

HOW TO AVOID RACE
DISCRIMINATION IN
THE WORKPLACE



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Topics covered:

- The impact of Black Lives Matter and other movements, including those from the business community.
- Unconscious bias – some key court cases
- Positive action (which is lawful under the Equality Act 2010, though rarely used) compared with 'positive discrimination' (which is unlawful in the UK save for some exceptions for disability).

Race Discrimination and the Equality Act 2010 (EqA)

INTRODUCTION

Race is one of nine 'protected characteristics' under the EqA. The other protected characteristics are age, disability, gender reassignment, being married or in a civil partnership, pregnancy & maternity, religion & belief, sex and sexual orientation.

The meaning of 'race' includes:

- Colour
- Nationality
- Ethnic or national origins, **EqA s.9**

The section of the Equality Act which covers the workplace makes it unlawful to:

- Treat someone less favourably than they treat, or would treat others, because of race. **EqA s.13 – direct discrimination.**
- Associative discrimination is also a form of direct discrimination. For example, if a white employee is treated less favourably himself because they associate with or support BAME colleagues he is a victim of race discrimination even though it is their colleague's race, and not theirs, that is the reason for their own less favourable treatment.
- Apply a provision, criterion, or practice (PCP) to everybody but which puts some groups at a particular disadvantage because of their race, (and which puts an individual within that group at a particular disadvantage) - and which cannot be 'objectively justified'. **EqA s.19 – indirect discrimination.**

- Harass someone for a reason connected with race. **EqA s.26 - harassment.**

The definition of harassment is unwanted conduct which has the purpose or effect of violating someone's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment (for a reason connected with a protected characteristic).

The person who has been subjected to harassment need not share the race that the offensive conduct was aimed at. For example, a white employee overhears a racist comment about her Asian colleague which she finds offensive. She could claim that she has been harassed because she has been subjected to an offensive and hostile work environment where Asian people are denigrated.

- Victimise somebody because they have raised a discrimination complaint or supported somebody who has raised a discrimination complaint (known as protected acts). EqA s.27 – victimisation.

Those who work in the public sector will also be aware of the Public Sector Equality Duty. This requires public sector bodies to have "due regard" to preventing unlawful conduct under the Equality Act; advancing equality of opportunity and fostering good relations between people who share a protected characteristic and those who do not; tackling prejudice and promoting understanding. EqA s.149.

THE IMPACT OF BLACK LIVES MATTER

The broad definition of race under Equality Act seeks to protect everybody from unlawful race discrimination, whatever their colour, nationality or ethnic or national origin. But we know from countless studies and statistics that people from black, Asian and minority ethnic backgrounds, disproportionately suffer far more race discrimination than their white counterparts.

Since the death of George Floyd last summer and the surge in support for Black Lives Matter there has also been a surge in the public debate about equality and what it means to be actively anti-racist as opposed to 'not racist'.

So, what might that mean for employers? The rest of this presentation looks at the topic of actively calling out racism and the pressure on and by businesses to address racial unfairness at work. Let us start by looking at some tribunal cases on unconscious bias.

UNCONCIOUS BIAS

In January 2020 KPMG's then Chairman described unconscious bias training as "complete and utter crap". He had to resign, of course, and KPMG immediately issued statements reaffirming their commitment to equality and diversity. There was a lot of social media commentary at the time and one post (from a man I have no reason to assume was associated with KPMG) wrote this:

"Unconscious bias is just more invented woke drivel."

Whilst the term 'unconscious bias' is used far more frequently today it is not a new concept. The employment tribunals have been recognising for over 20 years that unconscious bias can lead to unlawful race discrimination.

Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL)

The lead case on unconscious or subconscious bias is *Nagarajan v London Regional Transport* from 1999 in which the House of Lords said:

"Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated."

This case established 'the reason why' and this principle has been reaffirmed in many lead cases since then. It means that the Tribunal must examine the conscious or unconscious mental processes which led the employer to act in the way it did towards the Claimant. And it must consider whether race (or any other protected characteristic) played a significant part in the reason for the treatment.

Royal Bank of Scotland plc v Morris UKEAT/0436/10

This judgment from the Employment Appeal Tribunal (EAT) was published nearly 12 years ago but is so relevant to today because it examines that old trope – 'playing the race card'.

