

Equality: Race discrimination under the spotlight

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Following the death of George Floyd in 2020 and the rise of the Black Lives Matter movement, the issue of racism has been under the spotlight. More people are openly sharing their experiences of race discrimination and others are showing their solidarity via social media campaigns such as #BlackoutTuesday. Is the anti-racism movement doing for race discrimination what the #MeToo campaign did for sexual harassment and, in this context, what should employers do to tackle race discrimination in the workplace?

Even in organisations and businesses that, at first blush, appear to have a good record on diversity, there is more work to do. Taking the legal profession as an example, in 2019, the Bar Standards Board reported that the percentage of BAME barristers at the Bar was 13.6%. For the same year, the Solicitors Regulation Authority reported that the percentage of BAME lawyers working in law firms was 21%, while 18% of in-house solicitors were BAME. This compares to an estimated 14.4% of working-age people last year who were from BAME backgrounds. However, there was underrepresentation in certain areas – for example, only 8.1% of QCs and 8% of partners in the largest law firms (those with 50-plus partners) were BAME.

As the recent story of barrister Alexandra Wilson highlights, a problem with ingrained bias also persists. Wilson, a mixed-race barrister practising criminal and family law, was mistaken for a defendant three times in one day at court. Upon her arrival, a security officer asked for her name and searched for it on a list of defendants before she clarified she was a barrister. When she attempted to enter the courtroom, another legal professional told her to go and wait outside and to sign in with an usher for her case. Finally, a clerk told her very loudly to get out of the courtroom because she had to wait for her case to come on. Again, in both cases the assumption was that she was the defendant. She tweeted about the incident, saying:

This really isn't ok though. I don't expect to have to constantly justify my existence at work.

Wilson's experience demonstrates the systemic racism that is a part of many institutions and workplaces.

Legal protections

Before we get onto some practical tips for employers to tackle race discrimination and unconscious bias, it is worth pausing to consider the legal position. The Equality Act 2010 prohibits direct race discrimination (which includes direct discrimination by association and perception) as well as indirect race discrimination and harassment in the workplace. It also prohibits victimisation, essentially providing protection for individuals who assert their rights under the legislation and are retaliated against for doing so. For the purposes of the legislation, 'race' includes colour, nationality, ethnic origins and national origins.

Specific race protections exist for those 'in employment'. This term includes a wider group of people than those covered by other statutory protections such as unfair dismissal, as it encompasses not just employees but job applicants, contract workers, voluntary workers, office holders, partners and more. It does not protect the genuinely self-employed. Furthermore, 'in employment' covers not just active employment and dismissal but advertising a job, recruitment and the post-employment period.

It is also worth noting that an employer is not only liable for its own discriminatory acts but is also vicariously liable for the acts of its employees. For example, if an employee engages in 'banter' with any racist undertones or stereotypes and does so in the 'course of employment' (which can be interpreted widely), an employer can find itself vicariously liable. To defend itself, the employer will have to show that it took 'all reasonable steps' to prevent the employee from engaging in that behaviour. Such steps may include having training and policies in place, investigating the allegations properly and taking disciplinary action against the perpetrator. It can be difficult to avail yourself of this defence.

Unconscious bias and microaggressions

Discrimination is not always overt. There can be instances where a perpetrator may not even be aware that they are being discriminatory. It is important that employers are aware of these more subtle forms of discrimination, which include microaggression and unconscious bias.

According to the Merriam-Webster dictionary, a microaggression is:

A comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group (such as a racial minority).

In other words, our bias causes us to say something offensive, but this is not necessarily said with malice. For example, a manager might remark that a job applicant speaks good English, when in fact English is their first language, or that their name is hard to pronounce. When one understands what microaggression means, it is easy to witness this type of behaviour in the workplace and for employers to make efforts to tackle such behaviour.

Employers should also be aware of unconscious bias, which is essentially where the choices we make are based on influences such as our background, environmental conditions and

experiences. In the workplace, unconscious bias can lead to primarily recruiting or promoting people from certain ethnic or socio-economic groups.

Employers should undertake training to identify what unconscious biases they are affected by and look at how they can change practices to overcome this. There has been recent criticism levelled at such training. Our view is that simply having an unconscious bias training session is not, in itself, going to create an inclusive workplace culture or a 'reasonable steps' defence against a race discrimination claim. If, however, it is part of a wider package of measures and policies, it can certainly be useful in educating staff and relying on the defence.

Settlement agreements

The #MeToo campaign has led to scrutiny of the use of non-disclosure obligations in settlement agreements. This has resulted in the Equality and Human Rights Commission (EHRC) issuing the guidance *The use of confidentiality agreements in discrimination cases*. While sexual harassment was at the forefront of people's minds at the time, this guidance covers discrimination in general and employers should consider it if they face a race discrimination claim.

