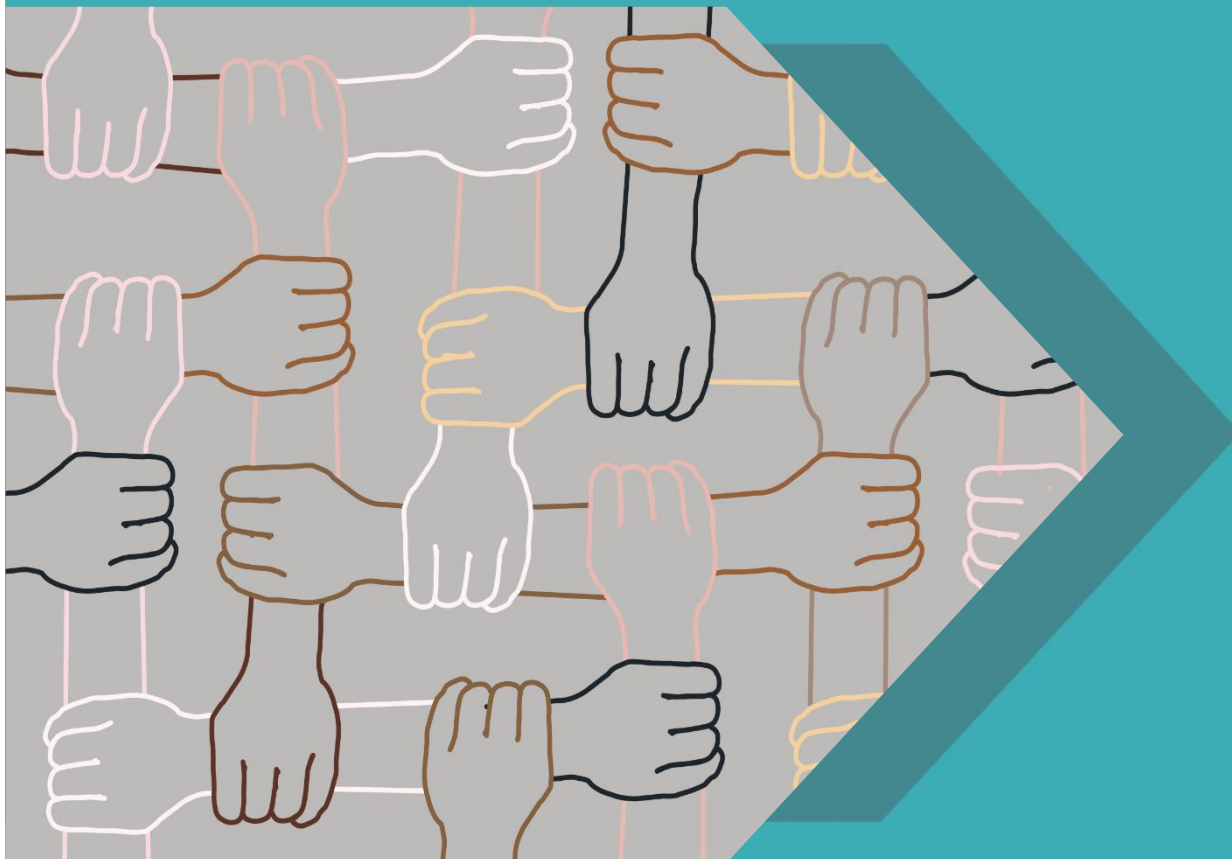


The Trade Union Challenge: Winning Legal Race Discrimination Cases

**The TUC Anti-Racism Taskforce, Strategic Litigation
Roundtable summary**



In 2020, the TUC General Council launched an Anti-Racism Taskforce to tackle structural racism within the labour market and wider society. The Taskforce is in operation for two years.

The Taskforce will lead the trade union movement's renewed campaign against racism at work. It will engage with Black workers across the UK to hear about their experiences. And it will produce recommendations on tackling structural racism in the UK, in workplaces and in unions themselves.

The Taskforce, led by NASUWT General Secretary Dr Patrick Roach, will then develop an action plan for change across UK workplaces – and within unions themselves.

