

Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

October 2020



SPECIAL FEATURE

What can employers do to support their B.A.M.E workforce?

The Networking group Black and HR conducted an online poll in which 77% of respondents said that their workplace had done nothing to address what has been happening in the black community in recent months.

It can be difficult for employers to know what to do or say, for fear of getting it wrong, but ignoring such a fundamentally important topic won't help.

Employers know that the Equality Act 2010 sets out the minimum standards required of employers, to prevent and protect individuals from race discrimination in the workplace. But making a difference takes more than doing the bare minimum.

We'd like to present you with an insight from an HR professional whose role in the NHS involves her promoting and supporting equality, diversity and inclusion initiatives.

[Read the full feature here p2>](#)

Welcome

We hope you've been keeping warm and dry in the face of storm Alex.

With the end of the year fast approaching, we're taking a look at some of the related issues which employers may be facing – including sickness and accrued holiday.

As always, please follow us on [LinkedIn](#) for our latest updates.





In the last 6 months, the impact of COVID on Black, Asian and minority ethnic (B.A.M.E) workforce within the UK has been significant. We saw an increased number of the B.A.M.E community dying from the virus.

Employees going to their workplace were doing so with a legitimate fear of the risk to their own life, whilst carrying the burden of the knowledge that they could impact the health of their loved ones. B.A.M.E employees were coping with unprecedented levels of trauma: the overwhelming stress and anxiety associated with working within a global pandemic, as well as the grief of bereavement of family, friends, and colleagues.

As an HR practitioner I witnessed many B.A.M.E employees fearing for their own safety and for those within their immediate family. They expressed their anger at being subjected daily to the heightened dangers posed by COVID-19. This was especially highlighted by global events such as the Black Lives Matters movement, and the increased awareness of race inequalities.

I personally lost a friend, whilst confronting my personal and professional experiences of racism and injustice. I realised that as I shared my awareness of the B.A.M.E experience on social media platforms; closet racist were identified within my friendship circle – evident from their discriminatory views and opinions.

My resilience was repeatedly challenged on a both a personal and professional level. I am certain I wasn't alone, and that this experience was echoed across the lives of many B.A.M.E employee across the UK.

Time for Change or be left behind

This truly has been a very challenging and emotive time for all, especially as the world prepares for a potential second wave of the virus and the onset of flu season. I urge organisations to take active steps towards real institutional change, rather than offer opportunist, empty token gestures. We are at a pivotal time, with racial inequality being the centre of focus. Organisational leaders need to acknowledge, listen and act now - especially businesses in and around London.

I have lived and worked in London since the 90s, and am fortunate to be part of a diverse and vibrant community full of different languages and cultures. The capital's workforce is a representation of this multicultural community, however, despite this, diversity is not being embraced.



Senior leaders and business owners must demonstrate true and meaningful change through leadership that is compassionate and employee centred. It is vital that they have equality and diversity at the forefront of their mind in every decision they make, thus embedding this within the infrastructure of their business, which is then reflected by their workforce. Failure to focus on diversity and address race inequality will ultimately have a detrimental impact on business reputation, growth potential and the bottom line.

I fully understand that trying to initiate sustainable change, when it comes to tackling racism and discrimination, takes courage and grit. We have recently seen a growing trend of large corporate organisations taking a stand and showing their support for the B.A.M.E community, which takes courage and commitment. ITV showed its support for Diversity's performance on 'Britain's Got Talent' after Ofcom received 24,500 complaints from the general public, by issuing a full page advert publically backing their performance.

The international sports world has shown its support of the Black Lives Matters movement with sports players either taking the knee or with their shirts. Many organisations have committed to ensuring there is diversity and inclusivity at senior board / management levels.

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Embracing diversity and change

To be a sustainable and successful business, it is important to recognise that institutional and structural racism exists – how to identify it, and how to address it. It is imperative that at this historic time, we acknowledge that as humans we all have some form of unconscious bias, to identify what they are and realise how they may impact our behaviour and decision making when it comes to the management and support of our staff.

I have heard on many occasions, 'I do not have biases', which is naive as we are all biased to a certain degree. If an organisation fails to address this at an institutional level then this will feed into the organisational structure, leading to negative experiences for employees in a majority of cases.

It is apparent that staff who experience marginalisation suffer from distress, have low morale and feel disenfranchised, and this can have the potential to negatively affect the organisations retention rate.

Ultimately, this could become a deep-rooted issue within the psyche of the individual and have a detrimental effect on the psychological contract (the trust and confidence) that exists between employer and employee.

