

acas working
for everyone

Guidance

Race discrimination: key points for the workplace

July 2016



About Acas – What we do

Acas provides information, advice, training, conciliation and other services for employers and employees to help prevent or resolve workplace problems. Go to www.acas.org.uk for more details.

'Must' and 'should'

Throughout the guide, a legal requirement is indicated by the word 'must' - for example, an employer must not offer a new recruit poorer terms and conditions because of their race.

The word 'should' indicates what Acas considers to be good employment practice.

Understanding the term 'employee'

Regarding discrimination matters, under the Equality Act 2010 the definition of 'employee' is extended to include:

- employees (those with a contract of employment)
- workers and agency workers (those with a contract to do work or provide services)
- some self-employed people (where they have to personally perform the work)
- specific groups such as police officers and partners in a business.

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Information in this guide has been revised up to the date of publishing. For more information, go to the Acas website at www.acas.org.uk. Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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About this guide

This guide offers employers, senior managers, line managers, HR personnel, employees and employee/trade union representatives an insight into how race discrimination can occur in the workplace, how it can be dealt with and how to reduce the chance of future discrimination. For an overview of how equality legislation applies generally at work, Acas provides the following guidance:

- Equality and discrimination: understand the basics
- Prevent discrimination: support equality
- Discrimination: what to do if it happens.

The Equality Act 2010 protects employees from discrimination, harassment and victimisation because of race, one of nine protected characteristics covered by the Act. Guidance on other protected characteristics and other useful tools and materials can be found at www.acas.org.uk/equality

What is race discrimination?

The protected characteristic of Race may include different elements that often merge:

- **race** – an umbrella term for the other four aspects below
- **colour** – examples include black and white. Like 'race' it tends to overlap, particularly with the concepts of 'ethnic origin' and 'national origin'
- **ethnic origin** – this usually refers to the ethnic group to which someone belongs. An ethnic group will usually have a long, shared history and its own cultural traditions which set it apart from other groups. It may also have a shared language, literature, religion and geographical origin, and may also be a minority or oppressed group. Examples of ethnic groups include Sikhs, Jews, Romany Gypsies and Irish Travellers (some of which have their own religions)
- **national origin** – birthplace, the geographical area and its history can be key factors. Examples include Welsh and English. National origins can include origins from a nation that no longer exists. For example, Yugoslavia. Someone's national origin is fixed at birth, but their children may have a different national origin if they are born in another country

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- **nationality** – usually the recognised state of which the employee is a citizen. In other words, what it says in their passport if they have one. For example, British citizen. This can be different from national origin.

A person's race can be made up of two or more of the elements above. For example, Black and British. So, the employee could say their racial group is Black British. However, the employee may follow African Caribbean culture, customs and traditions, so they may actually regard themselves as British African Caribbean. An employee's racial group could also be a mixture of colour and nationality. For example, Black South African.

Or, for example, an employee may have an Italian name and parents born in Italy, but who live in the UK as British citizens like him. They may also still follow Italian customs. So his ethnic group might be British Italian. This 'sense of belonging' can carry on through the generations.

National and regional identity

Welsh, Scottish, Northern Irish and English people are usually British by nationality (however, some people of Northern Ireland may identify themselves as Northern Irish or Irish). Also, all are recognised under the Race protected characteristic as having separate national origins as they were once separate nations. So, promoting someone solely because they are Scottish could amount to race discrimination against an English applicant of equal merit who was not offered the job.

However, the law does not cover more local or regional distinctions. For example, an employee working in the south of England who feels they are being treated unfairly solely because they are a 'Geordie', or an employee treated unfairly solely because they are a 'Southerner' with an Essex accent working in the north of England, are unlikely to succeed in claims of race discrimination. However, there are other employment rights and legislation which may still offer protections and, in addition, such behaviour should be considered unacceptable as it damages workplace morale and an individual's dignity.

Caste discrimination

Caste usually refers to the social levels in certain cultures and racial groups, such as in India, where people's positions in society are fixed by birth or occupation, and are hereditary.

There are moves to have 'caste' recognised specifically as part of the Race protected characteristic. While it is possible the Equality Act 2010 may be amended in the future, some legal opinions and cases consider caste to be already covered because they say it coincides with ethnic origin.

How race discrimination can happen

There are four main types of discrimination within the protected characteristic of Race under the Equality Act 2010. They are:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation.

Employers should be aware that successfully dealing with a complaint of discrimination is not always the end of the matter. It is useful to think of how any future instances of discrimination or victimisation might be prevented. To find out more, see the companion Acas guide Prevent discrimination: support equality.

Direct discrimination

This breaks down into three different types of direct discrimination where someone is treated less favourably directly because of:

- their own race – this is direct discrimination
- the race of someone they are associated with, such as a friend, family member or colleague – this is direct discrimination by association
- how their race is perceived – regardless of whether this perception is correct or not – this is direct discrimination by perception.

Direct discrimination in all its forms could involve a decision not to employ someone, to dismiss them, withhold promotion or training, offer poorer terms and conditions or deny contractual benefits because of Race. In almost all circumstances it cannot be lawfully justified. It cannot be lawfully justified, but However, the Act does, in very limited circumstances, allow for what are known as 'occupational requirements' under this protected characteristic. They are explained later in this guide.

