

Religious Discrimination

In employment



Overview

Since the mid 1970s UK law has prohibited discrimination on the grounds of race and sex in the employment context. Protection from discrimination by reason of religion or belief – outside of Northern Ireland – has been a long time coming. On 2nd December 2003, the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) came into force. This legislation implements the religious discrimination aspects of the EC Equal Treatment Framework Directive, and it applies to England, Scotland and Wales.

The definition of religion or belief

In the Regulations, 'religion or belief' is defined as being any religion, religious belief or philosophical belief. The wording of the Regulations was amended to make it expressly clear that those of no religious belief are also protected, for example, atheists.

To amount to a philosophical belief under the Regulations, the belief must be genuinely held, and meet the following criteria:

- It cannot be a mere opinion on information currently available, it must be a genuinely held belief
- It must relate to a weighty and substantial aspect of human behaviour
- It must attain a certain level of cogency, seriousness, cohesion and importance
- It must be worthy of respect on a democratic society, not be incompatible with human dignity, and not conflict with the fundamental rights of others
- It must be similar to a religious belief (only in the sense of status or cogency, but not in ideas).

Case law has established that the definition covers a belief in climate change, or pacifism, or veganism, although not a belief in Jedi-Knights. It can even extend to political beliefs such as Marxism, Communism or free-market Capitalism, but not merely to membership of a political party. Scientific beliefs can also be covered, for example a belief in Darwinism, if this is the basis for discrimination suffered. A belief also need not be shared by others to constitute a 'belief' under the Regulations.

Traditional established religions are covered by the Regulations without meeting the test for philosophical belief, but it's unclear how far the Regulations will provide protection to those people who follow less traditional faiths. Consideration is given to whether there is collective worship, whether there is a clear belief system and whether there is a profound belief affecting way of life or view of the world in determining whether the religion or belief is covered by the Regulations.

The protection provided by the Regulations

Who is protected? – In the employment sphere, the Regulations apply to recruitment, employment and vocational training. It is unlawful to discriminate against someone on the grounds of religion or religious belief, from the initial job application process through to dismissal. Under the Regulations, 'employment' is defined to include, 'work under a contract of service or of apprenticeship or a contract personally to do any work'. Workers, and not just the narrower category of employees, are protected. If you are supplied by your employer to work for another employer (contract workers), or are an office holder (company directors and members of some independent public bodies) you will also be protected. The Regulations extend still further, to the police, barristers, partnerships, providers of vocational training, employment agencies and trade organisations, among others. There is no opt-out clause for small employers.

What is prohibited? – The Regulations outlaw direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the employer. In fact, employers may be responsible for the acts of their agents, as well as the acts of their employees. Importantly, the Regulations also extend in limited circumstances to discrimination after the working relationship has ended. For instance, if a former employer provides a discriminatory reference, or refuses to provide a reference at all, due to a person's religion or belief, this could amount to unlawful discrimination.

Discrimination, Victimisation & Harassment

Direct discrimination – It is unlawful to treat a person less favourably on grounds of their religion, or belief, or lack of a religion or belief. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably than someone from another religion (or without that religion) or of a different belief has or would have been treated; and
- That this treatment was on the grounds of your religion, belief or lack of religion.

The less favourable treatment does not necessarily have to be on the grounds of your own religion or belief. For example, someone who is treated less favourably on the grounds of his wife's religion would be protected. The Regulations also protect those who are treated less favourably on the grounds of their perceived religion or belief. One example of this is where someone who is Hindu is treated less favourably because he is perceived to be a Muslim.

Indirect discrimination – The Regulations provide that a person also discriminates if an arrangement or feature relating to the employment (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all employees, but –

- Puts people of a particular religion, belief or lack of religion at a particular disadvantage when compared with people of another religion or belief;
- Puts the complainant at that disadvantage; and is not a proportionate means of reaching a legitimate aim (in other words is not justified).

The PCP must have been applied universally to all. For example, a PCP that all employees must work on a Friday evening would probably adversely affect those of the Jewish faith compared to other religions. Whether or not the PCP puts one religious group at a particular disadvantage compared to another will often depend upon the 'pool' of people considered. The employer must satisfy the tribunal that the PCP can be objectively justified. If this is established, a discrimination claim will fail.

Victimisation – It is unlawful to treat a person less favourably because they have made a complaint of discrimination. Discrimination by way of victimisation occurs when you are treated less favourably than another employee would be treated in similar circumstances, because you have done, you are about to do, or you are suspected of doing a 'protected act'. You may have done a 'protected act' if you have:

- Brought proceedings against the discriminator or any other person under the Regulations; or
- Given evidence or information in connection with proceedings against the discriminator or any other person under the Regulations; or
- Otherwise done anything in relation to the discriminator or any other person under or by reference to the Regulations; or
- Made allegations that the discriminator or any other person has committed an act which contravenes the Regulations. This would include raising a grievance of religious discrimination.

