

THE CHALLENGE OF OVERCOMING INSTITUTIONAL BARRIERS TO END RACIAL DISCRIMINATION IN THE WORKPLACE

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- *The case of John Jak Becerra in Colombia* •

ABSTRACT

Colombia is one of the countries with the most anti-discrimination laws in Latin America. In this rare legislative cocktail, there are very specific laws, such as the anti-discrimination law that criminalises discrimination, as well as more general laws, such as the law on harassment at work, which includes a clause prohibiting harassment based on race. Despite these various regulatory tools, the justice system has not succeeded in altering the situation of victims of racial discrimination. This is due to institutional barriers that make the anti-discrimination tools ineffective. These obstacles range from companies and public officials' lack of capacity to process the complaints, to deficiencies in the design of legal mechanisms to address discrimination. This situation is clearly illustrated by the case of John Jak Becerra, who was a victim of racial discrimination in the workplace and who, despite his attempts to use all the mechanisms available to him, was forced to bear the impacts of racial discrimination at work. This led the Colombian Constitutional Court to hand down a ruling ordering the companies and the Ministry of Labour to adopt corrective measures on racial harassment in the workplace.

KEYWORDS

Harassment | Work | Employment | Race | Labour discrimination

1 • The case

John Jak Becerra Palacios was born in the Department of Chocó in Colombia, a region where the majority of the population is Afro-Colombian, but his working life began in Bogotá where he has lived most of his life. He is the father of two children and the head of the household. John fought seven years to get the justice system to recognise that he had suffered from discrimination for being of African descent in a Colombian company where he worked as a warehouse assistant.

In October 2011, he denounced the abuse from his colleagues for the first time. The company not only ignored his appeal to end the situation, but also told him on several occasions that it was all in his imagination and decided to fire him without just cause.

This was when he began his crusade to bring his case before public administrative bodies, namely the Ministry of Labour. However, no institution helped him resolve his case and guarantee his right to freedom from discrimination. In 2016, John Becerra presented a new constitutional appeal with the goal of obtaining protection for several of his fundamental rights violated by his employer, the Ministry of Labour and the public prosecutor's office. The ministry took more than three years to respond negatively to his complaint for labour harassment, whereas the public prosecutors never answered his report denouncing the crime of racial discrimination.

For his constitutional appeal, John had the support of Dejusticia,¹ which argued before the Colombian Constitutional Court that the administrative and legal proceedings for addressing cases of racial discrimination in the workplace were ineffective. Even though Dejusticia does not usually defend individual lawsuits, John's case represented an opportunity to move forward on the protection of the labour rights of the Afro-Colombian population. In early 2016, the organisation decided to offer legal support for the case, as it contained empirical elements that the organisation had found in several studies that it carried out on labour discrimination on racial grounds.

Finally, it was only in July 2018 that the Court gave notice of its decision,² which recognised that John Becerra was the victim of racial discrimination and ordered structural measures to be adopted to make existing legislation prohibiting harassment based on race in the workplace more effective. With this ruling, the Colombian Constitutional Court established parameters for effectively punishing racist practices in working environments. This ruling set an important precedent that can serve as a basis for advancing further on the protection of the labour rights of Afro-descendants in the region.

In the described case, in which I had the opportunity to participate in the preparation of the defence together with other Afro-descendant lawyers, there were several challenges to filing it, especially convincing the constitutional judge that this discrimination was a systematic phenomenon that merited the adoption of structural measures. For this, it was necessary to

put the problem of discrimination against Afro-Colombians in the workplace into figures and demonstrate the shortcomings of the legislation and the existing mechanisms for addressing the impacts of harassment at work based on race.

2 • The employment situation of Afro-Colombians: barriers to access to employment, unskilled jobs and difficulties in keeping their jobs

The story of John Jak Becerra is but one of many cases of its kind in Colombia and the region. Even so, there are many difficulties in defending the victims of racial discrimination in the workplace. One of the obstacles is the lack of numbers and studies to describe discrimination against Afro-Colombians³ in the working environment as a systematic and structural phenomenon. This is one of the points on which Dejusticia centred its support for the lawsuit; for the case, it conducted an investigation in which it gathered several relevant findings on the labour conditions of Afro-Colombian workers in Colombia.

First of all, it is worth clarifying that when we talk about discrimination in the workplace, we are referring to systematic practices that put certain populational groups at a disadvantage in the labour market in terms of access, types of occupation, advancement opportunities and job retention. This practice involves differential treatment based on race, colour, sex, sexual orientation and motives other than one's qualifications and skills. It is a problem that has its origins in historical, social and economic factors with no objective basis for justification, but that have concrete impacts on people's lives.⁴

In cases of discrimination at work, prejudices usually play a fundamental role, as differential treatment is based on social imaginaries with negative biases towards minority groups. One of the common problems that employees belonging to these groups face are the stereotypes against them. Their negative impacts go beyond mere tension in the workplace, as they affect the opportunities for personal, economic and professional development and the social integration of the people suffering from discrimination.