Here, the EAT held that the Royal Bank of Scotland had directly discriminated against its black employee by suggesting he was 'playing the race card'.

Mr Morris, who was black, raised a complaint about his line manager who was white. The two had not been getting on for a while. Mr Morris did not raise race discrimination or suggest that his line manager's conduct had any connection with race. But the senior manager who got involved did suggest Mr Morris was raising a race discrimination complaint. Mr Morris was offended by the suggestion that he was 'playing the race card'.

The EAT held that the senior manager failed to treat Mr Morris' complaint as a straightforward complaint by one colleague against another, to be treated on its merits, but as a complaint by a black employee against a white manager.

The senior manager had applied a stereotype to Mr Morris that any black employee raising a complaint must be raising a race complaint. This was demeaning to Mr Morris and a stereotype which would not be applied to a white employee complaining about a black colleague.

Mr Richard Hastings v Kings College Hospital NHS Trust, London South Employment Tribunal, November 2018

Mr Richard Hastings, a black man, was awarded £1million by the tribunal after he won his claims for unfair dismissal and race discrimination. Mr Hastings worked for the Trust as an IT manager. He was dismissed for gross misconduct after he tried to defend himself against somebody who racially abused and assaulted him in the Trust's car park.

The tribunal described Mr Hastings as 'an honest and straightforward witness'. Here are some of the unconscious bias offences the tribunal found in the Trust's disciplinary procedure:

- Mr Hastings was consistently painted as the aggressor.
- White complainants were described as "victims".
- His evidence was prefaced with "According to RH", implying it was not truthful.
- There were missed opportunities to gather evidence of his innocence.
- There was no challenge of evidence from white witnesses despite inconsistencies.
- His own race discrimination grievance was not investigated.

Consider how different the outcome of this case might have been if those handling this disciplinary procedure had checked their own unconscious biases?

TIME TO BE ANTI-RACIST?

The next two employment tribunal cases consider the obligations on others to call out racism.

Allay (UK) Limited v Gehlen UKEAT/003/20

First, some legal background. In discrimination cases an employer is vicariously liable for the unlawful acts of its employees. Employers have statutory defence to discrimination and harassment claims if it can prove that it has taken 'all reasonable steps' to prevent the unlawful conduct happening in the first place, **EqA s.109**.

Most employers nowadays have equal opportunities and anti-harassment policies, and many give some sort of training on equality & diversity.

But is that training effective and up to date enough to prevent unlawful discrimination? This case is about stale equalities and diversity training being no defence to discrimination claims. But in its judgment the EAT seems to go further by suggesting that is time for all employees to support their colleagues of colour and call out racism – or at least report it to HR - when they see it happening in the workplace.

Mr Gehlen was of Indian origin. He brought a harassment claim against the company after a colleague continuously subjected him to comments such as 'go and work in a corner shop' and made references to his brown skin. Allay sought to rely on the 'all reasonable steps' defence because they had given equalities & diversity training 2 years earlier.

The tribunal concluded that this training was clearly 'stale' and ineffective because:

- E&D training had not stopped the perpetrator making the racist comments.
- A colleague and a manager who overheard the comments did nothing about it.
- A second manager told Mr Gehlen to report it to HR when he should have reported it himself.

The EAT made it clear that superficial equalities training as a tick box exercise will not do. If it becomes clear that despite training staff are continuing to engage in harassment, or do not understand the importance of preventing it and reporting it to managers, employers should take this a clear signal that more effective training is urgently needed. In this case, the EAT held that a reasonable step for the company to have taken would have been to provide refresher training.

Panahian-Jand V Barks Health NHS Trust,
London East Employment Tribunal, 18
February 2021

This is a fantastically encouraging decision in support of people who are brave enough to speak out against racism at work. It is from a tribunal of first instance, which means the judgment is not legally binding on other tribunals, but let us hope it reflects a growing desire of society at large to challenge racism and support those who do so.

Ms Panahian-Jand was a paediatric bank nurse who identified as white. She observed that staff were divided on racial lines between so called white 'Essex girls' and BAME staff. She told management that BAME staff were given a heavier workload and that two black employees were being bullied. She made formal complaints on behalf of black colleagues. She was then investigated by the Trust for misconduct, offered no more bank shifts and threatened in the car park by a member of management.