For example... direct discrimination

Abasi, an Egyptian student, applies for a part-time job at a family-run country pub to help him pay for his studies. The interview goes well, but the owner says he cannot offer Abasi a job as he does not feel Abasi would 'fit in' with the rest of the staff because they are all English.

Abasi is unhappy about this and writes to the owner to complain. This is likely to be race discrimination.

For example... direct discrimination by association

Paula recently married Feng and they honeymooned visiting his family in China. When she returned to work, Paula's boss called her into a meeting to say that the company had decided to 'let her go' because her supervisor anticipated she would want long spells of holiday to visit his family in China.

In this situation, it is likely that the employer's actions amount to discrimination on the grounds of her husband's nationality.

For example... direct discrimination by perception

Agnieszka, from Poland, moved to work in Norwich five years ago, and has a job in the admin department for a large telesales company. She works very hard, so finds little time for chat in the office.

An opportunity to join the telesales team is advertised on the company's intranet. She applies as the job pays more than her current role, but is not shortlisted for interview.

She talks to her supervisor and finds out her application was unsuccessful because she is 'quiet'. The manager who handled her application assumed that she spoke limited English and would therefore not be suited to a telephone-based job.

Agnieszka is angered by this presumption. She lives with her English boyfriend and they speak only English at home, so considers she is fluent in the language. This kind of assumption is likely to amount to discrimination.

Indirect discrimination

This type of discrimination is usually less obvious than direct discrimination and can often be unintended. In law, it is where a provision, criterion or practice is applied equally to a group of employees/job applicants, but has (or will have) the effect of putting those who share a certain protected characteristic at a particular disadvantage when compared to others in the group, and the employer is unable to justify it.

An employee or job applicant claiming indirect discrimination must show how they have been personally disadvantaged, as well as how the discrimination has or would disadvantage other employees or job candidates with the same protected characteristic.

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The Equality Act does not define a 'provision, criterion or practice'. However, in the workplace, the term is most likely to include an employer's policies, procedures, rules and requirements, whether written down or not. Examples might include recruitment selection criteria, contractual benefits, a redundancy scoring matrix or any other work practice.

In some limited circumstances, indirect discrimination may be objectively justified if the employer can prove it is 'a proportionate means of achieving a legitimate aim'. However, employers should note this can be a difficult process.

In attempting to demonstrate 'a proportionate means of achieving a legitimate aim', an employer must show:

- there is a legitimate aim such as a good business reason, but employers should note that cost alone is unlikely to be considered sufficient and
- the actions are proportionate, appropriate and necessary.

Both points apply in justifying 'a proportionate means of achieving a legitimate aim', not just one of them. An employer should also consider if there is another way to achieve the same aim which would be less discriminatory, and be able to show that it has been fair and reasonable, and looked for a less discriminatory alternative.

The process of determining whether discrimination is justified involves weighing up the employer's need against the discriminatory effect on the employee and group of employees with the race protected characteristic.

Employers should scrutinise closely whether any discriminatory act, policy, procedure or rule can really be justified. For example, are there other ways of achieving the same aim which would be less discriminatory?

It is important to stress that employers should monitor carefully their policies and practices, otherwise they may inadvertently indirectly discriminate. For example, policies and practices which were not discriminatory when they were first introduced may become discriminatory over time, perhaps because of a change in the composition of the workforce.

For more on monitoring, see the companion guide, Prevent discrimination: support equality.

For example... indirect discrimination

Antonio is 22 and moved to Britain from Italy four years ago to go to university. Since graduating he has had part-time jobs, but is now applying for a full-time post as a graduate trainee.

His application to a large IT firm was turned down because it said he had not been resident in Britain for a minimum of five years. Antonio is unsure why the company has this requirement, as he knows he is eligible to work in Britain and has not had to fulfil this requirement in applications to other companies.

Antonio contacts the IT firm as he is concerned that he, and other European Union workers who are not British nationals, are going to be disadvantaged by this requirement. The firm listens to Antonio's feedback, realises its mistake and scraps the requirement. It reconsiders his application and offers him an interview.

Harassment

Harassment is defined as 'unwanted conduct' and must be related to a relevant protected characteristic or be 'of a sexual nature'. It must also have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

This can include bullying, nicknames, threats, jokes, 'banter', gossip, intrusive or inappropriate questions, 'outing' someone, excluding someone (ignoring, not inviting someone to meetings or events etc.) or insults. It can be verbal, written or physical.

For example... harassment

Camille works for an estate agent and has just transferred to a new office, working with a new team she does not know very well.

Camille is French, but moved to England 15 years ago. Several of her new colleagues regularly makes comments about her being French - mimicking her accent, making jokes about her eating cheese and drinking wine when she goes for lunch and suggestively saying 'Oh la la' when she walks by.

Camille is extremely offended and approaches her line manager to make him aware of her colleagues' behaviour. He tells her to 'laugh it off' and that it's just a joke. She feels that this is unacceptable, and decides to pursue her complaint as a grievance through the organisation's formal grievance procedure.

