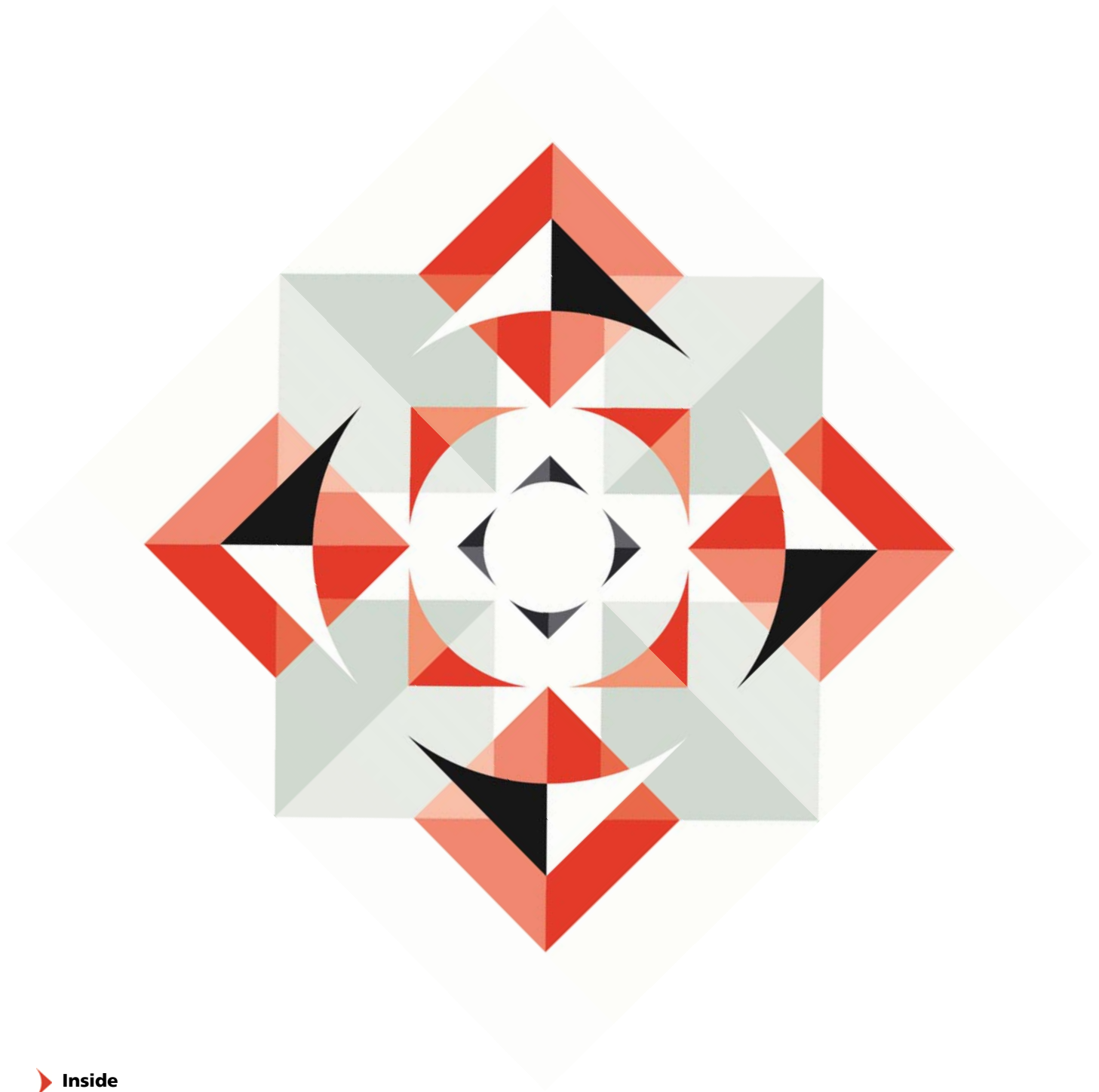


Race discrimination



► Inside

- Basic concepts
- Direct discrimination
- Other types of discrimination
- Occupational requirements
- Equality in the workplace



Introduction

The European Council Directive (2000/43/EC) prohibits direct discrimination, indirect discrimination, harassment and victimisation in the workplace in respect of race (which includes colour, nationality, ethnic origins and national origins). This is implemented through the Equality Act 2010.