The tribunal decided that she has been victimised for raising race discrimination complaints under the Equality Act and subjected to detriments making 'protected disclosures' in the public interest - i.e. whistleblowing – under the Employment Rights Act

The tribunal awarded her £26,000 in compensation. That included £15,000 in injury to feelings compensation for the distress she suffered as a result of being victimised by the Trust for raising the discrimination complaint.

Here are some extracts from the Judgment:

“Race discrimination can only be identified and resolved if working people blow the whistle.. the claimant was not raising these concerns in her own private interest. ..she thought race discrimination was wrong and the hospital had a public equality duty. She was trying to be a good citizen”

CALLS FROM BUSINESS, 'POSITIVE ACTION' AND THE EQUALITY ACT

In October 2020, the Confederation of British Industry (CBI) launched its "Change the Race Ratio" campaign to increase racial and ethnic participation in British businesses. The CBI states that it intends to achieve this objective through a number of measures including:

- Recruitment & talent development
- Safe open & transparent dialogue
- Mentoring, support & sponsorship

That same month Legal and General Investment Manager (the UK's biggest fund manager) warned FTSE 100 companies that it would openly vote against the re-election of a Board's Chair if it failed to include at least one black, Asian, or other ethnic minority member on its board by January 2022. Around 37% of FTSE 100 companies currently have all white boards.

These campaigns are to be welcomed but how do such commendable objectives fit in with current discrimination legislation?

Positive discrimination is in fact generally outlawed in the UK (although there are some exceptions for disabled people). Positive discrimination might be described as giving advantage to groups in society who are often treated unfairly. What is permitted in the UK is 'positive action', which is rather different.

The first thing to note is that employers are currently under no legal obligation to take positive action although pressure from campaigns like Black Lives Matter and now from the business community itself will hopefully encourage them to do so.

So how do employers take 'positive action' for BME people (or other disadvantaged groups) without by risking direct discrimination claims from others who say they are now the ones being disadvantaged?

The legislation is set out in s.58 and s.59 of the Equality Act 2010. (The Public Sector Equality Duty will also apply to those working in the public sector).

S58 covers the general 'positive action' rule. It enables employers to take measures that will encourage

greater participation from groups that are under-represented in their workforce. The Equalities watchdog, the EHRC, gives two examples of lawful positive action: providing work-place prayer rooms for Muslims or English lessons for workers with English as a second language.

S59 is more controversial because it covers positive action in recruitment and promotion. It applies where an employer reasonably thinks that workers who share a protected characteristic – such as sex, race, age, sexual orientation, religion, and belief and so on - are disadvantaged or disproportionately under-represented in their workplace. S59 only applies to candidate who are "equally qualified" and it is really intended to be used in "tie break" situations at the end of the recruitment process.

So, let us say an employer is faced with two equally qualified candidates for promotion, one black and one white. It is a fact that the number of black managers in this particular business is disproportionately low. Under S59 the employer can lawfully select the black candidate over their equally qualified white competitor because the business wants to overcome the current imbalance and increase the number of BME managers.

Employers do need to pay particular attention to the "equally qualified" clause. In the case of *Furlong v The Chief Constable of Cheshire Police*, Mr Furlong, a straight, white male, won claims for direct discrimination after the force failed to recruit him as a police constable. They wanted to recruit more female, LGBT and BAME officers who were under-represented in the force. Mr Furlong won his claim because he could prove that he was better qualified than the other candidates who were offered positions.

It is hardly ever clear cut though. Recruitment decisions rarely come down to qualifications in the formal sense alone. Employers will nearly always give weight to more subjective factors such as experience, strengths, and weaknesses. That means there is scope for confusion over how an employer determines that candidate “A is as qualified as B” for the purpose of S59. Even the Government Equalities Office’s own Guide acknowledges that candidates of “equal merit” may not be “equally suitable”. That said, an employer who recruits somebody primarily because they believe they ‘will fit it’ could be exercising the sort of unconscious bias and racial stereotyping that these new campaigns are hoping to eradicate.

Here are a few key points employers should follow to stay within the law when using positive action:

- Have some indication or evidence that the group or person you want to apply positive action to is disadvantaged or disproportionately underrepresented in the workplace. Sophisticated statistical data is not necessary.
- Be prepared to demonstrate whether the positive action the organisation is taking is a proportionate means of achieving a legitimate aim.
- Continually review the positive action measures the organisation is taking. If they are working successfully they may at some point overcome the disadvantage and therefore no longer be a proportionate measure to take.