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Also, it is possible for an employee to make a complaint of harassment where they are not on the receiving end of the conduct, but witness it and it has a negative impact on their dignity at work or the working environment. The employee making a complaint of harassment in this situation would not need to share the race of the colleague who is being harassed.

For more general information on harassment, see the companion guide, *Equality and discrimination: understand the basics*.

Victimisation

Victimisation is when an employee is treated less favourably than others for:

- making an allegation of discrimination, and/or
- supporting a complaint of discrimination, and/or
- giving evidence relating to a complaint about discrimination, and/or
- raising a grievance concerning equality or discrimination, and/or
- doing anything else for the purposes of (or in connection to) the Equality Act 2010.

Victimisation may also occur because an employee is suspected of doing one or more of these things.

In law, the less favourable treatment can also be called a detriment. For example, it might include being labelled a 'troublemaker', being left out and ignored, or being denied training.

An employee is protected under the Equality Act if they make, or support, an allegation of victimisation in good faith – even if the information or evidence they give proves to be inaccurate. However, an employee is not protected if they give, or support, information or evidence in bad faith – in other words, maliciously.

For example... victimisation

Marcus is a supermarket checkout operator. Six months ago a colleague, Ali, raised a grievance about race discrimination. Ali's complaint was specifically against their line manager who had been calling him offensive names. The complaint was upheld by the company's HR team and the manager was disciplined.

At Marcus's end-of-year performance review with the same line manager, he is told he will not receive a pay rise as his performance is 'not up to scratch'. Marcus later discovers he is the store's only checkout operator who will not receive a pay rise. He strongly suspects the manager is punishing him for giving evidence at Ali's grievance hearing.

Marcus feels he cannot continue working for the employer because of its behaviour towards him. If he is correct about his manager's actions, then this is likely to be victimisation.

Key areas of employment where it can happen

The majority of instances of race discrimination happen through bullying and harassment. In addition, there are many areas where workplace race discrimination can occur, but there are five in particular:

- recruitment
- pay, and terms and conditions of employment
- promotion opportunities
- training opportunities
- when an employee is dismissed.

Recruitment

To try to prevent discrimination in recruitment, employers should generally:

- be careful when advertising a job vacancy. They should stay clear of any reference to a particular race or any of the other protected characteristics. However, there can be rare exceptions – see the 'Occupational requirements' section further into this guide
- avoid advertising solely in one kind of place or media - for example by only advertising in a magazine aimed at a particular racial group, or on a website targeted at a particular ethnic group

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- avoid advertising for applicants of a specific nationality. For example, requesting that applicants should be Chinese when the requirement for the role is for them to be fluent in Mandarin
- be careful when advertising in specifying language requirements. For example, where it is essential for the job, an employer could advertise for fluency in English, but not for English as the candidate's first language
- be mindful if spreading word of vacancies through existing employees and managers, as 'word of mouth' is likely to yield only a small pool of candidates. Also be aware, it is likely to spread any imbalance in the make-up of the workforce, particularly where the workforce is predominantly one sex or racial group
- be aware that a job application form could inadvertently be discriminatory. For example, to require a form to be filled out 'in your own handwriting', where written English is not relevant to the job, may discriminate against those whose first language is not English or whose literacy skills may not be well-developed. The form should only ask for information and skills relevant to the job
- avoid automatically rejecting applicants because they do not have UK qualifications such as, for example, GCSEs, A-Levels or Scottish Highers. Qualifications obtained overseas are often comparable with UK ones so employers should be prepared to accept equivalent ones suitable for the role. The UK National Recognition Information Centre is an agency working on behalf of the Government giving information and advice about qualifications from all over the world - more information, can be found at www.ecctis.co.uk/naric. However, there can be some roles which require certain qualifications.

Interviewers should not be tempted to ask personal questions, which may be perceived as intrusive and imply potential discrimination. Where such information is volunteered, interviewers or others involved in the selection process should take particular care not to allow themselves to be influenced by that information.

For example... discrimination in recruitment

A British-based airline with a large number of French-Canadian customers wants to recruit employees who are able to speak French as well as English. The job advertisement states that only French nationals should apply. This is likely to be discriminatory as this excludes potential applicants who speak French but are of a different nationality.

Pay, and terms and conditions of employment

It is important to ensure that there are no terms and conditions (including contractual benefits) that disadvantage or exclude people because of their race, perceived race or association with someone of a particular race. For example, this might include a staff discount policy, death in service benefits, parental leave or compassionate leave.

For example... discrimination in terms and conditions

A company offers full sick pay for up to a month if an employee is not well enough to attend work. Eduardo falls sick with flu while visiting family in Brazil and visits a doctor who provides a letter for his employer so it will be able to understand why he was unfit for work. However, Eduardo's employer refuses to accept the letter, claiming it is not reliable. As a result, Eduardo does not receive his sick pay. This is likely to be discrimination because of Eduardo's nationality.

Promotion

In promotion opportunities, employees should not be discriminated against because of their race, perceived race or association with someone of a particular race. For example, it would be discriminatory to:

- share job adverts only with people of a certain race
- not promote an employee with the relevant skills because it is believed they would not fit in because of their race
- decide not to promote someone because they have previously made a complaint about discrimination
- have an unwritten rule that preferred candidates above a certain level should to be of a particular race.