It is our aim to use our trade union leverage to press for change across UK workplaces and to lead by example by demonstrating our capacity as a movement to secure racial justice at work.

The Taskforce now in its second year and is made up of senior leaders from the trade union movement and expert representatives from civil society and academia, including patron of the Taskforce Neville Lawrence.

The Taskforce is organised by four working groups: Collective Bargaining; Organising; Public Policy and Unions as Employers.

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Introduction

As part of the TUC Anti-Racism Taskforce collective bargaining workstream output, a roundtable on strategic litigation took place on 26 April 2022.

The roundtable had two main aims: to gather information about trade unions' current approaches to legal casework involving race cases that have a disproportionately negative impact on Black workers; and to draw up a set of key recommendations for unions to adopt a strategic approach to race litigation cases.

Gloria Mills, UNISON and chair of the TUC Race Relations Committee, chaired the discussion and participants came from across the trade union leadership, equalities and legal teams and from representatives of legal firms working with trade unions. The roundtable was attended by Lord John Hendy QC, Jo Seery of Thompsons Solicitors and Ijeoma Omambala QC, who shared their contributions in the opening segment of the session.

Selected remarks

Lord John Hendy QC:

- Strategic litigation can be used either as a tool of attack or defence by unions, e.g. by unions finding new legal ways to enforce existing rights or to defeat legal attacks by employers.
- Strategic litigation is only one item in the toolbox of a trade union; and litigation must not distract from the industrial strategy being pursued by the union.
- Lawyers working on strategic litigation for unions must go beyond knowledge of the intricacies of the law on industrial action or trade union rulebooks; they must gain a broad knowledge of many other areas of law, if they're to be effective.
- They must understand the politics of the law. The law functions as a system of control upon workers and upon trade unions.
- It's important to clarify what the purpose of the strategic litigation is and weigh up the risks of losing. If the strategic litigation may benefit thousands of workers, what will be the impact if the case loses?
- If you're thinking of strategic litigation and you've identified a route to take the case, it's sometimes possible to wait for the facts to emerge on which you can launch the case.

Jo Seery, Thompsons Solicitors:

- Statistics from Thompsons and from employment tribunals bear out the assertion that claims for race discrimination are harder to win than discrimination claims concerning other protected characteristics, such as age, disability, religion, sex or sexual orientation.
- This is despite a significant rise in the number of referrals being received for race discrimination cases, both by Thompsons and employment tribunals: the number of referrals Thompsons received in the period 2017-2021 is almost two thirds more than the number of referrals for sex discrimination. The number of referrals for race discrimination cases increased by approximately 130% in the same period compared by a 5% reduction in referrals for sex discrimination. Statistics from employment tribunals also reflect this increase in referrals for race discrimination cases, albeit by a smaller margin.
- Despite the rise in number of cases accepted by tribunals, this was not accompanied by an equivalent rise in proportion of cases seen to completion. Figures also show that 3% of race discrimination cases were successful at hearing, which is the same for sex and disability. 12% of race cases were struck out, compared to 7% for sex discrimination and 8% for disability discrimination. Although each case depends on its particular details, the statistics demonstrate that race discrimination cases fare worse at employment tribunals.
- There were a number of strategic priorities for unions. Three areas were identified; hair discrimination, pay and flexible working. In relation to the key issue of the ethnicity pay gap, this was best addressed collectively by unions through pay negotiations. This was particularly important following the government's recent announcement that it would not be introducing mandatory ethnicity pay gap reporting despite ONS data which revealed that there were significant pay gaps among minority ethnic groups. Similarly, a report by Business in the Community showed that workers from Black Asian and Minority Ethnic backgrounds were more likely to be adversely affected by inflexible working policies resulting in indirect discrimination as well as compounding the ethnicity pay gap.

Ijeoma Omambala QC:

- It is essential that Black union members are able to communicate their lived experiences of discrimination in the workplace, in the home environment, and in their lives. Unless the union has access to that information to build evidence for cases, it cannot formulate a meaningful litigation strategy around race because it won't understand its members' priorities around race. Once the union engages with its Black members in this way, it's in a better place to understand where its

resources and energies might be best focused, and it'll also be better placed to deliver a strategy that meets its members' needs.