THREE KEY RULES FOR ADDRESSING RACISM IN THE WORKPLACE

1. There must be genuine commitment from the top so that equality, diversity and inclusivity becomes part of the organisation’s culture. Without any substantive or meaningful engagement, it won’t work and there is risk of an organisational reputation of ‘jumping on the bandwagon’.
2. Do not assume that a BAME employee who raises a complaint is ‘playing the race card’ or let unconscious bias automatically favour the white employee’s version of events.
3. Gather evidence on equality and diversity in your workplace and set specific and measurable objectives for change.

“No employer can honestly say they are improving the ethnic diversity of their workforce unless they know their starting point and can monitor their success over time.”

Baroness McGregor-Smith, Race in the Workplace Review (2017) p16

Further Reading

FROM STATUTORY BODIES: THE EQUALITIES & HUMAN RIGHTS COMMISSION AND ACAS

[Race discrimination | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

[Equality Act 2010 | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

[Public Sector Equality Duty | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

[Race-discrim-keypoints-workplace.pdf \(acas.org.uk\)](#)

FROM GOVERNMENT & BUSINESS ORGANISATIONS

[It's time to change the race ratio | CBI](#)

Includes details of the CBI's 4 commitments to change based on the Parker Review and lists organisations and businesses signed up to the Change the Race ratio campaign.

[The business case for diversity is now overwhelming. Here's why | World Economic Forum \(weforum.org\)](#) Companies with more diverse management teams have 19% higher revenues due to innovation – 2018 Boston Consulting Group study quoted by World Economic Forum

[BME individuals in the labour market: analysis of full representation - GOV.UK \(www.gov.uk\)](#)

The potential benefit to the UK economy from full representation of BME individuals across the labour market, through improved participation and progression, is estimated to be £24 billion a year, which represents 1.3% of GDP." [p2 quoting BEIS Analysis (2016)

[Commission on Race and Ethnic Disparities - GOV.UK \(www.gov.uk\)](#)

[Black Lives Matter: New race inequalities commission and a London statue review - House of Lords Library \(parliament.uk\)](#)

Announced in June 2020 in response to BLM action after murder of George Floyd. Its creation was criticised by many including David Lammy MP who stated government should focus on implementing recommendations in existing reports

[Monitoring Ethnicity: A Comprehensive Guide for Employers - Business in the Community \(bitc.org.uk\)](#)

FROM BLACK, ASIAN AND MINORITY ETHNIC WRITERS, BROADCASTERS AND ACADEMICS ABOUT RACE

[Listen](#) (25 mins)

BLACK, BRITISH & JEWISH

[How I Celebrate Black History Month As A Black British Jew | HuffPost UK Life](#)

TIME TO SPEAK OUT WITH HUMAN RIGHTS LAWYER DEXTER DIAS QC

[Watch](#) (21 mins):

YOU CAN'T BE 'IMPARTIAL' ABOUT RACISM

[You can't be 'impartial' about racism – an open letter to the BBC on the Naga Munchetty ruling | BBC | The Guardian \(ampproject.org\)](#)

NOT-RACIST V ANTI-RACIST: WHAT'S THE DIFFERENCE?

[Watch](#) (3 mins)

DEATH BY 1000 CUTS

[Watch](#) (2 mins)

RACIAL LITERACY: WHAT DOES IT MEAN?

[Read](#) (5 mins)

BLACK WOMAN FIRST, THEN ATHLETE

[Read](#) (6 mins)

["I've Been A Black Woman Longer Than I've Been An Athlete": Katarina Johnson-Thompson On Her Personal Battle Against Racism](#)

RACE & THE EMPLOYMENT JUSTICE SYSTEM

[Read](#) (7 mins)

A PROMISED LAND

[A Promised Land by Barack Obama - Barack Obama Talks to David Olusoga - BBC Sounds](#)

SPEAKING THE TRUTH

[Read](#) (7 Mins)

#BLACKINTHEOFFICE

[This is how Black women use hashtags as a form of activism online \(stylist.co.uk\)](#)

WHITE PRIVILEGE/THERE ARE NO BLACK PEOPLE IN AFRICA

[Watch](#) (3 mins)

WHAT IS WHITE PRIVILEGE? - BBC BITESIZE

[Read](#) (5 mins)



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