More research will need to take place on this area, in light of the developments of this year, as the impact on employees has not yet been fully realised. However, one thing is for certain, any actions an organisation can take to improve the experiences of its B.A.M.E staff will have to run in parallel to a health and wellbeing action plan.

Practical steps [p3>](#)

What next?

Organisations need to operate at a higher level of consciousness; ensuring consideration is made for human rights, the community and society. This may feel like an uphill struggle but with each step towards corporate social responsibility, the closer the organisation is in moving towards operating within an equal playing field for its entire workforce.

Below I have outlined some of the basic practical steps an organisation can take to achieve this:

Establishing a clear organisational led equality, diversity and inclusion governance structure

For a compassionate and inclusive culture to take root, a governing structure is essential to ensure that ideas are generated at grass-root level, discussed with key decision makers and forwarded to senior management for implementation and improvement.

This can include creating a structure of engagement, in which B.A.M.E staff and senior management are able to promote, in partnership, organisational wide change by creating forums in which voices, ideas and lived experiences of the staff are openly shared and discussed with a view to creating organisational change.

Establishing and supporting a staff led network

Creating safe and confidential spaces for B.A.M.E staff to share and discuss key issues of interest. Staff networks are great way to do this. Networks are led by staff, for staff and enable honest, open conversations. There are opportunities to share with other colleagues' their experiences and challenges.

The aim of the network is to create further dialogue, raise awareness of issues whilst ensuring staff are supported. Successful organisations with a fully engaged and active staff network are more aligned with the needs of its employees, embrace inclusivity and the diversity of voices and cultures.

Embed values through organisation practices, policies and training

An organisation's success is determined by the way in which the organisation treats and interacts with its workforce. If there is a clear, shared vision and objectives based on a value based system then you will find a shared common purpose.

It is this common organisational purpose that will create a working culture that is fair and inclusive. It is therefore vital that organisational policies and practices promote race equality, ensuring delivered staff training address inappropriate behaviours and biases that may exist in managing, supporting staff and when decision making.

Identify and promote the power of ally ship

In improving the experiences of B.A.M.E. staff within an organisation it's important to promote the importance for non B.A.M.E staff to come forward and be an ally. Change can only be achieved with the support and engagement from a network of committed allies.

An ally is an individual who speaks out and stands against race discrimination and injustice. An ally works towards deconstructing implicit bias and is committed to continuously educating oneself on issues and experiences that affect minority groups. Allies play a vital role in addressing racial injustice. It is apparent that the more allies within an organisation, especially at a senior level, the better the experiences for B.A.M.E staff, and the more diversity is embraced.

There is a new, enriched sense of purpose and self-awareness in society and within businesses. There is a desire for change; this is now the time to take issues related to racial injustice and inequalities seriously and make a stand for the benefit of all, not just B.A.M.E workforce, showing solidarity and compassion.

About the author



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Mehvish has worked within the NHS in London as an HR practitioner since 2012. Prior to the NHS, Mehvish worked in both the finance industry and third sector.

She studied Law at undergraduate level and qualified as a legal executive and CIPD practitioner thereafter. Mehvish has held various roles including business development, Head of employee relations and HR business partner. She is an accredited coach, mental health first aider, and experienced mediator in community and workplace conflicts.

Mehvish currently is Head of Organisational Development and Equality, Diversity and Inclusion for a London NHS organisation. She is also a member of the North Central London People Board and co-leads the London wide HR black, asian and minority ethnic professional network.

As an OD and EDI lead, Mehvish is involved in a complete system engagement at every level of an organisation; supporting organisational change, promoting and its partners in the community, supporting equality, diversity and inclusion initiatives.



Government support for employers

Shortly after issuing our last newsletter the government announced the Job Support Scheme. We sent you an update outlining the key features and, on 9 October, the government announced an extension to the scheme.

Job Support Scheme

The extension will benefit businesses which are legally required to close their premises as a direct result of COVID-19 restrictions. In such cases, the government will cover two thirds' of employees' wages, up to a cap of £2,100 per month. Employers will need to cover National Insurance and pension contributions.

As with the rest of the JSS, the extension will be available from 1 November 2020 for 6 months, but will be reviewed in January. Further details are expected to be published in the coming weeks.

