with the fears about reducing standards, Greater Manchester FRS has involved firefighters in the interview and scoring process with positive results.

Community events

999 days were hosted with local police forces and North West Ambulance Service. These days have proved very popular as potential recruits can visit all the emergency service employers at one event.

Greater Manchester FRS regularly attends mosques at Friday prayer time and has invested time in building a relationship with the Imams. This has helped in two ways: information about fire prevention can be passed to those attending prayer and it has been useful as a recruitment opportunity in explaining the different work the FRS undertakes including the preventative work and the ability of recruits to help their community.

Community days are regularly held and are open to all but are often set up in certain communities where Greater

Manchester FRS want to target BAME candidates. If an individual attends a community day, they can also apply for a taster day, set up at all stations so candidates do not have to travel far. The taster days include a tour of the station, trying the fitness tests and speaking to crew.

Bedfordshire FRS

Bedfordshire has targeted similar groups/clubs to South Yorkshire but has found that attendance at shopping centres, where the public has the opportunity to try on kit, has been particularly successful. Bedfordshire ensures that these events are advertised on social media in advance and has found that those who have questions about recruitment make a point of coming along to speak to fire fighters. Bedfordshire use their positive action ambassadors (see below) at these events.

Mobile recruitment vehicle

Bedfordshire are investing in developing a mobile recruitment vehicle to attend schools and various community events such as fairs and carnivals. The vehicle will enable anyone to take the FRS fitness test and use equipment on the vehicle, including a ladder system and breathing apparatus. They are using one of their old vehicles which is being reconfigured and the plan is that it can be utilised by FRS in the Eastern region.

Training

Section 158 allows for training which will enable groups to gain employment. However, it is necessary to think about whether training is a proportionate means of achieving the aim.

In 2017 West Yorkshire FRS reported that out of over 700 women who applied for an operational role, only 45 made it through to the physical testing stage of the process, of which only four passed. These figures suggest that a disadvantage is suffered by women in the recruitment process and particularly the physical testing phase. These figures could be used as the basis on which to offer physical training as positive action aimed at removing the disadvantage experienced by women.

South Yorkshire FRS

South Yorkshire FRS offer women who have registered an interest in joining the FRS an opportunity to attend female fitness sessions. The sessions are offered before an individual starts the recruitment process. This has led to a significant increase in the number of women who are passing the fitness test.

South Yorkshire FRS has also taken the step of offering interview training to those who have registered an interest in joining the FRS but before the recruitment process has commenced. Their experience was that individuals had the necessary experience but did not understand how to communicate this in an interview. Interview workshops were offered to all individuals, not only those who had certain protected characteristic but if the data revealed

that certain protected groups were failing at the interview stage, this could be used as the basis on which to offer interview training to those groups who seem to be suffering a disadvantage.

Bedfordshire FRS

Bedfordshire FRS is looking at a scheme which has been put in place by Nottinghamshire FRS where a female fire fighter runs a regular fitness session at a local gym using FRS equipment. This class will be open to all but it is anticipated that it will appeal to women who are considering applying for an operational role.

Are recruitment targets the answer?

Section 159 enables employers to use positive action in a recruitment and promotion context, but whilst an FRS could set a target that 60% of new hires will be women (that it may not achieve), quotas are not permitted. Under section 159, an employer can only select a candidate with a protected characteristic over a candidate who does not have that characteristic where:

- candidates are **as qualified** as each other;
- the employer **does not have a policy** of treating people with a protected characteristic more favourably; and
- taking action is a **proportionate means of achieving a legitimate aim**.

Positive action in recruitment, therefore, has a limited use. An FRS cannot set recruitment quotas it will fulfil in terms of gender, BAME, LGBT or disability diversity under the guise of positive action. It cannot reserve a set number of promotions for those with protected characteristics. This would amount to having a policy of treating those with a protected characteristic more favourably and be positive discrimination and it must be remembered that an employer cannot select a lesser qualified candidate with a protected characteristic over a superior candidate. Positive action in recruitment is, put simply, the decision maker in a tie-breaker, i.e. where you have candidates who are equally qualified, the protected characteristic can tip the balance. In the context of recruitment for the FRS and the numerous ways in which an individual is tested and scored, it is unlikely that an FRS will be in a position where two candidates are 'as qualified' as each other.