For example... discrimination in promotion

Zoha was born in Pakistan and moved to England with her family 25 years ago. She has worked for the local council for 10 years, and currently is a town planner with the authority. Her colleague, Sandra, is white British and has worked for the council for two years.

Their line manager announces he is to retire, and his position is advertised internally. Only Sandra and Zoha apply. Both complete an application form and attend an interview. Sandra is the successful applicant. Zoha is pleased for her, but asks for feedback to enable her to work on her interview technique. She sees that her scores and written feedback do not correlate with the answers she gave at her interview.

She suspects she may have been discriminated against because of her Asian British national origin and raises a formal grievance.

Training

Withholding training from an employee because of their race, perceived race or association with someone of a particular race would be discriminatory. For example, it would be discriminatory to deny an employee training with the intention of making promotion less likely or selection for redundancy more likely, as 'punishment' for complaining about discrimination or as a malicious act.

For example... discrimination in training

Solomon, a university researcher, is of mixed race – his mother is white and his father black. He was born in London but lived in Nigeria for several years in his youth. His ambition is to become a lecturer. Outside of work, he is undertaking a public speaking course to develop his skills.

As part of the university's development programme, it is arranging for staff who are keen to be promoted to shadow senior colleagues. Solomon asks if he can shadow a lecturer in the biology department. A few days later he meets with a lecturer to make further arrangements, but is upset when the lecturer insists that students would struggle to understand him because of his Nigerian accent and that he might want to rethink his career path.

Solomon feels that these comments are unfair as he recently received positive feedback about his verbal and written communication abilities as part of a performance appraisal.

This is potentially discrimination because of Solomon's race.

Dismissal

If someone is dismissed because of race – whether this is their actual or perceived race, or the race of someone they are associated with – this would usually be seen as unfair dismissal.

For example... discrimination in dismissal

Amanda works in a shop specialising in Polish food. The shop is near her house in the Bristol neighbourhood she has lived in all her life. A few weeks into the job, the owner, Antoni, tells her that he doesn't have enough work for her so he must let her go.

A week later, Amanda discovers that the owner has employed someone else. The new member of staff is Polish, as are the rest of the employees and the owner. Amanda feels that her employment was terminated because she is not Polish. This is potentially race discrimination.

Considerations for everyone

Employers, senior managers, line managers, HR personnel, employees and their employee and trade union representatives should make sure they understand what race discrimination is and how it may arise, their rights and responsibilities, the employer's policy for preventing discrimination and what behaviour is unacceptable.

Awareness of what behaviour is unacceptable is essential, because many people do not consider that their jokes, nicknames, and 'banter' or invasive questions may be unlawful. These can be some of the most common forms of race discrimination.

Employers and employees should be very careful regarding questions related to an individual's protected characteristics as this might be or become discriminatory. However, an employer could provide training for all employees in constructively developing their awareness and understanding of each other, and building a culture in the organisation of promoting equality and diversity.

To find out more, see the guide [Prevent discrimination: support equality](#).

Managing cultural differences at work

Employers should be mindful that their employees will often come from a broad range of backgrounds and may have different customs and values.

Both employers and employees should be sensitive and respectful towards such differences. It is good practice for an employer to provide training for staff to establish a culture of respect in this area, and provide an understanding of what constitutes acceptable and unacceptable behaviours.

Avoid racial stereotyping

Employers and employees should avoid categorising or assuming that all people of a particular race have the same characteristics. Whether this is intended or not, stereotyping often has negative connotations and repercussions. For example, a line manager making an off-hand comment that people of a particular race are 'all lazy' is likely to cause offence and is potentially race discrimination.

Even when the stereotype is intended as a compliment, employers and employees should be aware that this still has the potential to cause offence. For example, suggesting in front of colleagues of other racial or

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ethnic groups that someone must be highly intelligent because they are of a certain race.

To find out more about the origins of stereotyping see the companion guide, Prevent discrimination: support equality.

Acceptable and unacceptable terminology

An employer should provide equality training to make clear to employees what terminology is acceptable and unacceptable if there is a genuine need to refer to someone's race, colour, nationality, or ethnic or national origin. The training should also explain that even referring to it at all unnecessarily could be potentially discriminatory. Derogatory terms that refer to somebody's race are clearly unacceptable and discriminatory.

It is important for everyone to remember that certain words have the potential to cause offence and therefore there is a need to be considerate as to how such words might be perceived by others. With discrimination, it is often how the recipient perceives words and actions rather than the intention of the person delivering them.

The term 'banter' is often used when there is a disparity between what was intended by one person and how it has been perceived by another. Employers should be prepared to manage situations where a 'joke' or banter has caused offence or upset.

Employers should manage these situations with care. Sometimes these situations can be dealt with by a manager having a quiet word with an employee and explaining that they have caused offence. In other situations, it will be appropriate for the employer to consider a more formal approach such as disciplinary action. There is more information about handling complaints further on in this guide and the companion guide, Discrimination: what to do if it happens.

It is important to remember that discrimination might not only affect those who are part of a minority group. It can affect others, too. So, employees and employers should be careful not to overlook potentially offensive comments simply because they are aimed at a large part or majority of the workforce.