Job Retention Bonus

On 2 October the government issued a Treasury Direction and guidance note containing further details about the bonus. The key headlines are:

- Employers can claim it between 15 February 2021 and 31 March 2021
- An online system for claiming will be made available with details on how to access it available by the end of January
- The JRB is a one off £1,000 taxable bonus payable in respect of each eligible employee
- Eligible employees are those who:
 - You made an eligible claim for under the CJRS
 - You kept continuously employed from the end of the claim period of your last CJRS claim for them until 31 January 2021
 - Are not serving notice of termination of employment as at 31 January 2021 (this appears to be termination for any reason)
 - You paid enough to each employee to meet the JRB minimum income threshold (at least £1,560 gross in the following tax months: 6/11/20-5/12/20, 6/12/20 – 5/1/21 and 6/1/21-5/2/21)



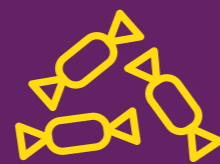
Believe it or not?

Working in the world of employment and HR makes sure there's never a dull moment – we've certainly helped clients with a whole host of weird and wonderful situations. We've drawn from online communities for these tidbits, where would you start with these grievances?



My boss just yelled at me for not responding to an email she didn't forward me.

My colleague eats all day long, sucks her teeth, licks and sucks her fingers, eats with her mouth open and talks with her mouth full. She's otherwise a nice lady but grosses me out.



I bought a family sized bag of skittles that I left unopened on my desk, when I got to work one morning someone had opened them and left me 3 measly skittles.

My co-workers like to complain about how tired they are, I know its normal but now they've turned into a competition and they moan all day long, I'm tired too but don't want to join their complaint-fest



My colleague fell asleep in plain view of everyone and no one is doing anything about it.

John makes everyone tea but he never puts sugar in mine and I've reminded him loads of times.



Sick pay update

With winter fast approaching, government support schemes changing and the 'R' rate ever fluctuating, we take a look at the latest position on self-isolation and sick pay.

Statutory Sick Pay (SSP)

Usually, to be eligible for SSP, an employee must be absent from work due to an "incapacity". However, there have been numerous changes to the regulations over the course of the year in the face of COVID-19. These changes combined mean that those who are deemed incapacitated and therefore entitled to SSP include employees who are:

- Shielding and unable to work as a result, i.e. they cannot do their job from home. Note that this isn't currently relevant in England or Wales because shielding has been paused
- Self-isolating for one of the following reasons and unable to work from home (because they're unwell, or physically unable to do their job from home):
 - Have COVID symptoms and are self-isolating in line with government guidance
 - Living with someone who is self-isolating due to COVID symptoms, and is therefore self-isolating in line with government guidance
 - Developed COVID symptoms while already self-isolating due to a household member having symptoms, and is now self-isolating in line with government guidance
 - Been notified via track and trace that they have been in contact with someone who had COVID and are therefore self-isolating in line with the notification
 - Tested positive for COVID and is self-isolating in line with government guidance
 - Living with someone who has tested positive for COVID and is therefore self-isolating in line with government guidance
 - Have been told, post 26 August 2020, to self-isolate for up to 14 days ahead of admission to hospital for surgery or another procedure

COVID & SSP in 3s

The 3 relevant COVID symptoms are:

1. Continuous cough
2. High temperature
3. Loss or change in normal sense of taste or smell

If an employee only has to self-isolate for 3 days, for example because they then receive a negative COVID test result, then SSP will not be payable. However, if an employee does have to self-isolate for 4 days or more then SSP will be payable for the entire period, including the first 3 day waiting period.

As well as the usual fit note, the evidence an employer can require in relation to COVID is:

1. An isolation note from NHS 111
2. The notification from the NHS or public health authority that they have come into contact with someone with COVID
3. NHS or GP letter telling them to shield for at least 12 weeks because they are at high risk of severe illness from COVID

Company sick pay

Whether an employee is entitled to company sick pay during periods of self-isolation depends on the wording of the contract and/or policy.

If the wording says something like – the employee is entitled to company sick pay if they qualify for SSP – then it would be payable. However, if the wording relating to company sick pay is tied to the individual being incapacitated by reason of illness or injury then it's unlikely they would be entitled to company sick pay, purely for having to self-isolate without incapacitating symptoms.

In practice, employers may decide in any case to pay company sick pay where an employee qualifies for SSP connected to COVID.

The last thing businesses will want is to inadvertently encourage asymptomatic COVID carriers to go to work for a fear of losing out on company sick pay.

What do I do about... back logs of annual leave?



One of the employment side effects of the COVID pandemic is back logs of annual leave – whether because employees have been on furlough, working so much they couldn't take holiday, or cancelling it because they couldn't travel.

As we near the end of the year, many employers are considering what the options are, especially if you won't want everyone taking holiday at the same time. An employer can require an employee to take, or not take, holiday on specific dates, and there have been some changes in the law due to COVID which may also help.

