



Parker Review Recommendations

Submissions from the Employment Lawyers Association

27 February 2017

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The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law. We include those who represent both Claimants and Respondents/Defendants in the courts and Employment Tribunals. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal and practical standpoint. Our Legislative & Policy Committee is made up of both barristers and solicitors who meet regularly to consider and respond to proposed new legislation.

A working party was set up to prepare this response to the Review, which is chaired by Kiran Daurka of Leigh Day. A full list of the members of the working party is appended to this response.

The Parker Review recommendations are soon to be finalised and you have requested comments on the recommendations before then. We set out our thoughts below in regard to the three broad recommendations made, namely:

1. Increase ethnic diversity of UK Boards
2. Develop candidate for the pipeline and plan for succession
3. Enhance Transparency and disclosure

Our comments on the recommendations echo the points raised in ELA’s submission to Dame MacGregor-Smith’s Call for Evidence, which we also attach to the covering email. We would expect a joined-up approach with that call for evidence and it may be preferable to review the contents of the Parker Review in light of the work completed by Dame MacGregor-Smith’s work.

1. Increase ethnic diversity of UK Boards

ELA’s response to Dame MacGregor-Smith’s Call for Evidence set out some of the barriers to career progression for BAME workers. In our view, the same issues apply to the barriers preventing diversity at board level. In relation to this particular recommendation, we consider the following sections of the attached Call for Evidence submission to be particularly relevant and informative:

- Culture
- Lack of executive team engagement and senior race equality champions
- Executive search, selection, shortlisting and recruitment
- Role models and mentors
- Lack of race monitoring data

- Lack of understanding and use of positive action

We also considered whether the Financial Reporting Council should add "race" to the UK Corporate Governance Code in addition to 'gender' and prescribe the nature of the information that should be reported. This requirement could be phased in over 3 years to enable companies to start to gather the relevant data required.

Whilst the Parker review is to be welcomed, as is any initiative addressing hurdles for BAME people at work, there was some concern raised that the "one by 2021" was a soundbite rather than a serious aspiration. The review committee may wish to review this to enable a more ambitious approach to diversity within the FTSE 100 and 250. The exercise could descend into a tick box exercise, which would be detrimental to the intention behind the proposed target.

2. Develop candidate for the pipeline and plan for succession

Substantive Unconscious Bias Training

Unconscious bias can influence many decisions in the workplace including recruitment, promotion and performance management. It can impact the decisions made where succession planning and talent management is concerned. Talented individuals who do not necessarily align to the *majority* may be overlooked for a role, promotion or a development opportunity because the decision maker subconsciously leans on his or her bias, and provides an opportunity to a person that they feel an affinity with because they have a shared experience or similarities in their identities.

BITC's **Implicit Association Test** (the "IAT") for unconscious racial bias was taken by 2.5 million people across multiple countries, including the United Kingdom. The Race IAT tests for "implicit or unconscious positive emotional responses to white faces relative to black faces". The results were collated and categorised across 12 professional sectors, as detailed below:

Racial Bias in Sectors in the UK - % of employees within these sectors that <i>have</i> unconscious racial bias	
Arts – 64.8%	Finance – 69.5%
Construction – 69.3%	Food Service – 70.4%
Engineering - 70.6%	Healthcare – 68.7%
Legal – 67.8%	Military – 80.8%
Sales – 70.5%	Science – 69.0%
Transport – 72.5%	

<http://race.bitc.org.uk/all-resources/infographics/racialbiasinfographic>

The data suggests that unconscious bias is a strong force within the workplace and can have a detrimental effect on the career advancement and career trajectory of ethnic minorities in the workplace. Research shows that deploying purposeful and substantive unconscious bias training helps organisations explore the impact of implicit associations and the influence it has on performance and the management of a workforce. Many organisations have deployed

unconscious bias training but it is argued that in some instances it lacks the level of substance and detail required or does not attach accountability measurements across all levels of management.

Race equality and unconscious bias training should be a part of the formal induction and training process for all employees and across all levels of management. Such training should be rolled out across an organisation on an annual basis. This is to ensure that capabilities are developed, such that performance is assessed fairly and reported honestly and objectively. Businesses should also consider making it mandatory that all those involved in the recruitment process (e.g. interview panels, HR, recruitment agencies and executive search firms) undertake unconscious bias training.

Robust Performance Management, Career Development Opportunities and Support

Research shows that for BAME employees, the story is of unfulfilled career aspirations and a lack of support in their roles. The YouGov research suggested that racial discrimination is one of the most common reasons given for having been overlooked for promotion, in addition to favouritism, unconscious bias, nepotism (personal contacts) and prejudice on the basis of gender or age.

Appraisals are one of the most contentious areas where bias and subjective opinions/factors can influence how a person advances their career in that organisation, their pay, promotion and how much support and guidance is provided. Poor management of appraisals and career support often results in the disengagement of the employee, which leads to a breakdown in the working relationship and a loss of trust and confidence between employee and their line manager. A significant number of grievance cases and employment tribunal claims have been dealt with by employment lawyers in this area.