If it is deemed necessary or relevant to refer to someone's race and there is uncertainty around what terminology they would find acceptable, an employer would be best placed approaching the individual to ask how they would wish to be described. This should be handled in a delicate way with conversations being discrete and professional.

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Also, employers and employees need to take into account that the acceptability or unacceptability of terms can change over time, and sometimes quite quickly.

Harassment because of Race

Racial harassment can take many different forms. It could be a verbal or written comment, what somebody thinks is a 'joke', exclusion from conversations or activities, violence or the threat of violence.

Some employers may feel they would benefit from having a policy setting out how they would deal with a complaint of harassment because of race. This kind of complaint can be difficult for an employee to discuss. An employer should take it seriously and listen to the concerns of the individual.

It is important for an employer to deal with this type of issue, not only because of its legal obligations, but also because there could be knock-on effects. The employee being harassed might feel de-motivated and their productivity fall, or it might lead to them being absent from work through stress. A climate of harassment can also damage morale generally in parts or all of the workplace.

Dress code

There can be many reasons why an employer may have a dress code. For example, to communicate a corporate image, ensure customers can easily identify a member of staff, or for health and safety reasons in the running of the workplace.

From the very start of thinking about a dress code, an employer should consult staff to get their input and support.

When drafting a dress code, an employer should carefully consider whether insisting on or banning a particular form, or item, of clothing would discriminate against staff of a particular race. If so, an employer is advised to see if there is a way around this.

For example... Sikhs wearing turbans as part of their religion

From 01/10/2015, the Deregulation Act 2015 brought in a change in the law which means Sikhs can now wear a turban instead of a safety helmet in almost all workplaces. For example, that includes construction sites, factories and warehouses. However, there are still limited exceptions where a Sikh must wear a helmet for specific roles in the military and emergency services.

Generally, if an employer imposes restrictions or requirements as part of its dress code - for example, because of its ethos or for health and safety reasons - it should ensure that these are directly related to the needs of the business.

More information is available at www.acas.org.uk/dresscode

Ethnic origin and Religion

Employers and employees should also be mindful that there can be cross-over between the protected characteristics of Race and Religion or belief. For example, Sikhs are an ethnic group within the protected characteristic of Race, and they have their own religion, Sikhism.

Generally, while employers are not required to give employees time off or facilities for religious observance, they should try to accommodate them whenever possible. For example, if an employee needs a prayer room and there is a suitable room available then they could be allowed to use it, providing it does not disrupt others or affect their ability to carry out their work properly.

Many employers find that being sensitive to the cultural and religious needs of their employees makes good business sense.

For more on discrimination because of Religion or belief, see the Acas guide Religion or belief and the workplace.

Languages and language requirements

The increased movement of people around the world means it can be quite common for organisations to employ staff from many different countries. As a result, there may be employees for whom English is not their first language. Often, there may be a number of employees who

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originate from the same country or share a common language which is not English.

However, an employer can:

- specify a language of operation, usually English, for business reasons. For example, in promoting effective communication in the running of the organisation so messages are consistently delivered and understood (In Wales, some jobs require the holder to speak both English and Welsh)
- insist on recruiting a job candidate who has skills in English necessary for the job, but it must not select based on assumptions about race, nationality, or ethnic or national origins
- consider in limited circumstances offering assistance to those whose English skills are limited. For example, an employer may wish to provide an interpreter at a disciplinary hearing. It can be an emotive situation and an employee may find it more difficult to communicate clearly in English when upset.

Employers should be wary of prohibiting or limiting the use of other languages within the workplace unless they can justify this with a genuine business reason. For example, telling two employees that they must speak English to each other outside of business operations when their first language is Russian could be potentially discriminatory. However, an employer might be able to justify this if other employees feel excluded or bullied because they cannot join in 'in the course of their employment'.

However, of course, there will be roles where the jobholder will be required to speak different languages as part of their duties. For example, in tourism and businesses with clients in other parts of the world.

For more on language in the workplace, see the Recruitment section of this guide.

Employing staff from abroad

Employers must check their employees are entitled to work in the UK, and should also ensure that any necessary paperwork is correct and up to date.

However, employers should ensure they are consistent in the checks they carry out. For example, just doing them for potential new recruits they assume are not British citizens, or not from the Channel Islands, the Isle of Man or Republic of Ireland, may be potentially discriminatory.

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Workers from European Union countries, plus Switzerland, Iceland, Liechtenstein and Norway are also entitled to work in the UK.

For more information about eligibility to work in the UK and an employer's obligations, go to www.gov.uk to:

- Check if someone can work in the UK
- Access the Home Office's code of practice for employers on avoiding unlawful discrimination while preventing illegal working

Matching core 'Occupational requirements' of the job

In certain and rare circumstances, it may be lawful for an employer to specify that applicants for a job must have a particular protected characteristic under the Equality Act. In law, this approach is known as an 'occupational requirement'.

However, it is not enough for an employer to simply decide they would prefer to employ someone of a particular racial group, ethnic or national origin or nationality. Any such requirement must:

- be crucial to the post, and not just one of several important factors **and**
- relate to the nature of the job **and**
- be 'a proportionate means of achieving a legitimate aim'. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely that the employer could claim an occupational requirement.

