

Race Discrimination in Employment

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An Insight into Race Discrimination

There are four categories of race discrimination:

- Direct
- Indirect
- Harassment
- Victimisation

There is more detailed information about each of these categories in our [Sex Discrimination article](#).

Firstly, what are we talking about when we say race?

Race can cover a large range of factors, although the Equality Act 2010 makes it clear that it includes colour, nationality, ethnic and national origins. Case law has determined that caste is also covered.

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Direct

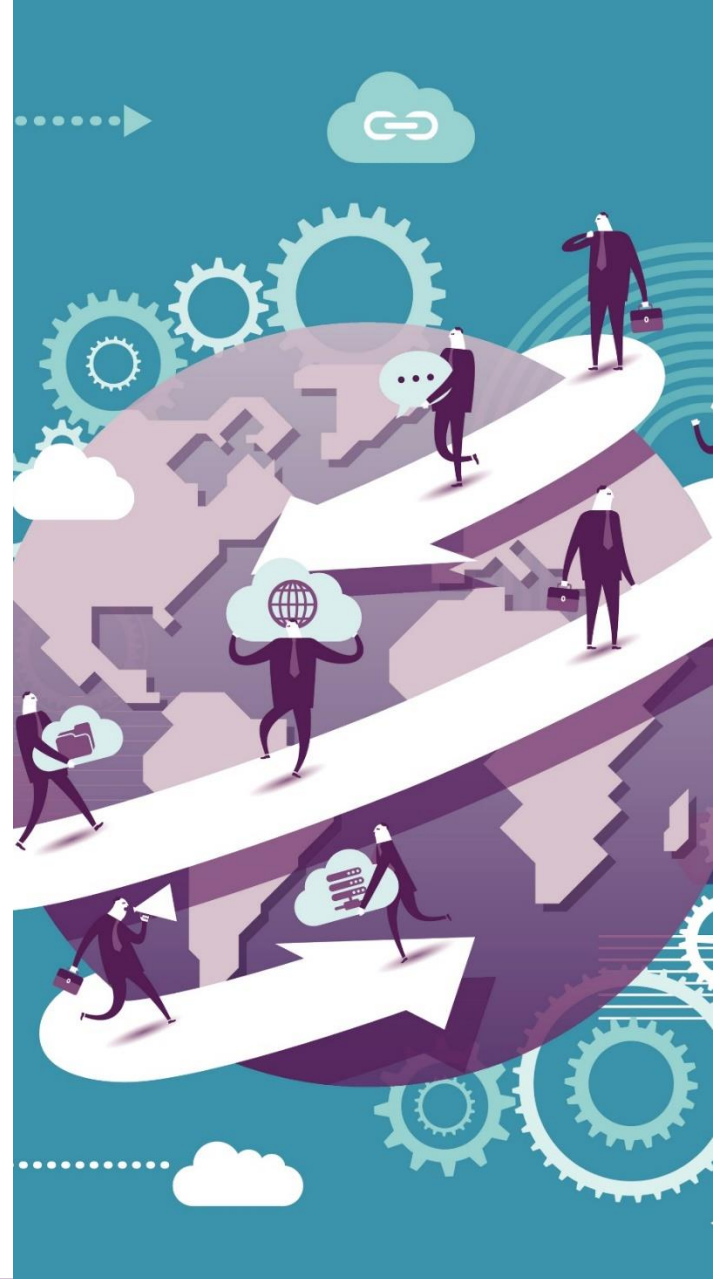
Direct race discrimination would occur if an employer treats employee A less favourably than employee B (perhaps giving A a telling off but not B, when they are both at fault) because A is from a different ethnic background, for example.

Indirect discrimination

Indirect race discrimination would occur if an employer applies a provision, criterion or practice (PCP) to all staff but it has the effect of placing employee A at a particular disadvantage because of their race/nationality.

For example, an employer refuses to accept applications from non-EEA nationals who need a work permit to work in the UK. In the example of A above, that employee would require a work permit to be able to lawfully work in the UK. The employer's provision would place that individual at a particular disadvantage and therefore would be indirectly discriminatory.

Don't forget that an employer can defend indirect discrimination if it can show that the PCP applied is a proportionate means of achieving a legitimate aim.



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Object Justification

Let's take a very slight detour as the objective justification defence has some nuances depending on the strand of discrimination concerned. This is a defence which employers can rely on in the following cases:

- Indirect discrimination concerning **all** protected characteristics
- Direct discrimination concerning **age only**
- Discrimination **arising from** disability (this is a strand of discrimination very particular to disability which should not be confused with direct or indirect disability discrimination)

This defence involves the employer demonstrating that:

- it had a legitimate aim (i.e. there needs to be an actual business need); **and**
- the actions it took which resulted in discrimination were a proportionate means of achieving that aim.

