

Privacy and Data Protection: Some Considerations Concerning Equal Opportunities Monitoring and Ethnicity Pay Gap Reporting in the UK

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Abstract - Equal opportunities monitoring involving the processing of 'special categories' of data has been conducted in the UK, mainly for the purpose of promoting and supporting diversity in the workplace under the premise of Social Justice – specifically, that everyone deserves equal access to employment, training, and professional development, solely on the basis of merit. Moreover, under the Equality Act 2010, no one should be subject to any direct or indirect discrimination, harassment, or bullying.

Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation, are ‘protected characteristics’ covered by discrimination law in the UK. Some of these personal data aspects are identified as a “special category” of personal data under the General Data Protection Regulation (‘GDPR’)¹ and the Data Protection Act 2018 (DPA).

This paper will look at the data protection challenges for organisations when collecting, processing, and storing Diversity and Inclusion (D&I) data, in the context of the gender pay gap reporting regime, and the UK’s government plans to extend such reporting to ethnicity pay gap.

1. Diversity and Inclusion

Promoting and supporting diversity in the workplace is a pivotal aspect of contemporary workforce management. Organisations’ conduct must be underpinned by the principles of equal opportunity, fairness, and transparency. Everyone has the right to be treated fairly - the right to equal access to employment, training, and development should be based solely on merit. In the UK, the Equality Act 2010 – covering, inter alia, age, disability, race, religion, gender and sexual orientation– sets the minimum standards, by prohibiting direct and indirect discrimination, harassment, and victimisation on the grounds of any of the defined protected characteristics.

In some circumstances, employers are required to conduct workplace monitoring, for example, under Gender Pay Gap Reporting requirements.² In addition to the employee’s gender, this

¹ UK GDPR as amended by Schedule 1 of The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019.

² The regulations requiring large employers to publish data on their gender pay gaps came into effect on 6th April 2017, with the first reports being due in April 2018. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 apply to private and voluntary sector organisations with 250 or more employees; The Equality

activity may also involve the collection and processing of information relating to employees' race and ethnicity, which under the GDPR and DPA2018, are aspects of information considered as a 'special category of personal data', therefore, some data protection restrictions apply.

Organisations rely on these sets of personal data to build fairer and more inclusive workplaces, as being that they are able to analyse their workforce ethnicity data, the resulting trends will better inform their decisions and policies. Although diversity and inclusion often appear together, they are not the same. The former relates to the acknowledgement of differences between people, and the latter values people's differences in order to create a "sense of belonging" — an employee's perception of acceptance within the workplace - no matter their backgrounds, experiences and identities.

2. Gender pay gap reporting

Since the introduction of the Gender Pay Gap Regulations³ in 2017, private and voluntary sector organisations with 250⁴ or more employees are subject to a requirement⁵ to report and publish their overall "mean and median pay gaps"⁶ for men and women⁷ - in terms of percentage difference.⁸

However, it is reported that 'a number of companies had filed mathematically impossible results, with gender pay gaps of more than 100%.'⁹, and by February 2019 'hundreds of companies' gender pay gap records still including inaccurate figures.'¹⁰ In June 2020, HR Lawyers Ward, R. and Heys, T., stated that 'It is difficult to find reliable data about the actual impact of gender pay gap reporting, but some reports claim that it has raised the level of women being recruited and promoted into more senior roles, while lowering overall bills by decelerating growth in men's pay.'¹¹

Act 2010 (Specific Duties and Public Authorities) Regulations 2017 apply to public bodies with 250 or more employees.

³ The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

⁴ In June 2019 the Government Equalities Office advised the Treasury Select Committee that the Government is considering extending gender pay gap reporting to employers with fewer than 250 staff.

⁵ At the time of writing, the UK Government suspended the gender pay gap reporting requirements to ease the burden on organisations dealing with the repercussions of the coronavirus outbreak.

⁶ The mean gender pay gap is the difference between the average hourly earnings of men and women, and the median pay gap is the difference between the midpoints in the ranges of hourly earnings of men and women.

⁷ The Equality Act 2010 gives women and men a right to equal pay for equal work. It replaced previous legislation, namely, the Equal Pay Act 1970, the Sex Discrimination Act 1975, and the equality provisions of the Pensions Act 1995.

