

The Employment Equality (Religion or Belief) Regulations 2003:
the cases so far and anticipated issues

Origins:

1. The Employment Equality (Sexual Orientation) Regulations 2003 came into force on 1/12/03. The Employment Equality (Religion or Belief) Regulations 2003 (“the Regulations”) came into force on 2/12/03. Both derive from EU Council Directive 2000/78/EC of 27/11/00, which imposes a general framework for equal treatment in employment and occupation. Both follow the broad pattern of the Sex Discrimination Act 1975 and the Race Relations Act 1976.
2. The DTI published a set of Explanatory Notes, and ACAS produced a document giving “practical guidance” for employers and employees.

Structure of the regulations:

3. Both sets of regulations outlaw four types of conduct taken on a prohibited ground:
 - Direct discrimination;
 - Indirect discrimination;
 - Harassment; and
 - Victimisation.

Direct discrimination – an outline

4. The Regulations provide that:

3(1) A person ('A') discriminates against another person ('B') if -
(a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons

3(2) The reference in paragraph (1)(a) to religion or belief does not include A's religion or belief.

3(3) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Direct Discrimination: association

5. It is not specifically required that the prohibited ground on which a complaint of discrimination is founded will relate to the **personal** circumstances of the complainant. It is unlawful to treat an employee less favourably on the ground of **someone else's** religion or belief, as well as the ground of that particular employee's religion or belief.

Direct discrimination: perception

6. Direct discrimination on grounds of religion or belief can also include discrimination based on A's perception of B's religion or belief, whether the perception is right or wrong. The formula is therefore wide enough to cover cases where mistakes are made by the discriminator. If I am treated less favourably on the ground that I am thought to be Catholic, then it matters not that in fact I am not Catholic.

Direct discrimination: instructions

7. It is unlawful discrimination to treat someone less favourably because of that person's refusal to follow an instruction to discriminate on a prohibited ground.

Direct discrimination: reason and motive

8. It is specifically provided in the Regulations that the key phrase 'on grounds of religion or belief' does not cover direct discrimination by reason of the discriminator's religion or belief.

Indirect discrimination – an outline

9. The Regulations provide that:

3(1) a person ('A') discriminates against another person ('B') if -

...

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but

(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,

(ii) which puts B at that disadvantage, and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

10. The notion of someone being put at a 'particular disadvantage' is significantly different from the formula used in the SDA and RRA (by which it has to be shown that a considerably smaller proportion of persons (of the disadvantaged class) are able to comply with the provision, criterion or practice).

11. This means that abstract test cases of indirect discrimination cannot be brought, because a complaint must be brought by an individual who is disadvantaged by the practice in question. The Regulations' formulation is more flexible and means that statistical evidence will not always be required to show 'particular disadvantage'.

Justification:

12. Where a complainant can show that he / she has been disadvantaged by reason of the application to him / her of a provision, criterion or practice and that persons of a particular religion or belief are particularly disadvantaged by this treatment, then the burden is on the discriminator to show that there is justification – i.e. that the application of the provision, criterion or practice constitutes a proportionate means of achieving a legitimate aim.

13. There are numerous potential areas of indirect discrimination (non-exhaustive list):

Holiday arrangements:

Khan v NIC Hygiene [2005] UKET 1803250/04

Fugler v. MacMillan London Hair Studios Ltd UKET

Pay:

For example, a pay practice which provides, for example, for double-pay on Sundays, may be indirectly discriminatory because of the disadvantage this brings to employees whose religion recognises a day of rest other than Sunday.

Meetings:

The ACAS Guidance warns that organisations “should consider carefully whether they are inadvertently discriminating indirectly in the times that meetings are arranged. For example, if team meetings always take place on a Friday afternoon this may discriminate against Jewish and Muslim staff for whom Friday afternoon has a particular religious significance”.

Hours of work:

The DTI explanatory note gives the following example:

If an employer refuses work breaks for all his employees on shift work between the hours of 0600 and 0900, this could be indirect discrimination on grounds of religion or belief:

- The practice which is applied to all employees equally is that they may not take any breaks during the relevant period.
- This practice could particularly disadvantage Muslim employees, because their faith requires them to take breaks from work to pray at certain times of the day.
- An employee could then show that he suffers that disadvantage if he himself is Muslim.

It would then be for the employer to justify the practice of refusing all work breaks.

The refusal may be based on a legitimate aim of ensuring work productivity. It would then be a question of whether the refusal of all breaks could be considered proportionate to that aim. The nature of the work may demonstrate an essential requirement for all staff to be working throughout that whole period. But if other staff can cover a brief absence, or

staff taking a short break can make up later for any time lost, that would suggest the refusal is not proportionate to the aim.