In Colombia, African descendants live in social and economic conditions that are more precarious than those of the rest of the population.⁵ This is evident when we study the Afro-Colombian population's participation in the labour market, where we find troubling disparities in terms of barriers to access, the types of occupation held and difficulties in staying employed. In John Becerra's case, providing concrete numbers to qualify and quantify these three aspects of the phenomenon was key. In the case, they were described as follows.

In relation to **barriers to access**, according to the study *La discriminación racial en el Trabajo* (Racial discrimination in the labour market) carried out by Dejusticia and Racial

Discrimination Watch Racial,⁶ race is a determining factor in one's chances of finding a job in the city of Bogotá. Based on the results of an exercise conducted for this study, it was found that the probability of being called for an interview decreases by 7.79% if the applicant is Afro-descendant, whereas for white people, it increases 3%.

As for the **type of occupation held**, in *Informe Raza y Derechos Humanos* (the Race and Human Rights Report) by Racial Discrimination Watch,⁷ it was reported that Afro-Colombians are overrepresented in low-level manual jobs,⁸ which correspond to unskilled workers in the service sector. It was found that over half of Afro-descendant workers are situated at this level (53.5%) in comparison to around 40% of mixed-raced workers. In contrast, as the skill level increases, the presence of Afro-Colombian people decreases and the gap between the latter and mestizo workers grows wider. In high-level manual positions, 23% of workers are Afro-descendants and 31% are mixed-race. In principle, this allows us to confirm the existence of a phenomenon of racial segregation in the labour market in which an individual's phenotype is a factor that determines his or her opportunities to hold a particular trade or position.

Similarly, Afro-Colombian workers tend to be victims of discrimination at work, which is directly related to their **difficulties in keeping their jobs**. This is what the study *Precario pero con trabajo: ¡otros están peor!* (Precarious, but employed: others are worse off!) revealed, which was conducted in 2012 by researchers from several Colombian universities.⁹ The study documented the lack of decent working conditions of the jobs held by Afro-Colombians. It also highlighted a general perception among workers that discrimination exists in their working environment, mainly against Afro-descendants (36.6%), followed by people from other ethnic groups and older adults (17%).

The figures above were key for making the case to prove and for convincing the judge that race is a dominant factor in discrimination in the working environment of private companies. It also showed that this problem manifests itself in three ways: first, as obstacles to accessing employment due to the institutionalisation of discriminatory practices in the recruitment process; second, in the predominant role played by stereotypes which lead more technical and specialised positions to be reserved for workers who are not of African descent; and third, as harassment from other employees in the same or higher-ranking positions, which generates hostile working environments that make it difficult for Afro-descendant employees to keep their jobs.

This was enough to demonstrate the need to issue structural orders geared towards increasing the effectiveness of existing legal mechanisms to address racial discrimination at work in private companies.¹⁰ While it would have been desirable to request measures to counteract the barriers to access to employment and to advancement opportunities at work, due to technical legal issues, this case only allowed us to concentrate on demanding measures to discourage tolerance of acts of discrimination within companies, which is the reason why Afro-descendant employees lose their jobs.

3 • An important precedent in the struggle against race-based harassment in the workplace

This lawsuit is important because it succeeded in demonstrating to the Colombian Constitutional Court the challenges that Afro-descendant workers face once they overcome the obstacles to obtaining a job in the formal labour market. For Afro-descendants, getting hired is only the first step; what is difficult for them is to keep their job despite having to work in hostile work environments due to companies' tolerance of acts of racial discrimination. John's case clearly reveals the obstacles imposed by not only the company, but also the state bodies that have the obligation to prevent and address harassment based on race in the workplace.

In its ruling on the case, the Court analysed harassment at work at three levels. First, it affirmed that the offensive expressions used by work colleagues constituted harassment in the workplace. This sets an important precedent, as it recognises that language does matter and therefore, it is inadmissible to use expressions that refer to an employee's race and are used to offend them. As a result, it was established that verbal abuse from work colleagues constitutes harassment at work and that the company cannot allow this kind of behaviour to continue.

Secondly, the ruling established that private companies have the duty to prevent and condemn this type of situation in the workplace. It makes it clear that the company must not only guarantee compliance by adopting mechanisms to stop race-based harassment at work; it must also ensure that these mechanisms are effective and efficient. In other words, it is not enough to organise moments of interaction or fraternisation; the procedures for processing complaints of discrimination must serve the purpose of resolving racial conflicts.