⁸ See gender pay gap reporting methodology, Government Equalities Office and Advisory, Conciliation and Arbitration Service, < <https://www.gov.uk/guidance/gender-pay-gap-reporting-make-your-calculations>> accessed 30 December 2020

⁹ Frances Perraudin, What is gender pay gap reporting, and what does it mean?, The Guardian, 28 Feb 2019, < <https://www.theguardian.com/society/2019/feb/28/what-is-gender-pay-gap-reporting-and-what-does-it-mean>> accessed 30 December 2020

¹⁰ Ibid

¹¹ Rachel Ward and Tom Heys, Ethnicity pay reporting: will the UK government now act?, Ius Laboris, 17 June 2020, < <https://www.mondaq.com/uk/employment-and-workforce-wellbeing/955518/ethnicity-pay-reporting-will-the-uk-government-now-act>> accessed 30 December 2020

Regarding the gender pay gap, the Office of National Statistics (ONS) report of 3 November 2020¹² provided, inter alia, the following statistics relating to the pay period that includes 22 April 2020:

Among full-time employees the gender pay gap in April 2020 was 7.4%, down from 9.0% in April 2019; the gender pay gap among all employees was 15.5% in 2020, down from 17.4% in 2019, and the gender pay gap remained close to zero for full-time employees aged under 40 years but was over 10% for older age groups.

Despite the identified “data inaccuracy”, the results presented in the above statistical example seem to help the case for the achievement of equality in the workplace through the continued aggregation and processing of employees’ data, whilst it offers, to some extent, the grounds for legislation to address the ethnicity pay gap be implemented.

3. Ethnicity pay gap reporting

In general, the UK law approaches equal pay claims predicated on gender in a different way from equal pay claims grounded on other protected characteristics, such as disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.¹³ The former are brought under the equal pay provisions of Part 5 Chapter 3 of the Equality Act 2010, and the latter under the general discrimination provisions in Chapter 2 of the Act.

The 2017 Conservative Party’s election platform included ethnicity pay gap reporting as part of its programme. In October 2018, the UK Government started a consultation on ethnicity pay reporting¹⁴ which closed in January 2019; however, the outcome is yet to be published.

Nevertheless, recent governmental announcements indicate that UK employers may soon be required to extend their pay gap reporting to include employees from different ethnic backgrounds – by producing aggregated data demonstrating the ‘difference in the average hourly rate of pay between Black, Asian and Minority Ethnic (BAME) and non-BAME employees in an organisation, expressed as a percentage of average non-BAME earnings.’¹⁵

Regarding the ethnicity pay gap, the survey ‘Ethnicity pay gaps in Great Britain: 2018’¹⁶ published by the ONS on 9 July 2019, indicated that White workers were paid 3.8 per cent

¹² See ONS, Gender pay gap in the UK: 2020, Differences in pay between women and men by age, region, full-time and part-time, and occupation., <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2020>> accessed 30 December 2020

¹³ Margaret Downie, ‘Preferential Pay Protection: Does UK Law Provide Poorer Protection to Those Discriminated against on Grounds of Protected Characteristics Other than Gender?’ (2019) 19 International Journal of Discrimination and the Law 4.

¹⁴ See Department for Business, Energy & Industrial Strategy and Race Disparity Unit, Ethnicity pay reporting consultation, < <https://www.gov.uk/government/consultations/ethnicity-pay-reporting> > accessed 30 December 2020

¹⁵ Deloitte, Ethnicity pay gap report, < <https://www2.deloitte.com/uk/en/pages/growth/articles/ethnicity-pay-gap-report.html> > accessed 30 December 2020

¹⁶ See ONS, Ethnicity pay gaps in Great Britain: 2018, 9 July 2019, < <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/ethnicitypaygapsingreatbritain/2018> > accessed 30 December 2020

more than all other ethnic groups in 2018. The ‘Ethnicity pay gaps: 2019 report’¹⁷ produced the following results:

[T]he ethnicity pay gap between White and ethnic minority employees has narrowed to its smallest level since 2012 in England and Wales. Most of the minority ethnic groups analysed continue to earn less than White British employees but, in 2019, those in the Chinese, White Irish, White and Asian, and Indian ethnic groups all earned higher hourly pay than White British employees. The ethnicity pay gap is larger for men than women (though for most ethnic groups, men continue to earn more than women).

Again, the trends presented in the above statistical exercise seem to help the case for the achievement of equality in the workplace through the continued aggregation and processing of employees’ data. Depending on the accuracy of the data collected, there appears to exist a correlation between the exercise of collecting and reporting employees’ data with the narrowing of the pay gaps. Perhaps, such data processing activities promote a higher level of awareness from organisations towards a culture of equality?

