



All aboard the positive action train to

FIRST ScotRail's efforts to recruit more women and people from ethnic minorities is the latest high-profile attempt by an organisation to examine its corporate make-up and ensure it is a diversity-friendly employer.

The business case for a diverse workforce is easily made. However, the route to diversity crosses a legal minefield populated by equality legislation.

Sex and race discrimination legislation share a common

DONNA REYNOLDS

model: it is unlawful for an employer to directly or indirectly discriminate against someone on grounds of their sex or race.

Good intentions do not enter the equation. If an employer discriminates - even if the purpose is to correct years of discrimination, meet set targets, or respond to customer preferences - this will almost certainly be unlaw-

ful. Positive discrimination is never permitted, and every person appointed to a job must be selected on merit.

In certain, limited circumstances, an employer might justifiably set out to recruit either a man, woman or individual from a specific racial group based on the requirements of the job itself. Essentially, this is permitted in cases where a particular gender or race is a genuine occupational qualification (GOQ) nec-

essary for the specific post. Being male, for example, might be considered a GOQ for the job of men's toilet cleaner if the facilities are not closed to allow cleaning to take place. GOQs do not, however, provide a route to diversity for an employer where none existed previously. In the First ScotRail example, it is hard to conceive that the duties of a train driver could only be performed by a woman.

Employers are, though, per-

avoid positive discrimination trap

mitted to take positive action, which is distinct from positive discrimination, in that it describes the active encouragement of certain groups to apply for a job, in contrast to positive discrimination, which would only entertain applications from such groups.

Organisations can take steps to encourage groups under-represented in their workforce to take advantage of particular job opportunities. They can

choose to provide training designed to help certain people qualify for certain roles. If only 21 of First ScotRail's 900 train drivers are female, women could reasonably be said to be under-represented.

Positive action increases the pool of suitable candidates, while allowing everyone to compete for job opportunities on a level playing field. Examples of legitimate positive action include:

- indicating in job ads that applications from women and ethnic minorities are particularly welcome;
- placing those ads in media used largely or primarily by women and ethnic minorities;
- offering single-sex or race pre-recruitment open days;
- and offering single-sex or race external training courses that prepare people for work in areas where they are currently under-represented.

There is no easy or quick solution to increasing diversity in the workplace. When employers take positive action in recruiting - as First ScotRail has done - they must take care not to exclude candidates from outwith the groups being targeted. Ultimately, when an appointment is made, the gender or race of the applicant must play no part in that decision.

● Donna Reynolds is a solicitor at CCW Business Lawyers.