Very few organisations proactively measure managers on how they manage the performance and development of the employees in their team. If recommendations are made to a manager on his management skills, it often arises after an employee has raised a grievance by which point, the relationship has been significantly damaged.

Not many appraisal systems have any form of independent review or adequate redress of an adverse performance review that could thwart the career trajectory and sit on a personnel record throughout an employee's career. If an appeal is available, it is rarely dealt with by an individual who is independent of the line manager involved, who has no stake in the outcome, nor may have been trained in respect of unconscious bias or race equality. Organisations should ensure that they have robust performance management processes which require appraisal decisions to be justified and have mechanisms in place for independent review of ratings. Those assessing performance should receive unconscious bias training and organisations should collate and monitor diversity information around promotion/development/performance ratings so they are able to identify barriers or any worrying trends for minorities.

A part of being ready for senior roles or 'board ready' is achieved by having gained the required leadership skills and capabilities to progress and this is gained by a combination of experience and attendance on career development courses.

The process for nomination for career development courses and the criterion that are required to

be fulfilled by an individual should be equality impact assessed to determine whether barriers exist to entry and fulfilment of these courses.

Senior Role Models (as referred to in recommendation 1 above)

The lack of senior BAME role models below Board level means that those individuals that are presently active carry a heavy burden to have to continually champion causes and issues, sometimes at the cost of their own career and reputations. Having and being seen to have senior level support/buy-in for diversity issues can lessen this burden. Some organisations have written diversity and inclusion into their company strategy or assigned responsibility for delivery the diversity agenda with specific board members/senior executives (who do not have to be from minority backgrounds). Some have gone as far as setting individual diversity targets for senior leaders to ensure they see achieving diversity as a priority and take personal responsibility for achieving diversity goals.

In terms of the critical mass, however, organisations may also consider the recruitment of BAME talent at the senior management level. There needs to be more than one role model or 'figurehead' so as not to count as the exception to the cultural norm, but a reflection of the cultural norm. Reviewing recruitment practices, expanding the breadth of sourcing platforms and challenging managers, recruiters and external recruitment vendors on the expectations of a diverse talent pool, is a positive way organisations can start to attract a more diverse population.

Increasing awareness and use of Sections 159 and 158 of the Equality Act 2010 should also be considered. Section 159 is concerned with the use of positive action during recruitment or promotion but does not extend more widely than that. Section 158 is important in the context of the use of positive action regarding training.

There is much trepidation around the use of these enabling provisions, and consequently they are little used. Training and better signposting of resources on the EHRC website in respect of the use of positive action could assist to ensure sections 158 and 159 of the Equality Act are put to effective use by public and private sector employers of all sizes, as these are provisions that could lead to speedy demographic changes and racial diversity.

Data Collation - Race

The extent of race inequality, disparate impact and the effectiveness of policies and practises is difficult to measure without adequate data collation and effective monitoring of it or completing equality impact assessments. Monitoring gender is comparatively straightforward, but monitoring in respect of race and ethnicity will need to take into consideration the various defining characteristics of 'race' in order for the data to be meaningful.

For public authorities, the introduction of the race equality duty pursuant to the Race Relations Amendment Act 2000 was said to be a watershed. It required all listed public authorities in carrying out their public functions to have due regard to the need:

- i. to eliminate unlawful racial discrimination; and

- ii. to promote equality of opportunity and good relations between persons of different racial groups.

The requirement of the main public authorities covered was to publish a race equality scheme stating which of its functions and policies the authority had assessed as being relevant to meeting the general duty and how it intended to comply with the general and specific duties.

Further Specific duties were also imposed on schools, colleges and universities. Employment monitoring results were to be published annually. Part of the expectation on how a public authority would fulfil its duty, was a formal structured approach to systematically assess the impact of policies or proposed policies on racial grounds. It required advance consideration to issues of race discrimination.

Where an assessment indicated potential adverse impact, in order to comply with the general equality duty, the authority would either need to change the policy, to consider an alternative or to justify the adverse impact was reasonably necessary and proportionate in context of the overall aim.

The (former) CRE and Home Office jointly developed a guide to race equality impact assessments. In July 2008, the government announced its intention to create a 'Single Equality Duty' to include protected characteristics comprising one set of general and specific public sector duties. The corresponding Public Sector Equality Duty came into force on 8 April 2010 under Section 149, Part 11 (Advancement of Equality) of the Equality Act 2010.

In so doing, aspects of the race equality were improved upon to make imperative the need to *advance* equality of opportunity and to *foster* good relations however this has not led to the courts having a wider interpretation of the obligations.

Under the new 'Single Equality Duty', the specific duties applicable to public authorities in England are far less onerous than those found in the preceding legislation as they abolished the need to produce a race equality scheme and this was replaced by a requirement on the public authority to set out the steps to be taken to achieve the objectives and implement such steps (unless there were exceptional circumstances).