4. Data Protection

A 2019 PwC’s report underlines the fact that a significant data collection exercise must be undertaken to enable organisations to analyse their ethnicity pay gap, a process that requires a good understanding of GDPR and related legislation:

Personal data regarding ethnicity is classified as a special category of personal data under the GDPR. When processed, such data may create significant risks to employees’ fundamental rights and freedoms, for example, resulting in unlawful discrimination. The GDPR is designed to protect individuals. The GDPR doesn’t prevent the collection of ethnicity data, however, it is important organisations consider the GDPR requirements that must be addressed before starting such collection.¹⁸

Under GDPR, employers can collect, process and store employee’s personal data for several purposes, namely, recruitment, payroll, monitoring and appraisal, sickness register and evaluation reports. The GDPR specifically refers to the processing of employees’ personal data in the context of special categories of personal data.¹⁹

¹⁷ See ONS, Ethnicity pay gaps: 2019, 12 October 2020, < <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/ethnicitypaygapsingreatbritain/2019>> accessed 30 December 2020

¹⁸ PwC, Taking the right approach to ethnicity pay gap reporting, March 2019, < <https://www.pwc.co.uk/human-resource-services/assets/pdfs/ethnicity-pay-gap-report.pdf>> accessed 30 December 2020

¹⁹ Article 9(2)(b) of the GDPR states that employee data can be processed when ‘processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment’.

The Regulation also determines that employees should be given the opportunity to ‘clearly distinguish the data to which he or she freely consents to being processed/stored and the purposes for which his or her data are stored’.²⁰ Moreover, employees should be informed about how the employer will use the data, and for how long the employer will store it.

In the UK, Schedule 1, Part 2 of the Data Protection Act 2018²¹ (‘DPA2018’), provides a comprehensive list of conditions which, if just one is met, enable the processing of the special categories of personal data, including, when the processing ‘is necessary for the purposes of identifying or keeping under review the existence or absence of equality of opportunity or treatment between groups of people specified in relation to that category with a view to enabling such equality to be promoted or maintained.’, or, when processing ‘is carried out as part of a process of identifying suitable individuals to hold senior positions in a particular organisation, a type of organisation or organisations generally’.

Personal data revealing racial or ethnic origin is considered ‘special category’ data under the UK data protection law, and its processing is generally prohibited unless a condition applies. The DPA2018 lists two conditions which are available to employers when processing data revealing racial or ethnic origin.

The first condition is a substantial public interest condition for Equality of opportunity or treatment.²² The condition applies in relation to the following personal data: (i) Personal data revealing racial or ethnic origin, (ii) Personal data revealing religious or philosophical beliefs, (iii) Data concerning health, and (iv) Personal data concerning an individual's sexual orientation, where the processing

[I]s necessary for the purposes of identifying or keeping under review the existence or absence of equality of opportunity or treatment between groups of people specified in relation to that category with a view to enabling such equality to be promoted or maintained.

However, the processing does not meet the condition if: (i) it is carried out for the purposes of measures or decisions with respect to a particular data subject, (ii) it is likely to cause substantial damage or substantial distress to an individual, and (iii) an individual who is the data subject (or one of the data subjects) has given notice in writing to the controller requiring the controller not to process personal data in respect of which the individual is the data subject (and has not given notice in writing withdrawing that requirement).

On 1 October 2010, general positive action provisions came into force,²³ allowing employers to target measures such as dedicated training to groups, such as women or people from ethnic

²⁰ European Union Agency for Fundamental Rights and Council of Europe, Handbook on European Data Protection Law (2018 Edn, Publications Office of the European Union).

²¹ Data Protection Act 2018 (c.12).

²² See Schedule 1, Part 2 (8) of the Data Protection Act 2018.