This delicate balancing exercise involves considering whether the business need sufficiently outweighs the discriminatory impact, and whether there could be other methods used to achieve those aims which would not be discriminatory.

In our example, of the employer refusing applications from non-EEA residents, the business aim is obvious – the company needs to employ people who have the legal right to work in the UK. That is certainly a legitimate aim, however there is a more proportionate way to achieve that aim: rather than refuse applications, accept applications for all, consider everyone on merit, and only consider right to work issues at the point you narrow down your potential successful applicant. If at that point it transpires your chosen candidate requires permission to work in the UK, it would then be a case of considering whether your business can assist with that (do you hold a sponsor licence, for example) or whether the individual has other means to obtain a visa (an EU family member in the UK perhaps).

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Harassment

Harassment would occur if employee B engaged in unwanted conduct related to race which had the purpose or effect of violating employee A's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for A. For example, colleagues leaving packets of biltong on A's desk every day, clearly a reference to A's nationality, might meet this definition and constitute harassment.

Victimisation

Victimisation would happen if employee A complained about the above act of harassment, and the employer fired them, or subjected them to some other detriment (for example moving them to a different part of the office to sit on their own) as a result.



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Exceptions to the Rule

There are some interesting exceptions which apply to unlawful discrimination, which could make it lawful if certain conditions are met. Some of these are:

- **Occupational requirement** – typically this means that because of the nature of the job, the individual needs to be of a particular race (or sex, religion, etc). The Equality and Human Rights Commission gives the example of a women’s refuge which may decide to recruit only female counsellors on the basis that their clients are mostly victims of abuse committed by men.
- **Complying with another law** – this would allow you to discriminate if, by not discriminating you would be breaking another legal obligation. It may sound obvious, but in practice it is the finer detail which can land you in hot water. Take our example above: an employer cannot legally employ someone who doesn’t have the right to work in the UK, so it might seem reasonable to reject a job application from someone who is not an EEA national. However, as examined above, that assumption can’t always be taken for granted so tread carefully when relying on reasons of legality to justify discrimination.
- **Positive action** – Not to be confused with positive discrimination, which is not lawful. Positive action allows an employer, for example, to select between two equally qualified candidates for a role, the person whose race is under-represented in the workforce. The key here is that the under-represented candidate/employee must be equally qualified as those they are up against.
- **Sikhs and safety helmets** – There is specific legislation protecting Sikhs from indirect race discrimination and a Sikh does not have to wear a safety helmet (when they would otherwise be required to on a construction site) if they are wearing a turban.

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Perception and Association – when you’re wrong, you’re wrong

One important thing to note about unlawful discrimination is that it can occur even if the offender has got it wrong.

Example

A prospective employer reviews an applicant’s CV and sees the name Maria Fernandez. The employer makes an assumption based on the candidate’s “foreign” name that she won’t have adequate spoken English skills and decides on that basis not to take her application forward. In this case the employer is wrong: Maria is British, she was born and grew up in England and speaks perfect English. Although the employer is wrong about their assumption, they have still discriminated against Maria because of her race.

This situation arises more commonly than you might think. One leading case involved an individual who successfully sued his employer for discrimination following a campaign of bullying and harassment from colleagues who taunted him for being gay. As it happens, he isn’t gay, and his colleagues knew that, but he still won his case as regardless of the bullies’ perception, their actions were still harassment. ([English v Thomas Sanderson Limited](#) 2008 EWCA Civ 1421).

Another concept unique to discrimination law which is often talked about alongside perception, is associative discrimination. The leading case on this involved a law firm, and a referral to the Advocate General for an opinion before being ruled upon by the European Court of Justice. It was found in this case that Attridge Law discriminated against their employee, Coleman, by association. It was her son who was disabled, and they suggested she used his disability to avoid work. The ECJ confirmed that people who suffer a detriment because of a protected characteristic of someone they are connected to, are protected from unlawful discrimination. ([Coleman v Attridge Law](#) C-303/06).

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The Consequences

We looked in detail at what the potential awards for discrimination are in our [Sex Discrimination article](#).

Just to recap though, there is no cap on discrimination awards and, in theory, the sky's the limit.

In practice the rocket high, million pound awards you may have read about in the Daily Mail are very rare. In fact, Employment Tribunal statistics for 2017/2018 show that the highest award for discrimination was £242,130. That was a disability discrimination claim, the highest award for race discrimination was £124,979 and religious discrimination bottomed out the figures at a paltry £6,846.

The courts will typically apply the Vento principle (see our [Insight into Sex Discrimination](#)) when determining injury to feelings award which splits discrimination claims into three bands of severity and corresponding ranges of compensation.



If you would like more advice regarding race discrimination in the workplace, get in touch for a friendly and informal chat today.

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