

Religious and Belief Discrimination in employment



Overview

On 2nd December 2003, the Employment Equality (Religion or Belief) Regulations 2003 (the '2003 Regulations') came into force. This legislation implemented the religious discrimination aspects of the EC Equal Treatment Framework Directive, and it applied to England, Scotland and Wales. As of 1st October 2010, all existing equality legislation (including the 2003 Regulations) was consolidated into the Equality Act 2010 ('The Act').

The definition of religion or belief

In the Equality Act, 'religion or belief' is defined as being any religion, religious belief or philosophical belief. Individuals with no religious beliefs, such as Atheists, are also protected. Major religions and beliefs (such as Christianity, Islam, Judaism, Hinduism, Sikhism, Humanism, Secularism and Paganism) are covered by 'The Act'.

To amount to a philosophical belief under 'The Act', the individual must genuinely hold the belief, and meet the following, fairly vague, criteria:

- It cannot be a mere opinion on information currently available, it must be an actual 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 in 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 the need to cut carbon emissions to avoid 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 Act'.

It remains unclear how far 'The Act' 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 Act'.

The protection provided by 'The Act'

Who is protected? - In the employment sphere, 'The Act' applies to recruitment, employment and vocational training. It is unlawful to discriminate against someone because of religion or belief, or lack of a religion or belief, from the initial job application process through to

dismissal. Under 'The Act', 'employment' is widely defined to include workers, those working under apprenticeships, Crown employees and members of the House of Commons and House of Lords. 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 Act' extends 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 Act' outlaws 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 and in some circumstances the acts of third parties (see harassment below). Importantly, 'The Act' also extends 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 because of 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 because of religion or belief
- That you can compare your treatment to someone (actual or hypothetical) with similar characteristics to yourself save for the religion or belief in issue
- That you were subject to disadvantage or detriment as a result of that treatment.

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the religion or belief of the individual being discriminated against.

'The Act' requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone of a different religion or belief, known as a comparator. Your comparator must be a person who in all other respects is in a similar or 'not materially different' position to you. The comparator can be a real person or hypothetical.

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

Indirect discrimination - 'The Act' provides 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 the PCP is not objectively 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. Recent caselaw suggests that justification factors can include the requirements of the job; and whether alternatives to potentially discriminatory arrangements have been offered by the employer. If this is established, a discrimination claim will fail. To succeed in an indirect discrimination claim, you must show that there are a group of people who share your belief who have been similarly disadvantaged – i.e. wearing a cross is not a requirement of Christianity, and if an individual is unable to show that the belief is a shared one, then an employer's dress code requiring no jewellery to be worn cannot be indirectly discriminatory.

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Victimisation - It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under 'The Act' or the 2003 Regulations; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under 'The Act' or the 2003 Regulations; or
- Doing anything in relation to the discriminator or any other person under or by reference to 'The Act' or the 2003 Regulations; or
- Making allegations that the discriminator or any other person has committed an act which contravenes 'The Act' or the 2003 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 unfavourably for doing so, you should be covered by 'The Act'. A protected act must be done in good faith.

Harassment - Harassment related to religion, belief or lack of religion is a form of discrimination. It is defined as being:

- Unwanted conduct related to religion or belief 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. In considering the effect of the conduct, the Tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

Employees who experience harassment related to religion or belief at the hands of a third party in the course of employment can claim against the employer if it can be shown that (i) the employer knew that the employee had been subjected to harassment on more than 2 occasions and (ii) the employer failed to take reasonable action to prevent a further act of harassment by the same or another third party. Third parties can include customers or contractors.

A claim can also be brought if harassment occurs because of an association with someone of a particular religion or belief, or if someone is perceived to hold a particular religion or belief.

Exceptions

There are two general exceptions where 'The Act' does 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 religious or belief groups will not be incompatible with 'The Act'.

Exceptions may also be made in limited circumstances where there is an 'occupational requirement' (OR) for a worker to be of a particular religion or belief. 'The Act' allows organised religions to apply a requirement related to sexual orientation, gender, transsexual persons and/or marital status if because of the nature of the job it is a necessary requirement to the doctrines of the religion, or to avoid conflict with the religious convictions of a significant number of the religion's followers. For example, the refusal to ordain gay bishops may not be incompatible with 'The Act'. Also, organisations with an ethos based on religion or belief may apply an OR if it can be objectively justified. 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 Act'.

On the other hand, religious organisations or organisations with a particular religious ethos will find it difficult to argue that all of their employees have to hold the beliefs of that religion. It will only be possible for the employer to show a 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 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.

Burden of Proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, 'The Act' provides that the claimant is required to establish clear facts which could enable the Tribunal to conclude that discrimination has occurred. It is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-religious/belief based explanation from the respondent, the Tribunal must draw an inference of discrimination.

Where an employer has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure. For example, an employer may have failed to follow the Codes of Practice in relation to the way in which they have investigated the employee's grievance or recruited an individual to a post.

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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 28 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 the correct legislation

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.

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).

If part of your claim arose before 1st October 2010, you should bring claims under 'The Act' and the 2003 Regulations. 'The Act' will be used in all cases where the claim arose after 1st October 2010 in its entirety. You should seek legal advice if you are unsure about which legislation applies to your claims.

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Remedies

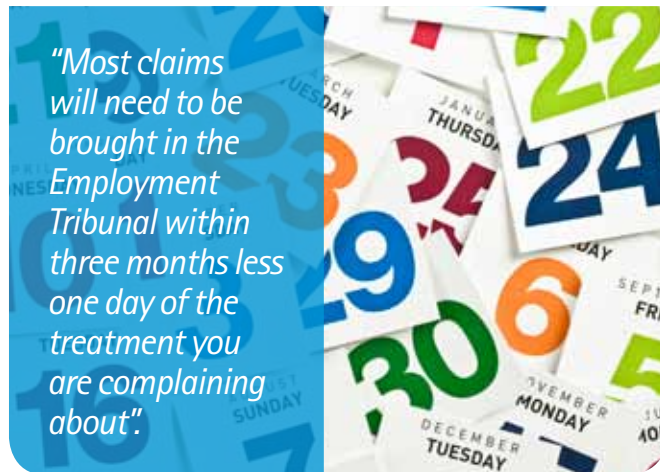
If the Tribunal finds that you have been unlawfully discriminated against, it may grant whichever of the following remedies it considers just and equitable:

- 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 successful in an unfair dismissal claim; 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 employer's discrimination.

And also in Service Provision

Since 30th April 2007, the laws on discrimination on the grounds of or because of religion or belief have been extended into new areas beyond just the employment sphere. 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 Act' (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. You cannot bring claims against a service provider for harassment related to religion or belief, although such claims can probably be dealt with as direct discrimination.




Contact Us

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