

RECENT DEVELOPMENTS

DISCRIMINATION LAW

Another look at harassment in the workplace: is there hope for change?

Demi Clarke-Jeffers*

Introduction

Recent 2022 guidance surrounding the issue of hair discrimination has been published by the Equality and Human Rights Commission: Preventing Hair Discrimination in Schools.¹ The premise of this guidance is to adopt an inclusive environment and help school practitioners improve, develop and review policies to ensure that they are not unlawfully discriminatory. The development and recognition of this issue emerged because of research and court actions, which prove that this issue disproportionately affects pupils with Afro-textured hair or hairstyles experience. The guidance identifies that some of the policies that are currently in place can be negative and encourages schools to ensure that the policies remain in conformity with the Equality Act 2010. In addition, the guidance provides insightful examples of race, disability, religion, and gender-based discriminatory issues that interlink with hair discrimination.

Background

The pivotal issue related to the reluctance to expand section 14 of the Equality Act because it was deemed by the government as ‘too complicated and ‘burdensome’² to apply three or more protected characteristics - age, disability, gender reassignment, race, religion or belief, sex, and, sexual orientation.³ Consequently, this failed to acknowledge issues of harassment:

A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In addition, it causes further problems when an individual in the workplace must choose whether they are being harassed with respect to their race, sex, culture, or religion. The importance towards Article 9 ECHR, right to manifest religion and belief, and Article 10 ECHR, right to freedom of expression, were emphasised as the law needs to ensure that it is not only aligned with the Equality Act 2010 but also with the human rights of the individual.

The author’s previous article - ‘Harassment at work: is the law failing?’⁴ - drew upon the successes and failures of the United Kingdom (UK) law in relation to hair harassment in the

* LLB Graduate, Coventry University.

¹ Equality and Human Rights Commission, ‘Preventing hair discrimination in schools’ (2022) <<https://www.equalityhumanrights.com/en/advice-and-guidance/preventing-hair-discrimination-schools>> accessed 16 December 2022.

² Government Equalities Office, ‘Equality Bill: Assessing the impact of a multiple discrimination provision’ (April 2009) <<https://data.parliament.uk/DepositedPapers/Files/DEP2009-1229/DEP2009-1229.pdf>> accessed 18 April 2022.

³ The Equality Act 2010, s. 26.

⁴ Demi Clarke-Jeffers, ‘Harassment at work: is the law failing?’ (2022) 27(1) Coventry Law Journal 167. <<https://publications.coventry.ac.uk/index.php/clj/article/view/884/936>> accessed 27 December 2022.

workplace. More specifically the article related to Black and Muslim women and the experiences they faced and continue to experience at work. The experiences varied from stereotypical perceptions of naturally textured hair deemed as “dirty” or “unprofessional”,⁵ along with inappropriate comparisons towards objects and animalistic scrutiny, which is dehumanising, humiliating and offensive.⁶ Moreover, it covered the exposure of the ‘Neutrality Policy’ 2017,⁷ and experiences of physical harassment noted in the case of *McGonigle*;⁸ although, in the latter case Judge Hallen identified a breach of policy in connection to harassment and bullying. Thus, judge Hallen expressed the need for employees to be treated with dignity in the workplace. This was significant towards the identification of dual harassment claims in the law.

From a young age, black women are placed in an intimidating, hostile, degrading, humiliating and offensive environment that continues to cause discrimination due to the inadequate protection provided by the law. Beforehand it was considered that the law was failing to regulate harassment within education settings due to policies that penalised afro-textured hair.⁹ In addition, an overwhelming 82.9 per cent of young people experienced harassment within the educational institution.¹⁰ The weight of the law was revealed to be ineffective, the implementation of the policies being restrictive, fostering the notion that wearing your natural hair is an issue. New policy would dispute the notion that the policy remains restrictive.

The previous article provided recommendations to implement the Halo Code to be adopted into UK legislation. The initiative pledges for “freedom and security to wear all afro-hairstyles without restriction or judgement”.¹¹ Incorporation of the Halo Code will ensure that everyone is included within the law and highlight that any form of harassment or discrimination will not be tolerated. The Halo code promotes inclusivity, which is important because the prerogative of the law is to serve, protect and defend people and thus it is necessary to acknowledge every aspect of an individual’s identity.