So for example, if you have made a complaint about religious discrimination and are later treated less favourably for doing so, you should be covered by the Regulations.

Harassment - Harassment on the grounds of religion, belief or lack of religion is a form of discrimination. It is defined as being:

- Unwanted conduct on the grounds of religion etc. that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An essential characteristic of the behaviour is that it is unwanted, and it is up to each individual to determine what is acceptable or offensive to them.

Exceptions

There are two general exceptions where the Regulations do not apply: these are a) safeguarding 'national security', and b) positive action. As far as the issue of positive action is concerned, any recruitment or promotion must be on the basis of merit. That said, policies which aim to attract applicants from under-represented religion or belief groups will not be incompatible with the Regulations.

Exceptions may also be made in limited circumstances where there is a 'genuine occupational requirement' (GOR) for a worker to be of a particular religion or belief. The Regulations differentiate between organisations which have an ethos based upon religion or belief and those which do not. Organisations without an ethos based on religion or belief must prove that a particular religion or belief is a requirement of employment and not just one of many relevant factors. For example, if the Prison Service wishes to appoint a Sikh chaplain for the spiritual wellbeing of Sikh prisoners, as an organisation that does not have a religiously based ethos the Service must show that religion is a central requirement of the role and that it is proportionate to apply that requirement. In this instance the Prison Service would be unlikely to be found to have breached the Regulations.

On the other hand, even if an organisation has a particular religious ethos this does not mean that all employees have to hold the beliefs of that religion. It will only be possible for the employer to show a genuine occupational requirement for a person performing a particular role to belong to the particular religion if the duties of the particular job require it. For example, if a mosque (which has a religion-based ethos) seeks to employ a caretaker, despite enjoying a broader discretion it may be difficult for the mosque to justify seeking only Muslim candidates as the role arguably does not have a religious component. However, if the mosque wished to employ someone to teach the Qur'an, it is likely to be lawful for the mosque to insist on candidates being Muslim.

A GOR on the grounds of religion or belief should not be used to discriminate on any other grounds such as sex, race or disability. In limited circumstances, a religious organisation may lawfully be able to discriminate on the grounds of sexual orientation or sex. As an example, the refusal to ordain gay bishops is not incompatible with the Regulations.

Questionnaires: getting the facts together

You can serve a questionnaire on your employer any time before lodging a claim at an Employment Tribunal or within 21 days from the date proceedings were lodged. The questionnaire can be used to ask your employer useful questions relating to your complaint. If your employer fails to reply to the questionnaire, or makes evasive replies, the tribunal may draw an inference of unlawful discrimination.

Time limits and grievance procedures/ACAS Code

Most claims will need to be brought in the employment tribunal within three months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on. Please note that in most cases, this time limit will no longer be extended where an internal grievance is lodged first as the rules relating to this have recently changed.

You will also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code. If your claim relates to matters that happened before 6th April 2009, or if it relates to matters that occurred ongoing through 6th April 2009 and you have lodged a grievance or tribunal claim about it, then different rules may apply in relation to grievance procedures and time limits. These issues can be complicated and you should take prompt legal advice if you think you may have a claim.

Remedies

If the tribunal finds that you have been unlawfully discriminated against, it may grant whichever of the following remedies it considers just and equitable:

- A declaration of the rights of the parties
- A recommendation that the employer take a particular course of action
- Re-engagement or reinstatement if the individual has been dismissed; and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by your employers discrimination.

And also in Goods, Services & Facilities


Since 30th April 2007, the laws on discrimination on the grounds of religion or belief have been extended into new areas beyond just the employment sphere, following the implementation of the Equality Act 2006. The discrimination now covered includes refusing to provide a product or service to a person of a particular religion or belief, or providing something of a lower quality or on inferior terms compared to that provided to others of another religion or belief.


Breach of the Regulations (technically known as 'breach of statutory duty') constitutes a tort or civil wrong – this means that claims must be brought in the County Court. The time limit for bringing a claim is six months from the date of the discrimination (or from the last of a series of acts of discrimination). The court has the discretion to allow a claim that is out of time, but you should not rely on this discretion. The court can award both financial and non-financial remedies – respectively monetary compensation or an injunction that 'rights the wrong'. Monetary compensation by way of injury to feelings is likely to be in the region of £600 – £6,000.

Contact Us

Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:

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