

Keeping the Faith

Religious Discrimination in Employment



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The EC Equal Treatment Framework Directive (No.2000/78) required Member States to introduce laws prohibiting discrimination on the grounds of religion or belief and sexual orientation by 2 December 2003 and age discrimination and disability by 2 December 2006.

On 2 December 2003, The Employment Equality (Religion or Belief) Regulation 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.

Definition of religion or belief

In the Regulations, "religion or belief" is defined as being any religion, religious belief or similar philosophical belief." This does not include any philosophical or political belief unless that belief is similar to a religious belief. Traditional established religious faiths will undeniably be covered. However, it is unclear, how far the Regulations will provide protection to those people who subscribe to less traditional faiths. Given the ambiguity of this definition, its exact scope will have to be determined by tribunals and courts.

The Protection Afforded by the New Regulations

Persons Protected

The Regulations apply to recruitment, employment and vocational training. It is therefore unlawful to discriminate against a person 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, "employment under a contract of service or of apprenticeship or a contract personally to do any work." Workers and not just employees are protected. Individuals who are supplied by their employer to work for another employer (contract workers) as well as some office holders (i.e. company directors and members of some independent public bodies) will also be protected. The Regulations also apply 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.

The Behaviour Prohibited

The Regulations outlaw a number of different types of behaviour: direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the employer. Employers may be responsible for the acts of their agents as well as the acts of other employees.

Direct discrimination: This is where a person is treated or would be treated less favourably than another because of their religion or belief. This also covers the discriminator's perception of the person's religion or belief. It does not matter if the perception is right or wrong, in order to pursue a claim. Direct discrimination also extends to a person's association with a particular religion or belief and the refusal of a worker to comply with a discriminatory instruction against another.

Indirect discrimination: This is where a "practice, provision or criterion" is applied or would be applied equally to all persons, but puts or would put persons of a particular religion or belief at a disadvantage compared to other persons, unless it can be objectively justified.

Victimisation: Treating a person less favourably because he or she has made a complaint or allegation, or is assisting someone else who has taken action.

Harassment: A person on the grounds of their religion or belief has their dignity violated or is subjected to an intimidating, hostile, degrading or an offensive environment.

Importantly, the Regulations also extend, in limited circumstances, to discrimination after the working relationship has ended. An example of this would be where a former employer provides a discriminatory reference or refuses to provide one due to a person's religion or belief.

Exceptions

There are two general exceptions where the Regulations do not apply: safeguarding "national security" and positive action. With regard to the latter, any recruitment or promotion must be on the basis of merit. However, policies which aim to redress the impact of existing inequalities by, for example, attempting to attract applicants from a particular religion or belief 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 that do not have an ethos based on religion or belief must prove that a particular religion or belief is a determining occupational requirement. If an organisation wishes to claim that it has an ethos based upon religion or belief, which it must prove, then the discretion afforded to it is broader. In this case the organisation must show that the 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 well being of Sikh prisoners, as an organisation that does not have a religiously based ethos, then the prison service must show that religion is a determining factor. In this instance the prison service would not fall foul of the Regulations. Conversely, if a mosque (which is an ethos based organisation) seeks to employ a caretaker, despite enjoying a broader discretion, it may be more difficult for it justify its behaviour if it only seeks Muslim candidates. However, if the mosque wished to employ someone to teach the Quran, although being a Muslim is not a prerequisite, it would be justifiable for the mosque to insist on a Muslim candidate as it would fit in with the overall ethos of the organisation and help to promote its values.

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.

However, in limited circumstances a religious organisation may lawfully be able to discriminate on the grounds of sexual orientation or sex. For example, the refusal to ordinate gay bishops is not incompatible with the Regulations.
Tribunal Claims

There is no minimum service requirement to bring a claim under the Regulations. A complaint needs to be presented within three months of the discrimination occurring. The complainant can also serve a questionnaire on the respondent in order to obtain information relating to their complaint. Once the complainant has convinced a tribunal or court that an act of discrimination has been committed for which the employer is responsible, the burden of proof shifts to the employer to justify their behaviour. If a claim is upheld, a tribunal can make a declaration that there has been unlawful discrimination, and award compensation. There is no upper limit to the amount that can be awarded.

To find out more

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