²³ Positive action applies to the following protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (including ethnic or national origins, colour and nationality), religion or belief (including lack of belief), sex, and sexual orientation.

minorities, who are under-represented or disadvantaged in the workplace, or to meet their particular needs.²⁴

To avoid a breach of employer's obligations under data protection law, when an employer processes employees' information 'for the purposes of measures or decisions with respect to a particular data subject', under the positive action provisions of the Equality Act 2010, for example, to promote equality of opportunity, the employer must do so under Article 6(1)(c) GDPR - 'compliance with a legal obligation to which the controller is subject', and Article 9(b) GDPR - 'for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law'.²⁵

The second condition under DPA2018 available to employers when processing data revealing racial or ethnic origin is a substantial public interest condition of 'Racial and ethnic diversity at senior levels of organisations'.²⁶ This condition allows for the processing of personal data revealing racial or ethnic origin, if the processing (i) is carried out as part of a process of identifying suitable individuals to hold senior positions in a particular organisation, a type of organisation or organisations generally, (ii) is necessary for the purposes of promoting or maintaining diversity in the racial and ethnic origins of individuals who hold senior positions in the organisation or organisations, and (iii) can reasonably be carried out without the consent of the data subject. An employer cannot rely on this condition if the processing is likely to cause substantial damage or substantial distress to the employee.²⁷

A limitation of this second condition is that employers are prevented from processing personal data revealing racial or ethnic origin of employees which are not being considered for senior level positions.²⁸

Even though the Data Protection Act 2018 and the Equality Act 2010 empowers, to a certain extent, employers to take positive action to support and promote employees in relation to their 'protected characteristics', it doesn't make it a compulsory task to take the positive action, therefore, before initiating any personal data processing or monitoring activity concerning race and ethnicity (or any other special category data), it is important to understand and address eventual risks that may be created by conflicts of the law, through a periodical review of these processing activities, and the conduction of a Data Protection Impact Assessment (DPIA).²⁹

Moreover, appropriate organisational policies must be in place, setting out the purpose of processing activities involving these data sets, namely, where it relies on the substantial public interest condition set out in the DPA2018. The record of processing activities (ROPA) must

²⁴ On this matter, the UK Government published specific guidance for employers, which is available at http://www.equalities.gov.uk/staimm6geo/pdf/401727_EqualityAct2010_PositiveAction_acc.pdf

²⁵ GDPR, Article 9(b)

²⁶ See Schedule 1, Part 2 (9) of the Data Protection Act 2018.

²⁷ See Schedule 1, Part 2 (9)(3) of the Data Protection Act 2018.

²⁸ See Schedule 1, Part 2 (9)(4) of the Data Protection Act 2018.

²⁹ Article 35 GDPR states that a data protection impact assessment should be made where personal data are processed for taking decisions regarding specific natural persons following any systematic and extensive evaluation of personal aspects relating to natural persons based on profiling those data or following the processing of special categories of personal data, biometric data, or data on criminal convictions and offences or related security measures.

also include the condition relied on, the lawful basis under Article 6 GDPR, as well as correspondent data retention schedules.³⁰

Inadequate processing of employees' special category data can lead to the UK's Information Commissioner's Office (ICO) intervention, which may result in hefty fines for breaching of the GDPR and DPA2018, suspension of data transfers, prohibition of further data processing, and civil law actions. Moreover, employment actions, namely, unfair dismissal, discrimination and whistleblowing claims could be triggered as a result of organisations' poor data processing practices.

5. Conclusion

There is still a long path to walk regarding equal opportunities and diversity, namely, regarding bridging legislative gaps between the Equality Act 2010 and data protection law. It seems clear that the current legal framework is susceptible to creating obstacles in how organisations address diversity, monitor employees and conduct associated data processing activities.

Organisations' managers must bear in mind that although aspects of data such as age, race and ethnicity are protected characteristics under the Equality Act 2020, under data protection law, employers are under an obligation to protect employees from discriminatory events emerging from the processing of such data. Therefore, a good understanding of both the application of positive action provisions under the Equality Act 2010, and data protection law, will help organisations to protect the fundamental rights and freedoms of their employees in the most appropriate way.

Although the findings of this study enhance the understanding of the effects of processing of sensitive data in the employment context, namely, in the context of the gender pay gap reporting regime, and the UK Government's plans to extend such reporting to ethnicity pay gap, further research is necessary in order to allow a more comprehensive understanding of the issues raised in the present work. Additional studies could continue to investigate such effects, perhaps in a broader employment spectrum.

In the meantime, to prevent negative data protection impacts, an approach to personal data processing for the purposes of gender and diversity (or ethnicity) reporting, should be grounded on anonymised data collection and analysis, or, if not possible, anchored on the implementation of appropriate technical and organisational measures, as described in article 25 GDPR, such as pseudonymisation, to ensure the highest level of protection of the rights and freedoms of individuals.

³⁰ See GDPR, Article 30.