All three points apply to an occupational requirement, not just one or two of them. There is more on 'legitimate aims' in this guide's section, Indirect discrimination.

An occupational requirement must be reassessed each time the job is advertised, even though it may have been valid for the same post in the past. Circumstances may have changed, meaning the occupational requirement may no longer be applicable.

An employer should think very carefully, and consider seeking specialist legal advice, before claiming an 'occupational requirement', as it can be **difficult to justify** and will be rare. Also, a job applicant might challenge

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at an employment tribunal an 'occupational requirement' which appears unjustified.

Further, an occupational requirement can only be used in a defence against claims of direct discrimination (but not for by association or by perception). It cannot be used in a defence against claims of indirect discrimination, harassment or victimisation.

Taking 'Positive action'

Under the Equality Act, an employer can take what the law terms 'positive action' to help employees or job applicants it thinks:

- are at a disadvantage because of their race, and/or;
- are under-represented in the organisation, or whose participation in the organisation is disproportionately low, because of their race and/or;
- have specific needs connected to their race.

An employer must be able to show evidence that any positive action is reasonably considered and will not discriminate against others. If it can, it may legally:

- take proportionate steps to remove any barriers or disadvantages;
- provide support, training and encouragement to increase the participation of people of a particular racial group, ethnic or national origin or nationality.

This is a complex area. For more on taking 'positive action' in hiring and promoting staff, see the companion guide, Equality and discrimination: understand the basics.

There is no legal necessity for an employer to take - or consider taking - positive action if it does not wish to do so.

Equal pay, and terms and conditions

It is possible for an employee to make a claim under the Equality Act that they are being paid less on the grounds of their protected characteristic of Race. For more on equal pay, see the companion guide, Equality and discrimination: understand the basics.

How employees should raise discrimination complaints

There are two ways a complaint of alleged discrimination may be handled. Informally or formally.

Some complaints may be dealt with **informally**, where the employer has a quiet word with those involved to reach a resolution which has the desired effect and to which they can all agree. Raising a complaint this way can prevent it escalating and possibly ending as an employment tribunal claim.

Complaints of alleged discrimination, though, can often appear particularly serious. It is not uncommon for these situations to evoke strong feelings for both the person who has made the complaint and the person that the complaint has been made against. Such a complaint is very likely to go through the **formal** approach, using the organisation's formal grievance procedure, and possibly its disciplinary procedure, too. All employers should have discipline and grievance procedures, and each employee's contract of employment should include information on where the details can be easily found.

How employees should raise complaints is covered in more detail in the companion guide, *Discrimination: what to do if it happens*.

When an employee experiences discrimination

When an employee makes a complaint that they have been a direct target of discrimination, an employer should be mindful that the employee feels they have been personally attacked. Handling the situation with sensitivity is essential whether this is being done informally or formally.

For example... How an informal complaint can work

Angela recently moved from Australia to Scotland and found work in a department store. Angela's colleague, William, makes fun of her accent. It upsets her, but she tries to ignore it. This doesn't make him stop. She tells her manager, but doesn't want to get William into trouble as she suspects he thinks it is 'banter'. The manager says he was unaware of William's behaviour and reassures her that he will have a quiet word with him.

The manager takes William to one side and reminds him of the company's policy on equality and diversity, and that certain types of behaviour can cause offence. It becomes clear that William was not aware that his behaviour had caused offence. A record is kept of the manager's conversation with William. He tells William that no formal action will be taken against him, as he has realised his mistake and promised he will no longer imitate her accent.

For example... How a formal approach can work

Vijay, or Jay as he is known to his colleagues, is working for a company as a 'temp.' He sees a vacancy advertised internally and applies. It is based in a different office and he does not know the manager who will be running the recruitment process.

Following completion of an application form, Jay has a telephone interview which he felt went really well. He is invited to a face-to-face interview with the same manager. However, Jay is disheartened after the interview as he feels the manager's attitude changed as soon as Jay walked into the room. A few days later Jay is told he did not get the job.

Jay is told he did not have the right skills, but he can't help feeling there is another reason why he did not get the job. He contacts the company's HR manager to discuss his concerns. Jay suspects that the interviewer had assumed he was white British. Jay's national origin is Pakistani, but he was born in Britain and considers himself British.

The HR manager asks Jay if he wants to raise a formal grievance, and Jay says 'yes'. The HR department is aware that this is not first time this type of complaint has been made against the manager who conducted the interview. They are careful not to jump to conclusions and thoroughly investigate the complaint. Jay's grievance is upheld. The manager who interviewed Ali is disciplined and dismissed as a result.

When an employee observes discrimination

It is also unacceptable for employees to be placed in situations where they observe discrimination taking place. What has been witnessed should

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be taken seriously by the employee who has seen it and by the employer who receives a complaint about it from the witness. The main issue is that discrimination is allegedly taking place. Also, the employer should be mindful that the witness feels strongly enough to make a complaint. As with a complaint from an employee alleging direct discrimination against them, a complaint about discrimination which has been observed should be handled just as sensitively.

