

Tackling inequality head on in UK Sport

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This year has been a watershed moment as individuals, companies and institutions take action to address issues of structural racism, and we welcome the news that the latest body going further to tackle racial inequality is the Football Association (FA). The FA aims to increase diversity in English football from coaching roles to executive level through its new Football Leadership Diversity Code (the Code), which introduces targets to ensure a minimum percentage of individuals holding these positions are of Black, Asian or Mixed-Heritage and/or female, effective immediately. From a legal perspective, that the scheme introduces 'targets' rather than 'quotas' may well be deliberate; though targets address the greater representation and inclusion that is needed, they also provide a degree of flexibility, perhaps to ensure clubs do not fall foul of discriminatory hiring practices.

Falling foul of the Equality Act 2010

Clubs should be reminded of the distinction between lawful positive action and unlawful positive discrimination. With the former, an employer is permitted to recruit a minority candidate under ss.159(1) Equality Act 2010 (the 'EA') on the basis of their protected characteristic (e.g. sex or race) if they reasonably think persons who share this protected characteristic suffer a disadvantage, or that their participation in the field is disproportionately low, provided that certain very specific conditions are met. The underrepresentation condition could easily be satisfied in football, as the latest statistics show, for example, only five black managers across 92 league clubs at present.

However, a recent employment tribunal case (*Mr M Furlong v The Chief Constable of Cheshire Police* [2019]) emphasises the all-important additional conditions in ss.159(4) EA when applying positive action: (i) the individual in question must be equally qualified for the role as other candidates, (ii) the employer must not have a policy of treating candidates with a protected characteristic more favourably, and (iii) the action is a proportionate means of achieving a legitimate aim. In *Furlong*, the tribunal concluded that the police force had discriminated against a white, heterosexual, male claimant who was overlooked for a position he was more qualified for compared to those who were hired instead – he suffered direct discrimination on the grounds of his sexual orientation, race and sex under s.13 EA.

Although the tribunal conceded that the police force had laudable aims in looking to increase diversity, and that this was legitimate, the approach taken was not proportionate and it ultimately rejected the contention that other candidates during the recruitment process were of equal or "deemed equal" merit, declaring this a fallacy based on the qualitative data the police obtained during the recruitment process. Whilst recruitment decisions in football are likely to be more subjective than the detailed set of assessments undertaken by the police recruits, the key takeaway point for clubs to keep in mind is that positive action is intended to be used in 'tie-breaker' scenarios and it is generally advisable to justify recruitment decisions on the candidates' qualities, rather than relying on this section of the EA.

Challenge accepted

The FA has attempted to address the lack of diversity at coaching level before, introducing the 'Rooney Rule' in 2018 (nothing to do with Wayne, the name comes from a similar rule in the US NFL). This rule requires at least one Black, Asian or Mixed-Heritage applicant to be considered when recruiting for senior coaching positions. However, criticisms of the Rooney Rule have prevailed, not least because the Premier League did not adopt the scheme. Even with these prior attempts to address the imbalance, superstar players like Raheem Sterling have highlighted the absence of Black, Asian and Mixed-Heritage leadership in the game today despite black players representing roughly a third of players, while Sol Campbell and Dwight Yorke have both spoken out about their struggle to break into the managerial ranks despite their experience.

The Rooney Rule is now incorporated into the Code with shortlists for interview containing one female, Black, Asian or Mixed-Heritage candidate, if they meet the specifications for the role. In contrast to the 'Rooney Rule' on its own, the number of clubs committing to the voluntary Code is encouraging and suggests a shift in approach and we may well see more effective change, as more than 40 clubs have signed up in total from across the Premier League, EFL, Women's Super League and Women's Championship already.

Extra time

The Code also includes a section on developing talent with some suggestions for organisations to include in their overall plan. The targets will have only limited success if there are not sufficient steps taken to support those from underrepresented groups to acquire the skills and experience needed. In addition to the above measures, clubs and other organisations should look at what training and mentoring they can offer to increase the number of candidates from the underrepresented groups – the goal should be that the numbers are sufficient to ultimately normalise applications from women and Black, Asian and Mixed-Heritage professionals for these roles in the first place.

Further details on the new Code can be found at: <https://www.thefa.com/news/2020/oct/27/football-leadership-diversity-code-launched-271020>

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