In light of the government's new Immigration Bill, which will require all public sector workers in customer facing roles to speak fluent English, our employment & equalities experts consider whether is it appropriate to stop workers speaking their native language at work, or to require them to only speak English during working hours.

We live in a multi-cultural society, and have welcomed people of all nationalities for centuries. There are sectors of the UK workforce which would crumble without workers from other countries - construction, the care industry, the NHS, hospitality and catering to name but a few. The government's new Immigration Bill will require all public sector workers in customer facing roles to speak fluent English, citing care workers in particular.

Taking this a step further, is it appropriate to stop workers speaking their native language at work, or to require them to only speak English during working hours?

**Kelly v Covance Laboratories Limited**

In October 2015 the Employment Appeal Tribunal (EAT) had to address this very issue in the case of Kelly v Covance Laboratories Limited. The case concerned a native Russian speaker who claimed direct discrimination and harassment because of her race when told not to speak Russian at work.

The Tribunal held it was possible for such an instruction to amount to an act of direct race discrimination or harassment. Language is "intrinsically part" of nationality, but in this case, there had been no discrimination. The employer had a reasonable explanation for requiring Ms Kelly not to speak Russian, which was unrelated to her nationality or national origins (included within the definition of race under the Equality Act 2010).
Covance carries out animal testing. It has previously been targeted by militant animal rights activists who infiltrated its workforce and subjected a number of employees to violent assaults. In the context of their security requirements, concerns arose about suspicious behaviour by Ms Kelly.

Against this background, an instruction to refrain from speaking in her native language at work in order that conversations in the workplace were capable of being understood by its English-speaking managers was not discriminatory. The instruction was explained as arising from a reasonable security concern rather than Ms Kelly's nationality - the same instruction was given to two of her colleagues not speaking English at work. The appeal was dismissed.

While Ms Kelly lost her case, it is a reminder that this could have gone the other way. Looking back over the handful of cases related to languages at work shows that as ever with employee relations, it depends on not just what you say, but how you say it.

What do we already know about language discrimination?

- Language, being intrinsically linked to nationality, is a protected characteristic under the Equality Act 2010.
- Prohibiting someone from speaking in their own / native / mother tongue is likely to be direct race discrimination, unless it was done for a reason unconnected to their race.
- Colleagues speaking another language at work when not everyone can join in probably wouldn't be direct discrimination, but could be harassment.
- Not taking a foreign speaking worker’s complaint of harassment seriously (when they were accused of being rude and exclusive when speaking their native tongue during rest breaks) can be harassment.

So how can employers apply these principles in the workplace? Let’s remind ourselves of the legal framework, then consider the practicalities.

A brief reminder of the legal framework

Direct discrimination is about treating someone less favourably than someone else in materially similar circumstances because of their race, nationality, ethnic origins, disability etc. For example, 'don't speak Polish at work'.
It cannot be justified (except for age discrimination), so the only defence is to show the actions were for reasons unconnected to the protected characteristic.

**Indirect discrimination** is harder to spot but more common in the workplace. It's where the application of a rule, such as 'you must speak English at work', is applied to everyone, but has a disproportionate impact on a sub-group of the whole, such as workers whose English is not fluent.

It can be justified if the employer can show the rule was a proportionate means of achieving a legitimate aim. This means having a strong business objective, and there being no less discriminatory way of achieving it. It's this second part that is hard to get home on.

**Harassment** is unwanted conduct directed at someone because of a protected characteristic that has the purpose or effect of violating their dignity or creating a degrading, offensive, intimidating or hostile environment. It doesn't matter if the harasser didn't mean it to be degrading or offensive, the effect is key (although there is a reasonableness caveat).

**Victimisation** specifically means treating a person less favourably because they have complained (or intend to complain) about discrimination, or because they have given evidence in relation to another person's complaint.

It's important to remember that language is not just about nationality and race, but it can equally be linked to a disability. A worker's first language may be British Sign Language, not spoken English, or their ability to speak English may be affected by a disability.

**So how do you strike the right balance?**

As explained above, telling a worker that they cannot speak their native language at work is likely to be direct race discrimination. Instead, requiring all workers to speak English may be indirectly discriminatory, which can potentially be justified. So what justification might you rely on?

Construction and healthcare industry employers may consider it is necessary for health and safety reasons. The need to clearly communicate about dangers, risks and safe processes could be a legitimate aim. But on sites where the majority of workers are not native English speakers, can communication be more effective in their second language?

Regulated sectors such as banks may require workers to speak English with colleagues and on client calls so that they can ensure risk compliance. But when most banks now
offer specific services to foreign speaking customers and clients, how real is this need?

For many roles in the workplace, communication is key. There is clearly a legitimate purpose in requiring those who have to communicate with clients, customers and service users to be able to communicate effectively in English.

The lines become blurred when service users ask workers to speak in their native language to ensure they can communicate effectively. It’s arguable that a teacher should speak in their student’s language at times to ensure they discharge their duty of care towards them.

What about communication between colleagues? So far, the Tribunals have accepted a School’s policy of requiring school teachers to speak English in the classroom, to one another regarding work issues, or in front of children.

The Equality Act Employment Code of Practice acknowledges that English is the business language of Britain and is likely to be the preferred means of communication in most workplaces. But it gives a clear steer on workers’ own time, warning employers who require them to use a particular language during work breaks to ensure they avoid discriminatory consequences.

So what’s the practical solution?

1. Consider whether it’s necessary to require everyone, or groups of workers to speak English during their working day. Could it benefit the organisation and its users for workers not to speak English?
2. Does having English as the predominant language have a disproportionate impact on some of the group, or might it be degrading, offensive or intimidating?
3. Could you achieve your objective in a less discriminatory way?
4. Could you justify requiring English to be spoken in group and formal procedural situations, but allowing foreign languages during breaks and among groups of workers who all speak the same language (if they revert to English when someone who doesn't understand their common language joins the group)?
5. Should you try break down language barriers by offering language classes, English or foreign languages relevant to your workforce?
6. Involve your staff! Ask them what they think is reasonable and what makes them feel included or left out.

This really comes down to respect at work, and whether people feel trusted, safe and
included. It will depend on the business needs and mix of staff, but hopefully these practical pointers will help to navigate employers to a solution that everyone can work with.

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