For example... How an informal approach can work

Lucy works in a customer services department. Some colleagues make negative comments about the company's ten Latvian staff. They refer to them as 'the Latvians' or 'that lot'. Lucy is offended that they think the staff from Latvia are 'all the same' because they share a nationality.

She speaks to her supervisor to tell her how she feels. The supervisor has never heard the remarks, but understands why Lucy would be offended. The supervisor speaks to the customer services staff involved and arranges workplace training on equality. Following this, Lucy's colleagues have a clearer understanding of equality issues and why their behaviour caused offence.

Lucy feels this is a positive outcome and the matter has been resolved.

For example... How a formal approach can work

Steve works as a mechanic in a garage employing 20 staff. Recently, a new mechanic, Michael, who is black British, was taken on. Everyone else who works there is white British.

Steve overhears colleagues making nasty comments about Michael. At first Steve thinks this is because Michael is the 'new boy', but over a period of weeks their behaviour gets worse, including calling him names to his face and threatening him with violence when the garage owner is out of sight. Steve believes their actions are racially motivated.

Steve approaches Michael to see if he is okay. Michael tells him he is deeply upset. Because Michael is new he is not confident about making a complaint - he worries he could lose his job. However, because Steve is offended by what he has witnessed, he raises a grievance with the garage owner and gives details of the incidents.

The employer deals with Steve's complaint efficiently. As part of an investigation, the owner asks Michael if he is prepared to give a written statement which will be handled in the strictest confidence. He also reassures Michael that under no circumstances would he be punished for making a statement. Michael makes the statement and the employer upholds Steve's grievance. The perpetrators are disciplined and dismissed as a result.

How employers should handle discrimination complaints

When an employer receives a complaint about race discrimination, it should take the matter very seriously, and listen carefully and with empathy to what the employee says.

A complaint – or grievance as it is also known – might be handled in an organisation **informally** or **formally** depending on the nature of the particular complaint, its seriousness, the possible action that may need to be taken, or the outcome desired by the person making the complaint, as explained in the previous section, How employees should raise complaints.

However, if an employer becomes aware that discrimination, harassment or victimisation is taking place because of someone's race, it is important that they do not wait until a complaint or grievance is raised. The sooner action is taken the more easily it can be resolved and it is less likely that the employer would be liable for the discriminatory actions of the employee\

s involved. It is for an employer to decide whether to pursue disciplinary measures against an employee. However, it should ensure it investigates complaints thoroughly and follows disciplinary procedures where warranted. Any inaction by the employer could damage staff morale in general and possibly culminate in the employee who made the complaint submitting a claim to an employment tribunal.

How employers should handle a complaint of alleged discrimination is covered in more detail in the companion guide, Discrimination: what to do if it happens.

To help give a better understanding of when to use an informal approach or a formal one concerning alleged race discrimination, both employers and employees should assess the following examples.

When to consider an informal response

It is likely an employer will use an informal response for what appear to be relatively low-key complaints of discrimination. Such a response will be largely based on having conversations with the parties concerned to investigate the situation in the hope of resolving the matter without using the organisation's formal grievance procedure.

If the matter turns out to be relatively straightforward, the informal approach can have the advantage of resolving the matter sooner, with

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less stress and at less cost than if the matter went through the formal grievance route. Also, it can make it easier for work relationships to be rebuilt.

When considering whether an informal response is appropriate, an employer should be mindful of the outcome the person is seeking and the outcome that might be necessary from the employer's point of view.

However, using the informal approach can be a risk. In using it, a manager might be accused of not taking a complaint seriously enough. Or, the conversations might reveal that the complaint is much more serious than at first appeared.

But, if the matter appears relatively straightforward, it can be worth trying an informal approach first. If it doesn't work, the matter could still be dealt with formally.

For example... An informal response to an informal complaint

Siobhan works in a bank. Some colleagues are talking about a recent conference they attended. They refer back to a group of delegates from the Republic of Ireland - but one member of staff, Tina, calls them 'Paddies'.

Dublin-born Siobhan is offended, but is not confident in raising this in front of a group and suspects that Tina thinks it is a friendly term. Siobhan speaks to her manager, Robert, to inform him of the situation. She says that although the term is unacceptable, she does not wish to make an official complaint.

Robert speaks to Tina's line manager who has a private chat with Tina to explain the situation. Tina remembers the conversation and says that now her manager has explained the situation she can see why her language was inappropriate. Tina apologises to Siobhan and they are able to move forward.

When to consider a formal response

The formal response, usually using the employer's formal grievance procedure including a hearing, is very likely to be the way forward when the allegation of discrimination is serious. It is even more likely if the complaint could also lead to a disciplinary investigation.

However, there can be other circumstances where the need for a formal response can arise, as highlighted in the final example, A formal response to an informal complaint.

For example... A formal grievance

Munich-born Kurt submits a written grievance to a senior manager, Grace, because he says his own manager regularly rejects his holiday requests without reason. Kurt believes they are refused because his manager does not like Germans. Grace acknowledges receipt of the grievance in writing. She contacts her HR department for advice and starts an investigation. Grace can see from annual leave records that Kurt has not taken much holiday and the leave year is almost at an end. Other staff have taken most of their leave.