The pass and fail approach

One solution which has been suggested to the difficulty



presented by the ‘as qualified’ wording at section 159 is using a pass/fail approach so that a pass mark is set above which all candidates are deemed to be as qualified as each other. The Employment Tribunal (ET) decision in *Chief Constable of Cheshire v Furlong* [2018] is one of the first ET judgments on positive action and focuses on the pass/fail approach.

The Respondent had undertaken numerous steps to try to improve diversity through positive action (under section 158, which deals more generally with positive action) over a period of time. These included targeted advertising, buddy schemes, targeted seminars, recruitment workshops and promotional events. Unconscious bias training was also rolled out for those involved in recruitment and assessment. Whilst this had led to improvements in diversity, women, BAME and LGBT individuals were still underrepresented.

The Respondent’s recruitment process was made up of three stages: application form, assessment centre and then interview and the Respondent took the decision to adopt a pass/fail approach after the interview stage so that all those who passed were deemed to be as qualified as each other. The Respondent then relied on section 159 in selecting those candidates for recruitment who had protected characteristics.

Mr Furlong, a white heterosexual male without a disability, passed all three stages but was told he had been unsuccessful and “put on hold” as there were not enough vacancies. Mr Furlong believed that he was better qualified than some of the candidates who had been selected and challenged the pass/fail approach that had been adopted, arguing that it was discriminatory.

The ET found that Mr Furlong had been discriminated against. Although the Respondent acted reasonably in reaching the view that persons with certain protected characteristics were underrepresented and they had a legitimate aim in seeking to improve diversity, the Respondent had not demonstrated that the protected groups suffered disadvantage and had not complied with section 159 in key respects.

Although numerical scoring was not used during the interviews, the tick box process which was used provided qualitative data about the candidates. It was clear that the 127 candidates who passed were not all “as qualified” as each other. The ET found that the Respondent, in using a pass/fail mechanism, had put forward an artificially low threshold in order to put in place its positive action plan.

The ET found that the Respondent had a policy of treating those with certain protected characteristics more favourably than those without the characteristics. Given the size of the exercise, the ET found that the approach had all the hallmarks of a policy designed to get those who had protected characteristics across the line first, ignoring qualitative assessment.

When considering whether the steps taken were

proportionate, it was necessary to consider the balance between the underrepresentation of those with protected characteristics and the impact of the steps taken on Mr Furlong and the other white non-disabled males who were unsuccessful. For those individuals, such as Mr Furlong, who had “passed” all stages and who were more meritorious candidates than some with protected characteristics who had been appointed, the ET found that the knock on effect of the pass/fail approach could be discontentment and disillusionment which may lead to a lack of confidence in the ability of police constables and the police force in general.

The ET found that applying the pass/fail rate to the large volume exercise was not reasonably necessary. Instead, the ET suggested that before applying the pass/fail test the Respondent should:

- consider the impact of the previous positive action steps taken;
- measurably assess pass/fail in a smaller exercise first;
- not impose artificially low thresholds; and
- not ignore qualitative assessment of candidates.

It is important to note that this element of the judgment is fact specific and the ET decision does not mean that the pass/fail approach will be unlawful in all cases. Clearly, the size of the group and the fact that a low threshold was selected influenced the decision. There may be scope for FRS to consider the use of the pass/fail approach but in smaller recruitment or promotion processes, or where a high pass mark is set so that the points regarding confidence in those who are selected would not apply.

The Equality and Human Rights Commission in its statutory code of practice acknowledges that a set of criteria can be established by employers which can take into account a candidate’s overall ability, competence and professional experience together with formal or academic qualifications, in establishing whether one person is “as qualified” as another. An employer can also look at other qualities which would make a person suitable for a job. For example, there may be more subjective elements that come into play, such as assessing the ability to work as part of a team, and this is acceptable.

The other point to bear in mind is that this case is an ET level decision only and would not need to be followed by another ET. It is also concerned with section 159, which deals specifically with recruitment and promotion, and not section 158, which is about positive action generally, for example offering training, networking groups, mentoring schemes and work shadowing and positive attraction campaigns.

Reviewing the recruitment process

In looking at the use of positive action, FRS may also find it useful to review their recruitment processes in order to assess whether changes can be made to account for any unconscious bias.

Greater Manchester FRS

In Greater Manchester FRS the following changes were made:

- personal details were removed from the application form before the assessment day;
- rather than one interview panel, pods of two people were used to assess each candidate. The scores from the pods could then be compared and any biases identified; and
- crews were invited to be part of the marking process. Greater Manchester FRS found that in crew listening to answers and details from candidates, rather than judging on appearance real cultural change has occurred.

