

Stepping up a gear with diversity & inclusion: the key challenges facing the Board and HR

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Our whistlestop tour...

- Why does D&I matter from a legal perspective: the discrimination landscape
- Positive discrimination: limitations and the risk of over-reaching
- Inclusion and disability post-pandemic
- Age discrimination: a new trend?
- The regulatory agenda
- New developments:
 - Sex harassment duty
 - Ethnicity pay gap reporting?

The discrimination landscape

- Protected characteristics:
 - age
 - disability
 - gender reassignment
 - marriage and civil partnership
 - pregnancy and maternity
 - race
 - religion or belief
 - sex
 - sexual orientation

The discrimination landscape

- Possible claims:
 - Direct discrimination
 - Indirect discrimination
 - Discrimination arising from disability
 - Failure to make reasonable adjustments
 - Harassment
 - Victimisation

Positive discrimination v positive action

- Positive discrimination is generally unlawful
- What about positive action?
 - Where an employer reasonably thinks that either:
 - Persons who share a protected characteristic suffer a disadvantage connected to the characteristic or have different needs; or .
 - Participation in an activity by persons who share a protected characteristic is disproportionately low.
 - ...they can take proportionate steps to meet the group's particular needs, lessen a disadvantage they might experience or increase their participation in a particular activity
 - Akin to more general reasonable adjustment obligation
 - Limited application in practice, e.g.:
 - Targeted job adverts
 - Targeted open days or mentoring

Watch out for the overreach...

- *Bayfield v Wunderman Thompson*
 - Advertising agency took steps to address a large gender pay gap (median of 44.7%)
 - Redundancy of two white, male, middle-aged creative directors
 - Desire to reduce gender pay gap was a “perfectly legitimate response” but unfair redundancy scoring was direct sex discrimination
- Potential increase in discrimination claims from white men

Disability and inclusion

- The impact of the pandemic
 - Much of the work formerly carried out in the office can be done at home
 - This may provide more opportunities for disabled workers who can take on roles that were previously inaccessible to them
 - What is a “reasonable” adjustment has probably now changed. Employers need to think harder about what can be accommodated, for example:
 - Can a job be done entirely from home?
 - Can a disabled employee join hybrid meetings remotely?
 - Can hours of work be adjusted to reflect, for example, rest periods?
 - Physical adjustments to the office environment (e.g. quiet areas)
 - Altering HR processes to allow participation remotely
 - Acquiring or modifying equipment – investigate technology to help, for example sight and hearing, neurodiversity
- The menopause: a new disability?

Age discrimination: a new trend?

- Increasing opportunity and risk
 - Changing age demographics in the workforce can lead to tension between older and younger workers
 - Companies need to balance potentially competing needs to attract and/or promote new talent, to implement effective succession plans and retain expertise
- We consider there to be an increasing risk of age discrimination claims – more older workers both wanting to retain their jobs and feeling entitled to do so

Age discrimination: confusion in the case law

- University of Oxford v Pitcher/Ewart
 - Directly discriminatory compulsory retirement age of 67
 - Legitimate aims:
 - promoting inter-generational fairness
 - facilitating succession planning
 - promoting equality and diversity
 - One tribunal held it was objectively justified and the other held it was not
 - EAT upheld both decisions - there were material differences in the evidence presented to both tribunals
 - For example: a survey of the impact on retirees (Pitcher) v's statistical analysis of the creation of vacancies (Ewart)

FCA Policy Statement: D&I on company boards and executive management

- Applies to UK and overseas issuers with equity shares admitted to the FCA's Official List
- For financial years starting on/after 1 April 2022
- Key points to note:
 - Focuses on increasing the representation of women and of those from ethnic minority backgrounds at senior management levels
 - This will be monitored by an annual disclosure requirement
 - Representation targets will be set on a 'comply or explain' basis
 - Publication of numerical data on sex or gender identity and ethnic diversity
 - Part of the FCA's aim to increase market transparency for investors

FCA Discussion Paper: D&I in the financial sector – working together to drive change

- Published July 2021
- Current proposals:
 - All firms to publish D&I policy
 - Targets for the entry of under-represented groups
 - Diversity audits
 - Boards must be diverse & inclusive
 - Bank & insurer SMFs to have prescribed responsibilities on D&I
 - D&I metrics relevant to variable remuneration
 - SMFs – D&I “performance” relevant to fitness & propriety assessments
 - Possible impact on SMF approvals

Direction of travel

- Change will come – focus is on how change will be implemented, not whether it will
 - Consultation on Discussion Paper ended 30 September 2021, detailed proposals anticipated shortly, Policy Statement expected Q3 2022
- In fact, it's here already
 - April 2022 Policy Statement on boards and executive management
 - Dual regulated firms have a prescribed responsibility for culture
 - Solo regulated firms “FCA expects all senior managers to take responsibility for developing and embedding healthy cultures in their areas of responsibility”

What should you do now?

- Assess where you are – a D&I audit of where you stand, what are the gaps and challenges, what are you doing to plug them and how effective are you being
- Ensure D&I part of your strategy
- Consider if your remuneration process and policy is gender neutral and takes into account D&I performance
- Make sure policies and codes of conduct are up to date and fit for purpose
- Provide impactful and effective training
- Consider how progress can be measured

Sexual harassment

- A new proactive duty to prevent sexual harassment confirmed in July 2021 but no further update on when it will be implemented
- All reasonable steps defence
- A claim only after an incident has occurred
- Protection from third party harassment e.g. customers, clients, suppliers
- New EHRC statutory Code of Practice
- Possible extension of Equality Act claims time limit from 3 to 6 months?

Key steps – what should you do now?

- Review:
 - Equal opps & anti-harassment policies – are they fit for purpose?
 - Third party agreements – do they require policy compliance?
 - Existing reporting mechanisms – are they effective?
- Communicate: zero-tolerance approach to harassment will be taken
- Encourage: an open “speak-up” culture so employees feel safe to report inappropriate behaviour
- Train: all employees from induction onwards & managers on how to deal with harassment reports effectively and sensitively

Ethnicity pay gap reporting

- March 2022 change: ethnicity pay gap reporting will not be mandatory
- Potential for pressure on employers to do so to demonstrate commitment to anti-racism and being a workplace of choice
- Government to publish guidance in Summer 2022 to support employers who wish to voluntarily report
- Guidance is designed to help employers navigate the challenges of implementation including confidentiality and categorisation

Thank you



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