In accordance with literature and legislation from the United States (US) it was argued that the UK is behind the US and lacks the strength and development of the US because the US have the CROWN Act (Creating a Respectful and Open World for Natural hair), which prohibits “discrimination based on an individual’s texture or style of hair.”¹² Thus, it is evident that the UK lacks the independent framework and effective legislation to negate any issues surrounding the issues of hair discrimination and harassment in the workplace and in educational institutions.

In summary, the prior article recommended adopting the Halo Code to benefit employers and employees whilst also mandating continuous cultural competency training in the workplace. The prior article urged for the importance of change to the UK legislation and

⁵ D Wendy Greene, ‘Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in *EEOC v Catastrophe Management Solutions*’ (2017) 71 U Miami L Rev 987.

⁶ Jessica Morgan, ‘These Black Women’s stories Prove Hair Discrimination Happens Here Daily’ *Refinery 29* (UK, 11 February 2020).

⁷ *Achbita v G4S Secure Solutions* [2017] EU: C: 2017: 203.

⁸ *McGonigle v WM Morrison’s Supermarket plc* [2021] UKET 3202627/2021.

⁹ Michelle De Leon and Denese Chikwendu, ‘Hair Equality Report 2019: “More than just Hair”’ (2019) <<https://www.worldafroday.com/hair-equality-report>> accessed 19 April 2022.

¹⁰ *Ibid.*

¹¹ Jane Edwinal, ‘Halo Code’ (October 2020) <<https://halocollective.co.uk>> accessed 27 December 2022.

¹² Janelle Griffith, ‘House passes the Crown Act banning discrimination against Black hairstyles’ *NBC News* (America, 18 March 2022).

remained discouraged to what was currently in place as lacking, and held the view that it was not a priority towards legislators “current agenda.”¹³

Towards the beginning of 2022, it was deemed that the law was failing to support this demographic when cases of harassment occurred, due to the lack of legislation that could directly support Black and Muslim Women in relation to harassment claims. However, there seems to be a potential shift towards more proactive change, support and improvement by the Equality and Human Rights Commission (EHRC), below.

The new EHRC Guidance

The recommendation provided within the policy is useful as it suggests that schools should provide training for teaching staff in order to cultivate virtuous relationships and to absolve unlawful discrimination and harassment relating to hair, thus resulting in understanding, and further to support members of staff. Another recommendation is to foster equality throughout the year by organising a host of activities such as the celebration of afro-textured hair and including Black role models. Another resource the Commission provided is a decision-making tool that can be used to aid the elimination of any potential discrimination related to hair. These are in addition to several other external resources, such as World Afro Day,¹⁴ including resources from a variety of different platforms which advocate for equity.

Recent developments would dispute the prior standpoint that the law is failing to regulate harassment in the education setting as ‘ineffective’, as the guidance provides sound guidance on the vast amount and variety of hairstyles that can be adopted whilst understanding that it is not only limited to what they listed. Moreover, it also provides advice and support in terms of the negative language and connotations of the words individuals use, which can impact on young people's self and identities. This brings awareness of the type of language one should avoid. This is paramount because as mentioned previously the implications of harassment in educational settings can be carried on into the workplace. In addition, the report is also aware of the mental health impact that can be caused because of harassment within the education setting, thus raising awareness of ongoing and contemporary issues. Moreover, the guidance provides anecdotes of real-lived experiences that perpetuate the impact of disproportionate unlawful discrimination on young people. Although the educational institution is very much the foundation level to combat hair discrimination, the issue is bigger than education itself, although it is a good starting point, and it must be expanded out into other institutions to allow it to have a clear and direct benefit for those who are affected by the issue.

Furthermore, linking to the point that the guidance provided is isolated in relation to preventing hair discrimination in educational institutions, the focal point is not spread into other industries such as in the workplace, where it is evident that hair-related issues arise in these settings (including the negative issues and experiences that individuals with afro-hair textured or hair-styles experience). Consequently, if other industries are not encouraged to adopt changes in their policies a cyclical nature will continue to persist. Thus, this guidance can be replicated in the workplace as it provides sufficient recommendations on how to create a policy to eliminate unlawful hair discrimination. Ultimately, this is merely a policy that suggests and prompts policy changes for the benefit of institutions to avoid them from

¹³ Demi Clarke-Jeffers, ‘Harassment at work: is the law failing?’ [2022] 27(1) CLJ
<<https://publications.coventry.ac.uk/index.php/clj/article/view/884/936>> accessed 27 December 2022.