Bedfordshire FRS

Bedfordshire has looked carefully at each stage of the recruitment process in trying to establish whether any of the tests used may be disproportionately impacting on groups with protected characteristics. Where they have identified data which indicates that one of the online tests does disproportionately impact on BAME individuals, they have taken the decision not to score that particular test but to use the outcomes during the interview process. Bedfordshire are in the process of analysing the impact this has.

One point which has caused some debate in the recruitment process is having a policy that interview panels must be diverse. The argument for diverse interview panels is that candidates do not perform as well in the interview process when they are faced with a panel that does not reflect a diverse workforce or the candidate. The requirement will not mean that a candidate with a protected characteristic will be treated more favourably and selected; it is separate from the question of whether you use positive action to select a candidate under section 159. In our view, diverse interview panels should be regarded as inherently a good thing even if all the candidates being interviewed were, for example, white males. Having a diverse panel which also represents the local community would bring different perspectives to bear when reaching decisions about appointment and promotion. In our view, this is unlikely to be discriminatory action.

Cultural change

In order for positive action to have a real impact on diversity, there also needs to be a cultural shift generally so that the FRS are truly inclusive workplaces. Buy-in at all levels in an FRS as to why diversity is important is essential.

Some FRS which have introduced positive action have faced internal challenge; an argument frequently cited is that standards are slipping and that these FRS simply want to improve their diversity statistics by giving those with certain protected characteristics special treatment. In a service where trust between colleagues is paramount, fire crew need to know that their colleagues are capable

of carrying out the role and so internal events have been held to ensure that staff understand what positive action programmes entail.

Greater Manchester FRS

Greater Manchester FRS held an event for senior staff, mentioned above, to explain why they were undertaking the 'positive attraction' process and trying to engage with new groups which have not previously thought of the FRS as a viable career option. Guest speakers attended, including the first female fighter pilot. Greater Manchester FRS found that this event was a turning point in staff understanding the benefits of the positive attraction programme.

Bedfordshire FRS

Bedfordshire FRS has invested time in ensuring that the current workforce is engaged in promoting diversity. They send out a weekly newsletter where diversity is a key topic. Corporate meetings have been held with various groups and with all levels of staff about the importance of diversity and the role of positive action. Bedfordshire FRS has developed a scheme using positive action ambassadors. In recruiting volunteers for this programme, Bedfordshire spoke to all members of a watch and they now have 19 volunteers, 50% of who are female.

Next steps

The difference which can be made through the use of positive action is evidenced in data from London Fire Brigade. LFB has had a positive action programme in place for a number of years. Figures from 2004 show that 2.52% of the operational workforce were women and 7.66% were BAME. In 2019, and as a result of steps taken to improve diversity, there has been an increase to 7.39% women and 13.08% BAME.

Some of the key tips from those FRS we have spoken to which have used positive action to encourage applications from more diverse candidates are:

- use people within your FRS who are passionate about this subject and who really want to engage with others as their enthusiasm is likely to influence others;
- look at new venues for recruitment opportunities and return regularly because it is important to keep the conversation going and for people to see you are committed to encouraging new groups;
- carry out research and find out who are the key influencers in certain areas who can have a real impact on others.
- be prepared to invest time in building relationships. People need to know that you are committed to improving diversity and whilst those involved in positive action work and engagement will open the doors to communities, it is important that operational staff also engage with communities to develop relationships.

“Our work on positive action and workforce diversity indicates the importance of building a diversity strategy that does not sit alone but is imprinted throughout a fire and rescue service recruitment system, its talent system and its retention system, into its supply chain, stakeholder and external communication plans. The evidence clearly indicates if the fire service delivers workforce diversity in this way, it will create long term sustainable potential for change”

Jagtar Singh, Joint National Advisor, AFSA

Contact:



Jagtar Singh OBE
Joint National Advisor
Asian Fire Service Association
E: jagtarbasi@yahoo.com



Andrew Rowland
Partner, Capsticks
T: +44 20 8780 4760
M: +44 7738 027472
E: andrew.rowland@capsticks.com



Nicola Green
Legal Director, Capsticks
T: +44 20 8780 6975
M: +44 7841 981757
E: nicola.green@capsticks.com