And thirdly, it ordered the Ministry of Labour to train its employees to receive and duly process complaints for harassment at work on the basis of race. It also forced the ministry to develop a methodology for treating victims of racial discrimination at work and gave it a 6-month deadline to do so. This is crucial for guaranteeing victims of racial discrimination access to justice, as they often get caught up in red tape, without fully resolving their problems.

Even though the ruling represents an important step forward in the struggle for racial justice in employment, there is another step that remains to be taken. One of the main outcomes expected from this case was the adoption of regulations on companies' civil liability for tolerating acts of racism in the workplace. This is important because it would open up the possibility of obtaining monetary compensation based on the logic of compensation for moral and material damage caused by the companies' irresponsible actions or omission that bring harm to victims of racial discrimination.

There is no doubt that the Court's sentence represents progress in the area of legislation needed to combat racial discrimination at work in Colombia. However, as the case of John

Becerra clearly shows, regulations are insufficient if they are not enforced and for this to happen, changes in the organisational culture of companies and public authorities that are responsible for preventing and halting harassment based on race in the workplace are needed. On one hand, by making such a change in companies, one ensures that there will be awareness of the fact that acts of discrimination will not be tolerated and that efficient conflict-resolution mechanisms will be developed. Changes to the culture of state institutions, on the other hand, will mean more efficient, effective and timely processing of complaints of racial harassment at work and consequently, more adequate protection of the right of victims of racial discrimination at work. Therefore, the orders issued by the Constitutional Court represent a major step in ensuring more effective protection for the labour rights of Afro-descendant workers employed by the private sector in Colombia.

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Addendum: As an Afro-Colombian lawyer dedicated to litigation on racial justice, I would like to express my sincere gratitude to John Jak Becerra Palacios for his courage and bravery. He sets a good example for our generation.

NOTES

1 • Dejusticia. Centro de Derecho, Justicia y Sociedad is a non-governmental organisation (NGO) based in Colombia that is dedicated to socio-legal research and public interest litigation.

2 • "Sentencia T-572/17," Corte Constitucional de Colombia, 2017, accessed November 15, <http://www.corteconstitucional.gov.co/relatoria/2017/t-572-17.htm>.

3 • In the official figures from the last census conducted in 2005, it was reported that Afro-Colombians are 10% of the country's entire population. However, several social organisations affirm that this number is low, which is due to individuals' lack of self-recognition in racial terms. They estimate that African descendants make up between 19% and 30% of the population.

4 • See: "Q&As on business, discrimination and equality," International Labour Organisation (ILO),

2011, accessed November 15, 2018, http://www.ilo.org/empent/areas/business-helpdesk/WCMS_159778/lang-es/index.htm

5 • César Rodríguez Garavito, Tatiana Alfonso Sierra and Isabel Cavalier Adarve, *Raza y Derechos Humanos en Colombia: Informe Sobre Discriminación Racial y Derechos de la Población Afrocolombiana* (Bogotá: Ediciones Uniandes, 2009).

6 • César Rodríguez Garavito, Juan Camilo Cárdenas C., Juan David Oviedo M. and Sebastián Villamizar S., *La Discriminación Racial en el Trabajo - Un Estudio Experimental en Bogotá* (Bogotá: Ediciones Antropos, 2013).

7 • César Rodríguez Garavito *et al.*, *Raza y Derechos Humanos en Colombia*, 2009.

8 • Occupation is defined as "a set of jobs whose main tasks and duties are characterised by a high degree of similarity". Based on this concept,

the ILO established the International Standard Classification of Occupations (ISCO), which are divided up according to the skills needed to perform them. In this system, the first level groups together simple and routine physical or manual tasks. Within the skill levels, there are also sub-divisions in which jobs are classified according to the level of skill or experience required for the job. Not all the positions regrouped in the same level are equal, as even though a factory assistant and a machine operator both belong to level 1, their occupations have been classified in different subgroups; a machine operator is considered a higher-level position. See: “Clasificación Internacional Uniforme de Ocupaciones CIUO -08 A.C. Adaptada para Colombia,” Departamento Nacional de Planeación de Colombia, 2015, accessed November 15, 2018,

https://www.dane.gov.co/files/sen/nomenclatura/ciuo/CIUO_08_AC_2015_07_21.pdf.

9 • Guillermo Correa Montoya, Alexander Pérez Álvarez, Víctor Hugo Viveros Bermúdez and María Edith Morales, *Precario Pero con Trabajo: ¡Otros Están Peor! Déficit de Trabajo Decente en la Población Afrocolombiana Cartagena, Buenaventura, Cali y Medellín 2009-2010* (Medellín: Escuela Nacional Sindical, 2012).

10 • While previous cases of racial discrimination at work did exist, in these cases, the state was the employer. This is not a minor issue, as constitutionally, one can demand that the state adopt higher standards of protection for the right to equality and to freedom from discrimination. Conversely, there is the idea that private companies are exempt from these constitutional obligations.



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