This Inbrief provides a general summary of the main features of the law and highlights some practical issues for employers to consider.

Basic concepts

Who is protected?

Protection for individuals from race discrimination is set out in the Equality Act 2010 ("the Act").

'Race' is defined as including colour, nationality and national or ethnic origins. This means that individuals have protection from discrimination because of the colour of their skin, the country from which they originate and/or the country in which they are a national through birth or naturalisation.

The definition goes further and also gives protection to individuals because of their national origin. This is an historic and/or geographical area which at some point in time indicated the existence of a nation (for example, as England and Scotland were once separate nations, the English and the Scots have separate national origins). The definition also includes ethnic origin. This relates to an ethnic group sharing a long history, often associated with cultural traditions, religious observance and a common language (for example Sikhs are a distinct ethnic group for race discrimination purposes).

Caste is not currently included in the definition of race. There is power to include caste as an aspect of race discrimination under the Act, but this has not yet been implemented.

It is unlawful to discriminate against:

- > **Job applicants** – in relation to recruitment arrangements and decisions, harassment and victimisation
- > **Employees** – in relation to terms, promotions, transfers, training, benefits, dismissal, harassment and victimisation
- > **Ex-employees** – where the discrimination is closely connected to their employment

Types of discrimination

- > **Direct discrimination** – less favourable treatment because of race
- > **Indirect discrimination** – applying a provision, criterion or practice which disadvantages an employee/job applicant and would put others of the same race at a

particular disadvantage and which is not a proportionate means of achieving a legitimate aim (i.e. not justified by the employer)

- > **Victimisation** – subjecting someone to a detriment for making a complaint or bringing or assisting with a claim.
- > **Harassment** – unwanted conduct related to race which violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment

Direct discrimination

Under the Act, direct discrimination covers any less favourable treatment that is 'because of' race. This definition is quite wide, and does not require the treatment to be directed at the individual's own race.

This means that an employee can complain if he or she has been discriminated against because of another person's race. For example, an employee could make a claim if she is treated less favourably because of the race of someone she associates herself with, such as her partner. An employee could also make a claim if he is disciplined for refusing to carry out instructions to discriminate against people because of their race. For example, if a pub landlord instructs his employees to refuse to serve black people.

This also means that the law covers perceptions of race. If a person is disadvantaged because they are assumed to be a particular race, they will be able to make a claim whether or not that assumption is correct. For example, if an employer refuses to interview a job applicant because she has an African sounding surname.

Direct discrimination cannot be justified in legal terms save in very limited circumstances where there is an occupational requirement for a person to be of a particular race. For more about this, see below.

Other types of discrimination

Indirect discrimination

This is the application of a provision, criterion or practice ("PCP") which on the face of it applies equally to all but which in fact puts or would put those of a particular race at a disadvantage. The person complaining of it must actually have



been disadvantaged. An employer has a defence if it can show that the PCP is a proportionate means of achieving a legitimate aim. For example, if a supermarket requires all of its staff to have excellent spoken English, it might be a justifiable requirement for those in customer-facing roles, but for workers based in the stock room, such a requirement could be indirectly discriminatory as it is less likely to be objectively justified.

Victimisation

Protection from victimisation means that anyone who makes a complaint of discrimination (whether to the employer or to a tribunal), or assists someone else's complaint, is protected from being treated unfavourably as a result.

Harassment

Harassment takes place where a person is subjected to unwanted conduct related to race, which has either the purpose or the effect of violating dignity or creating an offensive environment. The definition of harassment can therefore cover both single acts directed at a particular person and more general behaviour that creates an inappropriate environment. For example, racist jokes being told in the office.