- With discrimination cases generally, and race discrimination cases in particular, there is a need to do a lot of preparatory investigative work. There must be a willingness to engage in that preparatory work and it must be done with intelligence. That brings the question of how effectively unions are preparing their representatives to do that work. What resources are being made available to those reps, so that they are supported and comfortable in asking questions and looking for the right information.
- Pay and benefits is one example of a strategic areas where litigation can make a difference and impact on a wide range of workers. There are equal pay claims that can be brought in relation to race, and they are not being brought often enough. This is a glaring gap as there are many cases that could have great prospects of success – whether in terms of a court judgement or tribunal decision, or by forcing employers to put an end to their applications of discriminatory criteria and arrangements, without the need to go to court. That can be a very effective bargaining tool and one that we sometimes underestimate.
- Another opportunity for challenging race cases is through disciplinary procedures and arrangements in certain organisations. According to statistics, there is a stark race disparity in the people who are punished within organisations. Often that disparity is often not interrogated enough, either internally by workplace representatives, or externally, by the scrutiny of a court or tribunal.
- Regarding workplace segregation, there are workplaces across the country that are segregated by race. Generally, this means that Black people are doing lower-paid and/or dangerous work, not because they want to, but because that is where they are allowed to be. If we have more discussions with Black members, lots of valuable information can help drive litigation and bargaining strategies.
- Final recommendation is for the movement to do more to think outside the box. By exploring other ways to raise and litigate on race discrimination issues; thinking about forums other than the tribunals system. For example, could a claim be brought before the High Court, to seek a declaration on whether a particular practice is discriminatory or not?

Roundtable topics of discussion

The questions that the participants explored included:

1. Does data and evidence suggest trade unions have been successful or unsuccessful in winning race discrimination cases?
2. Where do you stand in your confidence of their unions on handling cases of race discrimination? How do unions communicate with Black members about their strategic approach to race cases?
3. Do unions have strategic approaches to pursuing and monitoring class actions related to race discrimination?

Recommendations

For the trade union movement to earn the confidence of Black members and effectively address racism in the workplace, they must adopt a joined-up approach to litigation and be proactive in taking on more test cases of race discrimination. Trade unions must ensure that they are collectivising race cases, through their management systems as opposed to investigating cases on an individual basis. Monitoring cases and identifying patterns would be helpful for further cases for investigation to be identified.

The roundtable identified five key areas of strategic representation for trade unions to take on:

1. That trade unions should widen the scope of their criteria for supporting cases beyond whether the case has a 50% chance of success to the wider reasons for pursuing them. The aim isn't always to win but rather, about unions being "seen" to support Black workers. This would also send a message to employers that unions are serious about legally challenging institutional racism, which would be a good outcome. In itself. However, unions should also contemplate the downsides of losing a case; what could be the implications for millions of workers across the country or across Europe. So, these considerations must be evaluated on the most scientific basis possible.
2. That unions need to share their experiences of litigation and identify strategic issues that they can pursue jointly through the courts. This could be achieved by ensuring that annually the TUC legal officers' network has a dedicated meeting for sharing insights, updates, and useful approaches on race discrimination cases.
3. That there is a need for unions to take more ownership of the details of cases with closer collaboration between union lay reps, union officials and legal representatives to enable more effective case preparation. This could take the form of developing tools for reps to better understand how race discrimination can be identified and what evidence needs to be collected to enable successful litigation. A

pathway for union lay reps to seek advice from union officers on gathering information to build race cases should be developed.

4. Trade unions should allocate resources to race equality cases by making interconnections between race equality and other priority campaign areas, where institutional racism and structural inequality results in disproportionate impacts on Black workers and communities. The current cost of living crisis. And the impact of insecure work are examples where strategic litigation campaigns could be undertaken
5. Trade unions have an opportunity to identify potential test cases in the NHS and other public services on issues of disciplinary and capability outcomes, and how they have a disproportionately negative impact on Black workers.