The fact that it is only 'guidance' and not legally enforceable means that is not always followed. With the spotlight on racism, we may see a renewed effort to encourage employers to use settlement agreements to settle existing disputes with employees but not to cover up underlying race issues. If an employer is settling a number of race discrimination claims, perhaps linked to a certain individual, alarm bells should be ringing. Instead of sweeping the problem under the carpet, it should be taking steps to tackle the root cause.

Ethnicity pay gap reporting

In October 2018, the government launched a consultation paper proposing to introduce mandatory ethnicity pay gap reporting obligations akin to gender pay gap reporting. The Equal Pay (Information and Claims) Bill is due to have its second reading in the House of Commons imminently. While we wait for this to become a legal obligation, a small number of organisations are already voluntarily reporting on their ethnicity pay gaps.

When reporting does become a legal obligation, this is likely to expose a lack of diversity in many organisations or even systemic race discrimination. Any issues are likely to attract media attention and have negative reputational consequences. Employers who want to be on the front foot could start to gather data to get an idea of any pay gaps. If necessary, they can then consider the best strategies to increase diversity and create a culture that promotes equality.

Can race discrimination ever be lawful?

There are certain circumstances in which it can be lawful to discriminate on the basis of race.

Positive action

The Equality Act allows employers to take 'general positive action' in situations where people who share a protected characteristic suffer a disadvantage connected to that characteristic and are disproportionately underrepresented or have particular needs. An employer may take proportionate measures to help meet the needs of such people or to assist them in overcoming the disadvantage or increasing their participation.

The *Equality Act 2010 Code of Practice on Employment* provides the example of a school governing body responding to national research showing that Bangladeshis have low rates of participation in the teaching profession. The governing body seeks to tackle this by offering open days in schools to members of the Bangladeshi community who might be interested in teaching as a profession. This would be a form of positive action to encourage participation.

There is a separate type of positive action that allows an employer to treat a person with a protected characteristic more favourably than other people in a recruitment or promotion situation. However, it may only do this if the person is 'as qualified' as the other candidates and taking the action is a proportionate means of achieving a legitimate aim.

Occupational requirement

In some circumstances, there may be an occupational requirement for a person of a particular race to do a particular kind of work. For the application of an occupational requirement to be lawful, this must be a proportionate means of achieving a legitimate aim.

The Code of Practice contains the example of a local council setting up a project to encourage older people from the Somali community to make more use of health services. The council wants to recruit someone of Somali origin for the post because it involves visiting elderly people in their homes and it is necessary for the post-holder to have a good knowledge of their culture and language. The council does not have an existing Somali worker who can take on the new duties. In this situation, it could legitimately rely on the occupational requirement exception to recruit a worker of Somali origin.

Practical tips for employers

As a result of the Black Lives Matter movement, we expect to see an increase in employees lodging grievances, blowing the whistle or bringing claims about race discrimination. To create a diverse and inclusive workplace and be able to rely on an 'all reasonable steps' defence should they face claims, employers should be considering what steps they can take now to implement change.

Take top-down action

Employers should take action on equality and diversity from the top down and practise what they preach. This could include appointing an executive sponsor to provide leadership on race issues.

Implement clear policies

Employers should check they have clear policies and procedures in place to deal with any issues - including equal opportunities, whistleblowing, anti-harassment and bullying, and disciplinary policies. These should set out what is acceptable behaviour, what the consequences are for non-compliance and that the organisation has a zero-tolerance stance on racism. Employers should review these policies and procedures regularly and communicate them effectively to staff.

Focus on workplace training

Employers should fully train employees on new policies and procedures or offer regular refresher training if policies are already in place. An employer is unlikely to be able to defend itself against a race discrimination claim if it never flagged up or gave training on its policies (or if training was infrequent). It is important to be aware that not all racism is conscious or overt and therefore the training should incorporate the subjects of microaggressions and unconscious bias.

Review recruitment processes

Employers should check that recruitment, interview and promotion processes are inclusive and, where appropriate, consider positive action to assist the progression of under-represented groups. If an employer uses recruitment agencies, it should review their policies and investigate how they recruit and whether they recruit diverse talent.

Promote and take part in initiatives

Initiatives such as the Race at Work Charter invite organisations to sign the charter and commit to a number of actions, including capturing ethnicity data, making commitments at board level, mentoring and reverse mentoring. Employers should also keep abreast of other initiatives, such as the CBI's announcement in October 2020 that it is launching a Change the Race Ratio campaign to increase BAME participation on boards and in senior leadership positions. This will allow organisations to see the direction of travel and consider whether they want to implement any similar steps.

Create visible and accessible networks

Setting up networks to promote diversity and inclusion can be very beneficial in sparking initiatives and raising any issues employees may be facing. It is important to publicise the networks to employees and make them inclusive.

Reference point

Equality Act 2010 Code of Practice on Employment:
www.legalease.co.uk/employer-code

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