The harasser does not need to intend the harassment – it is enough if their conduct has a harassing effect. In determining this, a tribunal will take into account all the circumstances including the point of view of the victim. It may not be harassment where it is not reasonably obvious that the victim could regard the behaviour as offensive. For example, if a person reacts very sensitively to something that most would not regard as inappropriate. However, if the victim has made it clear that such behaviour is unwanted, any repetition will be harassment.

As with direct discrimination, harassment may be based on the race of another person with whom the victim associates. It may also be based on the victim's perceived race.

Occupational requirements

The Act provides a defence to discrimination on grounds of race, where being a particular race is an 'occupational requirement' of the job. For example, if a film production company was making a film about Barack Obama's journey to presidency, it would potentially be lawful for

them to require a black actor for the lead role. An occupational requirement can be used to justify decisions not to recruit, train or promote and to justify dismissal.

The test for occupational requirement

In order to reject someone for a job on grounds of their race, an employer must look at the nature of the employment, or the context in which it is carried out, and then show that:

- > The requirement to be of a particular race is a **occupational requirement** (i.e. it is crucial to the post, and not one of several factors or merely a sham or pretext)
- > Applying the requirement must be a **proportionate means of achieving a legitimate aim** (i.e. alternatives have been considered by the employer, and this is the only realistic solution)
- > The person in question does not meet the requirement, or it is reasonable in all the circumstances to be satisfied that they do not meet the requirement

It will actually be quite difficult for an employer to show that they have a valid occupational requirement. It is likely that there will only be a few jobs where an occupational requirement can be used. ACAS has published some guidance (available online at www.acas.org) as to what employers need to do in order to establish an occupational requirement, including:

- > Identify the requirement at the start of the recruitment process and make it clear to all applicants
- > Consider whether the requirement is really necessary for each particular post, including reviewing the position periodically
- > Consider whether specific duties could be allocated to other employees instead

Equality in the workplace

Equality benefits

The law also applies to discrimination in the provision of employment benefits. This means that the same benefits need to be offered to all employees regardless of their race.

Positive action

The Act allows employers to take some action to try and improve the situation for disadvantaged groups without this necessarily being unlawful discrimination against others.

Where an employer reasonably thinks that persons who share a particular race have needs:

- > which are different from others who do not share that race,
- > suffer a disadvantage connected to their race, or
- > have a disproportionately low participation rate in an activity

an employer can take proportionate action to address those issues. For example, an employer might provide training aimed at particular minority communities, targeted assistance with job applications, work experience for members of a particular ethnic group, or free English language lessons.

The Act also allowed employers to use race as a 'tie break' in favour of an under-represented or disadvantaged group in recruitment and promotion, where there are two candidates of equal merit. However, the preferred candidate must be 'as qualified' as the other candidates, and the employer cannot have a general policy of treating such people more favourably.

Equality policies

Employers need to ensure that race is included in all diversity and equal opportunities policies. The ACAS guidance recommends that these policies should be reinforced by:

- > making it clear to staff what behaviour is unacceptable, including the fact that race discrimination is unlawful
- > making sure that staff know what to do if they think discrimination or harassment is taking place
- > ensuring that staff are trained in equality issues, including issues relating to race

A diversity or equal opportunities policy, backed up by appropriate training, will help an employer to show that it has taken all reasonable steps to prevent employees from

discriminating against or harassing other employees. This is essential if the employer wants to avoid being liable for any discriminatory conduct of its employees.

Equal opportunities monitoring

There is no obligation in the Act (or elsewhere) for employers to collect information from employees about their race and similarly no obligation not to do so. Employers who decide to collect it should do so on a voluntary basis and explain why the question is being asked and what the information will be used for. For most purposes it will be possible for the information to be gathered confidentially and anonymously and this may persuade employees to co-operate. Remember that this will be 'sensitive information' for data protection purposes and should be treated accordingly.

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