Responses from the breakout sessions

Does data and evidence suggest trade unions have been successful or unsuccessful in winning race discrimination cases?

Trade unions don't gather enough data on race discrimination cases, so it is difficult to measure our success in winning these cases. As a movement, we need to think hard about how we collect this data, what data to collect and who can access our data. At a basic level, race, gender and age should be factors included when collecting data. A major issue that trade unions should address is our criteria for deciding upon which race discrimination cases to pursue. Who sets the criteria and why is it so high? We must review these questions to lower the barriers that stop lawyers and legal teams from taking on more race cases. We must also question why unions seem unwilling to allocate more resources for pursuing race discrimination cases.

In light of this, unions and legal partners should shift the focus on winning to be more inclusive of different ways to define a "win". The majority of race discrimination cases are settled, rather than being fought to the end. These settled cases could also be considered as successes and should be more publicised.

The political benefits of unions being seen to dedicate our resources to backing up Black workers shouldn't be underestimated. It would send a message both to members and to employers about our stance on race and demonstrate industrial strength. This can often influence shifts in policy and practice in workplaces.

Where do you stand in your confidence of their unions on handling cases of race discrimination? How do unions communicate with Black members about their strategic approach to race cases?

There's a consensus that Black members' have low levels of confidence in their unions' handling of race discrimination cases.

Trade unions need to take steps towards increasing transparency in how we decide upon which race discrimination cases to pursue. We must aim to allocate more resources and lower barriers for legal teams in pursuing these cases.

We must expend a significant amount of effort to earn Black workers' confidence in our handling of race discrimination cases. Part of this involves reviewing our criteria for pursuing race cases to increase the number of cases we take on. Other, equally important, steps we could take include: boosting the representation of Black officers among the points-of-contact in unions; improving our end-to-end support for Black

workers reporting discrimination; and cutting down on red tape in our process for pursuing legal cases.

It's concerning to note that in reports of multiple discrimination against workers with intersecting characteristics, issues related to race are often dropped from the case. An example of this is in sexual harassment cases — a worker may be pressured into solely pursuing sex discrimination, instead of multiple discrimination, including racialised harassment. The impact of this can be: firstly, that racism goes unrecognised and is dismissed; and secondly, that the worker is forced to frequently recount and relive their distress.

To counter this, unions should implement training on understanding markers and patterns of race discrimination. This would ensure that union officers and reps effectively gather evidence, protect Black workers from further traumatising, and validate their lived experiences.

Do unions have strategic approaches to pursuing and monitoring class actions related to race discrimination?

Unions must take steps to encourage local organisers and union officials to better collaborate with one another. One way to do this is by unions developing tools for local organisers to recognise and understand patterns of race discrimination. Another suggestion is to build pathways for organisers to seek further advice from union officers on how to effectively gather information for building race cases.

Trade unions' siloed approach to work and competition with one another only serves to let down our Black members. To foster a more joined-up strategy, we could establish legal officers' networks, and strengthen existing ones. This would open up space for sharing insights, updates and useful strategies for handling race cases.

Conclusion

The TUC Anti-Racism Taskforce's Collective Bargaining workstream has opened an important space for discussion on approaches to handling race discrimination cases and collectivising these cases. This roundtable only serves as an opening of a needed and necessary conversation and action that trade unions must take. A set of actions has been agreed:

- The findings of the Strategic Litigation roundtable will be highlighted in the TUC Taskforce General Council report to Congress.
- The Taskforce will encourage members to extend the conversation on strategic litigation approaches and taking legal officers through the mechanics of building a race case.
- The TUC will explore possibilities of joint working with the EHRC on the use of their race fund, with the aim of encouraging them to take a strategic approach on legal action, legal interventions, and the use of their investigatory powers on racism in the workplace.
- The TUC's Legal Officers' Network will host an annual meeting sharing insights, strategic approaches and the current legal challenges when it comes to race discrimination. This would be an opportunity to bring relevant unions together with expert council to discuss specifically about the opportunity for strategic litigation in their own occupations/industries and how to take forward a legal challenge.