



Resources: Tie breaker clause

Harnessing BAME talent: A guide for UK employers



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The 'tie-breaker' provision was introduced by the Equality Act (2010) and says that if two candidates for promotion or recruitment are equally qualified for a position, the employer may select the candidate who has a protected characteristic, as long as the reason for doing so is to overcome a disadvantage connected to that protected characteristic or to reduce under-representation of people with that characteristic, (and to do so is 'a proportionate means of achieving a legitimate aim').

In simple terms, this means that if you have two candidates who are equally suited, (in terms of their qualifications and experience or using the criteria you have applied to make the decision), then you may choose the one from the group that is under-represented. In this context, if you had a White and a BAME candidate that were equally qualified and there was under-representation of BAME staff in your area, then you could select the BAME candidate.

Key considerations would be:

- Has a careful decision been taken to agree a focus on the under-representation of particular characteristics over others because of the relative issues within your organisation? This will help justify the emphasis given to the protected characteristics in a given situation, to allow you to prioritise a candidate's race over their gender for example.
- What evidence has been used to justify and measure under-representation? Have valid benchmarks been used and is this under-representation true of the organisation as a whole, your team, this type of role? You need a robust set of evidence to justify your decision.
- Are you certain of the candidates characteristics or are you just assuming this based on their appearance? During the recruitment process, those on the panel should not have access to any diversity monitoring data for confidentiality reasons and to ensure this information does not influence the decision-making process. As a consequence this final stage of the decision-making needs to be handled carefully to avoid sharing sensitive personal data beyond those who have agreed access to it.