¹⁴ Michelle De Leon and Denese Chikwendu, ‘Hair Equality Report 2019: “More than just Hair”’ (2019)
<<https://www.worldafroday.com/hair-equality-report>> accessed 18 December 2022.

unlawfully discriminating. Furthermore, it is reiterated throughout the guidance that it is simply a tool. This indicates that there is a choice whether to incorporate it into school policy, but with the potential of court action if not followed. Further, this policy becoming statutory is salient in creating awareness and knowledge for staff and those impacted, who will feel comfortable enough to raise these issues.

Presented within the guidance is an extensive and advantageous list and/or requirements that can be considered when developing policies. However, can this remedy the present problem of harassment in the workplace? It is a useful tool to use when considering improvements in developing policies if used appropriately and purposefully, and thus can be extremely advantageous for current employees in the workplace to feel more comfortable and at ease to know that they have a policy that is conscious of the characteristics that they possess. Thus, there will be less confusion or dispute about how they decide to wear their hair as a specific style, or have it covered. However, currently it remains as a policy that has not been embedded within legislation, and this could cause hesitation to rely on or to make their employees aware of such policy.

The EHRC provides several examples which intersect each other and which seemingly disputes the ideology that the protected characteristics in actuality are not ‘too complicated’ or ‘burdensome’.¹⁵ The EHRC provide simple case law examples that reveal that there can be overlaps, including acknowledgement and awareness of this. An example which the EHRC provides is the intersection between disability, race and gender: the EHRC provided rationales, which is beneficial as it provides a comprehensible visual framework towards the intersectional characteristics.

Throughout 2022, it has been observed that an increasing amount of employers have made the decision to be actively involved in the Halo Code Initiative. This is commendable and highlights the importance of employees within the workplace and encourages celebration towards inclusivity and begins to build safe environments for individuals to express their self through their ‘crowning glory.’¹⁶

Conclusions

As suggested previously, the inclusion of the Halo Code as law would be beneficial for employees and employers, not only to acknowledge that there is a mandated law to protect against harassment, but also to require cultural competency training within the workplace. Cultural competency training would be advantageous for everyone within the workforce as well as educational institutes, allowing them to be aware, understand and learn about the cultural values and beliefs of the issues that Black and Muslim women experience.

The positive recommendations from the EHRC radiate significant positive steps in the right direction. Proposing for Black educators and role models to play an impactful role within education opens the doors to support and understanding, not only for educators, but also for the young people in the environment, who then become part of the workforce leading to a positive working environment.

¹⁵ Government Equalities Office, ‘Equality Bill: Assessing the impact of a multiple discrimination provision’ (April 2009) <<https://data.parliament.uk/DepositedPapers/Files/DEP2009-1229/DEP2009-1229.pdf>> accessed 28 December 2022.

¹⁶ Crystal Powell, ‘Bias, Employment Discrimination, and Black Women’s Hair: Another Way Forward’ (2018) 2018 BYU L Rev 933.

The above has demonstrated both law's success and deficiencies. The law has been successful in regulating harassment at work in terms of the definition provided by the Equality Act 2010, as well as dealing with general harassment claims. To reiterate, the duty of the law is to ensure that everyone is protected and can call on the law to assist them. By providing the platform for Black and Muslim women to feel protected is essential in order to deter the normalisation of harassment within education and the workplace.

Prior developments would suggest that the law is failing to regulate harassment in the workplace specifically in relation to Black women and their hair. Recent developments would indicate that there is steady progression being made, which begins at the formative educational institutions. This is positive and is surely leading in the right direction in supporting individuals' characteristics. This allows individuals the choice to wear their afro-textured hair or hairstyles accompanied by religious, cultural, or other protected characteristics in order to create policies that foster collectiveness and inclusivity. On the other hand, the law remains behind the US as the law has yet the suggested statutory guidance as the US has with the CROWN Act. Arguably, this issue does not position itself at the bottom of the agenda as previously argued, but rather it is on legislators' radars to be an important issue ripe for amendment. Support for this issue is paramount, and UK law needs to urgently work on this reform to help individuals, especially those that hold more than one protected characteristic, so that any claims of harassment can be dealt with effectively and appropriately.