Given the dearth of data now being collected, the extent of discrimination faced by BAME individuals and the slow pace of change, consideration could be given to:

- I. reintroducing the race equality scheme and statutory guidance;
- II. providing clear guidance to private sector employers on conducting equality impact assessments;
- III. introducing a similar race equality scheme requirement for companies with over 250 employees.

Increased Enforceability of Equality Policies

The statutory Code of Practice on Employment 2011 which replaced the previous statutory Code of Practice on the duty to promote race equality in employment published by CRE in 2006 is less comprehensive than its predecessor and offers less practical guidance to employers. The CRE's code provided useful guidance on positive action, regional demographic variations and examples of policies. Draft policies and toolkits sharing best practice would be a useful resource for organisations and employees in navigating race equality issues accompanied by training.

Race & Ethnicity Pay Reporting

Gender pay reporting legislation will soon require employers with more than 250 employees to publish on an annual basis the pay gap between male and female employees. In 2016 the Guardian published an article headlined "Black workers' pay gap in the UK widens with qualifications". BAME university graduates are reportedly paid 23% less than their white counterparts.

The Trades Union Congress (TUC) general secretary told the Independent that *"These are very worrying findings. Black and Asian people face a massive pay gap, even if they have a degree. This is not about education, but about the systematic disadvantages ethnic minority workers face in the UK"*.

One way to ensure large companies focus on pay gaps, indicative of barriers to progression at work, is to expand the pay gap reporting legislation to include a focus on race and ethnicity. In order to influence change there needs to be an increase in accountability and ownership for tackling such issues. A starting point would be to place accountability on companies for race and ethnicity reporting in the same way as is for gender. As quotas for diversity within boards increases, so too should the gap decrease as the numbers of BAME workers should be progressing up the ranks in a more inclusive workforce which is mindful of race barriers.

3. Enhance Transparency and Disclosure

The current position demonstrates that there is a serious paucity of data that identifies the ethnicity diversity of the FTSE 100 boardroom. Various resources of research and careful analysis of the data was used to gather meaningful evidence which could give insight into the representation of people of colour that are involved in the decision-making and leadership roles in corporate Britain. The methodology used in the data collation to identify directors of black, East Asian, Latin American Middle Eastern or South Asia Ethno-cultural backgrounds (i.e. non-white) was far-reaching and revealed that UK citizen directors of colour only represent 1.5 % of the total director population. This data not only highlights the need to increase ethnic diversity but significantly that there must be proper channels to report and retain data on the diversity of boards so that this information is readily available. As it is only through data collection that the

increase (or decrease) of ethnic diversity of UK boards can be measured and that evidence used to see whether there has been progress.

At present, companies in the UK have no legal duty to report on the ethnic diversity of boards (or its workforce more generally) and the report does not recommend mandatory regulatory changes. However, the lack of ethnic diversity on UK boards requires more than a verbal commitment from companies. The transition towards mandatory requirements may be considered too much of a leap, however, the voluntary call for evidence used by large corporations, such as PWC, may be a step in the right direction. PWC focus on extracting insight from data and test the reliability of that data. This can reveal patterns and key trends not visible before and provide boards with deeper insight into their operations.¹

UK Boards should be required to demonstrate in their annual report, that they have had regard to *ethnic diversity* when considering the balance of skills, experience, independence and knowledge of the board². By volunteering this information as part of the corporate governance process and the annual report, easier collation of data on ethnic diversity will be enabled whilst also highlighting where there may be blocks to such inclusion.

The review wishes to avoid affirmative action in terms of quotas. However, having a diversity and inclusion target should be considered as part of business strategy. This was effective in the case study presented by EY who added this target to Partners' scorecards and was successful in increasing ethnic diversity in their Partner intake by having a target of 10%, which was exceeded.³

The raised awareness to increase the number of women on the board of listed companies preceded a call for evidence on 24 February 2011 following the report of Lord Davies⁴. This provided the groundwork for the final recommendations which included a call for evidence and meaningful disclosure of the proportion of women on the board in the corporate governance statement and requested a response to how it addresses diversity in its annual report.⁵ The call for evidence was monitored over a 5 year period resulting in the final Davies report on 29 October 2015 which identified key points to increase gender diversity. This momentum has been continued by the Government to conduct an independent review to increase the target to 33% of women on the boards by 2020⁶. The same degree of focus and call for evidence which has driven the address of gender balance in the boardrooms should be adopted to increase ethnicity and inclusion on the board.

ELA Working Party:

¹ www.pwc.com

² The UK Corporate Governance Code (April 2016), Section B

³ The Parker Review, Appendix C, pg46.

⁴ Women on Boards (Davies Report)

⁵ Gender diversity in boardrooms-practical law

⁶ <https://www.gov.uk/government/news/rallying-call-for-female-boost-in-business-and-the-boardroom>

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