Grace speaks to employees in Kurt's department to see if they have experienced similar problems, but this does not appear to be the case. Kurt gives Grace a series of emails where the manager has rejected his requests. Grace holds a meeting with the manager before deciding how to proceed.

Grace arranges a grievance hearing and sends Kurt a written invitation. He decides to bring a colleague with him. At the hearing, Grace explains that while the manager should have explained why leave requests were rejected some of the refusals were legitimate as other members of the team had already booked off the same time. However, Grace says some of the rejections are linked to the manager's negative view of Germans.

The hearing's outcome is sent to Kurt in writing – Grace and Kurt agree a plan for him to take his leave so he gets his full leave entitlement. An investigation into the manager's conduct will be carried out.

For example... A formal response to an informal complaint

Anita has worked for her employer for almost a year. She asks to reduce her working week so she can go back to college. Her manager follows the flexible working process and meets Anita to discuss her request. Unfortunately, because Anita's team is small and they already have a part time member of staff the employer is unable to authorise her request.

Anita is upset, but understands the employer's decision and says that she can get her diploma by taking evening classes. However, during the conversation it becomes clear that the real reason that Anita wants to reduce her days is to avoid working with Penny. Anita says Penny has been making offensive comments about her race and trying to turn the rest of the team against her. She adds that she does not want to rock the boat as she is the newest member of the team.

Anita's manager explains that the behaviour she has described is very serious and the employer has a responsibility to look into the matter. The manager agrees with Anita to speak to the HR department about how to proceed and come back to Anita with an update.

Following a conversation with HR, Anita's manager contacts her to say that she will investigate the matter further. She makes it clear that Anita does not have to make a complaint herself, but it would be useful if she provided a written account of her experiences. The manager explains that other members of the team will be asked to do the same thing. She reassures Anita that any statements will be dealt with in a sensitive manner. Anita trusts that the employer will come to a fair conclusion.

Further information

Acas learning online

Acas offers free E-Learning. The Equality and diversity course gives an overview of what equality and diversity mean, why they are important, putting the principles into practice in an organisation and a test to gauge understanding of the key points. Acas also offers another e-learning course on how to handle bullying and harassment.

Acas training

Our Equality and Diversity training is carried out by experienced Acas staff who work with businesses every day. Training can be specially designed for smaller companies and our current programme includes:

- equality, diversity and discrimination: the essentials

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- tackling bullying and harassment at work
- promoting mental health at work.

Go to www.acas.org.uk/training for up-to-date information about our training and booking places on face-to-face courses.

Also, Acas specialists can visit an organisation, diagnose issues in its workplace, and tailor training and support to address the challenges it faces. To find out more, see to the Acas website page Business solutions.

Acas guidance

Equality and discrimination: understand the basics

Prevent discrimination: support equality

Discrimination: what to do if it happens

Age and the workplace: a guide for employers and employees

Race discrimination: key points for the workplace

Religion or belief and the workplace

Asking and responding to questions of discrimination in the workplace

Bullying and harassment at work: a guide for managers and employers

Bullying and harassment at work: a guide for employees

Code of practice on discipline and grievance

Guide on discipline and grievances at work

Age discrimination

Disability discrimination

Gender identity discrimination

Marriage and civil partnerships

Race discrimination

Religion or belief discrimination

Sex discrimination

Sexual orientation discrimination

The Equality and Human Rights Commission

<http://www.equalityhumanrights.com/>

Equality Advisory Support Service

For wider equality issues the Acas helpline does not cover, call the EASS helpline on 0808 800 0082 (Text phone: 0808 800 0084)

Additional help

Employers may be able to seek assistance from groups where they are members. For example, if an employer is a member of the Confederation of British Industry or the Federation of Small Businesses, it could seek its help and guidance.

If an employee is a trade union member, they can seek help and guidance from their trade union representative or equality representative.

Keep up-to-date and stay informed

Visit www.acas.org.uk for:

- Employment relations and employment law guidance – free to view, download or share
- Tools and resources including free-to-download templates, forms and checklists
- An introduction to other Acas services including mediation, conciliation, training, arbitration and the Acas Early Conciliation service
- Research and discussion papers on the UK workplace and employment practices
- Details of Acas training courses, conferences and events.

Sign up for the free Acas e-newsletter. The Acas email newsletter is a great way of keeping up to date with changes to employment law and to hear about events in your area. Find out more at:

www.acas.org.uk/subscribe

The Acas Model Workplace. This engaging and interactive tool can help an employer diagnose employment relations issues in its workplace. The tool will work with you to identify areas of improvement you can consider, and will point toward the latest guidance and best practice:

www.acas.org.uk/modelworkplace

Acas Helpline Online. Have a question? We have a database of frequently asked employment queries that has been developed to help both employees and employers. It is an automated system, designed to give you a straightforward answer to your employment questions, and also gives links to further advice and guidance on our website:

www.acas.org.uk/helplineonline

Acas Helpline. Call the Acas Helpline for free and impartial advice. We can provide employers and employees with clear and confidential guidance about any kind of dispute or relationship issue in the workplace. You may want to know about employment rights and rules, best practice or may need advice about a dispute. Whatever it is, our team are on hand. Find out more: www.acas.org.uk/helpline

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Facebook - <https://www.facebook.com/acasorguk>

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