Can employees carry forward holiday?

Yes – emergency legislation means that where employees have been prevented by the COVID pandemic from taking their holiday, they can carry it forward to the next leave year. This applies to the minimum 4 weeks afforded under the Working Time Regulations, which previously, employees were not permitted to carry forward.

However, this only applies where it hasn't been “reasonably practicable” for the employee to take their holiday in the current leave year and the government guidance states that employers should do everything reasonably practicable to ensure that the worker is able to take as much of their leave as possible in the year to which it relates.

It's important to be very clear with employees who carry leave forward when they are expected to take it – they have up to 2 years to use that leave but you can require them to take carried over leave first.

Can employers buy back holiday?

If you provide holiday in excess of the minimum statutory entitlement, you could look at buying back that excess (i.e. paying it out to the employee without them taking the time off). That's likely to be an attractive option only if the employee has a high amount of accrued holiday and the value of them working outweighs the additional payment.

Can employers require employees to take holiday at a specific time?

Yes – provided you follow contractual and/or statutory requirements. The employment contract might permit the employer to require an employee to take unused holiday during a period of notice or even at a specific time (e.g. Christmas shut down).

If there is no such contractual provision then employers can rely on the statutory notice provisions whereby you give twice the amount of notice as the length of holiday you want the employee to take, e.g. 4 days' notice to take 2 days holiday.

Especially for businesses who will be quieter due to the impact of COVID, you might decide to give staff notice to take holiday at specific times before the end of the year – whether in rotation or as a result of a complete shutdown.

Recent Case Decisions

When does changing an employee's job role amount to constructive dismissal?

Argos Ltd v Kuldo

During a restructuring Argos Ltd placed Kuldo at risk of redundancy, but then “mapped” her into a new role, claiming it was no more than 30% different from her existing role.

Kuldo complained that the new role was not a ‘suitable alternative’ and that she should be made redundant but Argos disagreed. Kuldo resigned in protest claiming constructive unfair dismissal, wrongful dismissal and a redundancy payment.

The Employment Tribunal found that the change of role for Kuldo amounted to constructive dismissal because:

- There was an absence of proper consultation
- There was a lack of understanding of how the 30% difference metric had been applied
- There had not been a full assessment of the 30% metric in Kuldo's case

Kuldo's claims for wrongful dismissal and a redundancy payment were referred back to the Employment Tribunal to consider however the finding described above, that the change in role was a constructive dismissal, was upheld.

This case provides valuable guidance on ensuring a proper, thorough process is followed when seeking to change an employee's role within a business, especially where the employee may actually be redundant.

Immigration costs increasing

In our September issue we set out various costs involved when sponsoring an individual to work in the UK. One of the costs payable by the individual, the Immigration Health Surcharge (also known as the IHS or NHS surcharge), is set to increase.

From 27 October 2020, each applicant will have to pay £624 per year of their visa, an increase from £400 per year.

Most foreign nationals staying in the UK for at least six months have to pay the IHS, although there is now an exemption for applicants in health and care sectors. Students, their dependents, those on Youth Mobility Scheme visas and anyone under the age of 18 will pay a reduced fee of £470 per year.

Abuse of the furlough scheme: a word of warning

Unite the Union reported on 29 September that it's pursuing a claim on behalf of one of its members against Falconex Ltd for unfair dismissal, unlawful deduction of wages and breach of contract.

Falconex allegedly told the worker in question:

- that he was expected to work throughout his furlough period
- he was on the top of the list of any redundancy
- the business would never consider re-hiring him
- going to a solicitor or union would be seen as a direct threat to the business

Whilst further details of the claim remain to be seen, these sorts of allegations aren't isolated. HMRC are reportedly looking into 27,000 high-risk furlough scheme claims and criminal investigations into suspected fraud are underway in a number of cases.

There have been plenty of anecdotal accounts of workers feeling pressured to work during periods of furlough, and we're bound to see more of these emerge over the coming months as government financial support runs out and employers are forced to make redundancies.

It's clear from the detail available about the new Job Support Scheme that differences between that and the furlough scheme are designed to help combat such fraud.

But not all situations involve deliberate fraud. The government guidance, treasury directions and other commentary around furlough scheme rules were scant to begin with, changed frequently, and at times even contradicted one another.

Employers who are concerned that they may have made mistakes with their furlough claims should act now. HMRC introduced an amnesty, whereby employers can correct claims without penalty or sanction where they notify HMRC by the later of:

- 20 October 2020; or
- 90 days after the date you received the furlough monies in question.

You must use the government online service to obtain a reference number in order to pay HMRC back.