Days of work:

Williams-Drabble v. Pathway Care Solutions [2005] UKET 26011718/04

Advertising:

The ACAS Guidance suggests that advertising is best undertaken in a form accessible to a diverse audience. For instance, it recommends that organisations use a wide interest publication or agency rather than one focused on a niche or specialist culture or interest area which will limit the diversity of applicants and may constitute indirect discrimination.

The Guidance gives the example that an advertisement placed only in a particular religious magazine may constitute indirect discrimination as it is unlikely to be seen by people of other religions or beliefs. Although the magazine may be available to all potential applicants, it effectively disadvantages groups of people who for religious or belief reasons may not subscribe to that particular publication.

Recruitment:

An example given in the ACAS Guidance is that, where a recruitment process includes a social gathering, care should be taken to avoid disadvantaging anyone for whom alcohol is prohibited on the grounds of religion or belief. For instance, holding the gathering in a hotel bar may pose particular difficulties for those whose religion forbids association with alcohol. Invitations should make it clear that applicants with specific dietary requirements (which may be associated with their religion or belief) will not be disadvantaged by the process or the venue. Employers do not have to provide specific food such as Halal or Kosher if it is not proportionate for them to do so but they should ensure that there is some appropriate food available (e.g. vegetarian).

Arrangements at work:

An example of good practice given in the ACAS Guidance is that of a worker who, for religious reasons, is vegetarian felt unable to store her lunch in a refrigerator next to the meat sandwiches belonging to a co-worker. Following consultation with the staff and their representatives, the organisation introduced a policy by which all food must be stored in sealed containers and shelves were separately designated 'meat' and 'vegetarian'. This arrangement met the needs of all staff and at no cost to the employer.

Religious observance:

Hussain v Bhullar Bros [2005] UKET

Dress:

Azmi v Kirklees Borough Council [2006] UKET

Eweida v. BA?

(NB: *Catharell v. Glynn Nuttall Ltd* [1982] UKET 7935/81)

Victimisation

14. The Regulations provide that:

4(1) a person ('A') discriminates against another person ('B') if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has –

- (a) brought proceedings against A or any other person under these Regulations;*
- (b) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations;*
- (c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or*

(d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations,

or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.

4(2) Paragraph (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

Harassment

15. The Regulations provide that:

5(1) For the purposes of these Regulations, a person ('A') subjects another person ('B') to harassment where, on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect of -

(a) violating B's dignity; or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

5(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

22(3) In proceedings brought under these Regulations against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.

16. Harassment is not to be seen as an instance of less favourable treatment for the purposes of direct or indirect discrimination; it is a wrong that stands on its own, and it

may be shown to exist without proof of the elements needed for direct discrimination. There is no need to look to see how a comparator is or would be treated.

17. Harassment, as the ACAS Guide points out, need not be intentional. It may also arise as a result of nicknames, teasing, name calling or other behaviour, even when this is carried on without malicious intent. The definition of harassment requires merely that the conduct has the 'purpose or effect' of producing the defined consequences mentioned in 5(1).
18. Although harassment stands separately from direct (and indirect) discrimination, like direct discrimination, it may never be shown to be justified.
19. There are numerous potential areas of indirect discrimination:

Elgedawy v. Hanover Park Commercial [2006] UKET

Sheikh v. BDO Stoy Hayward [2006] UKET

Key definitions:

20. Detriment: there is no overlap between direct discrimination and harassment, the term being defined so as to exclude the latter. Strictly speaking, therefore, it is correct to describe the regulations as offering protection against discrimination **and** harassment at work.
21. Employment: employment under a contract of service or of apprenticeship or a contract personally to do any work.
22. Religion or belief: any religion, religious belief, or similar philosophical belief.
23. The dictionary definitions are:
Religion (OED): "particular system of faith and worship";
Belief (OEDD: "acceptance of any received theology".

24. The DTI explanation of the provisions of the Regulations provide that:

“The reference to “similar philosophical belief” does not include any philosophical or political belief unless it is similar to a religious belief. That does not mean that a belief must include faith in a God / Gods or worship of a God / Gods to be “similar” to a religious belief. It means that the belief in question should be a profound belief affecting a person’s way of life, or perception of the world. Effectively, the belief should occupy a place in the person’s life parallel to that filled by the God / Gods of those holding a particular religious belief. As with a religious belief, a similar philosophical belief must attain a certain level of cogency, seriousness, cohesion and importance, be worthy of respect in a democratic society, and not incompatible with human dignity (see judgment of the European Court of Human Rights in Campbell and Cosans v UK (1982) 4 EHRR293 at 304). Examples of beliefs which generally meet this description are atheism and humanism; examples of beliefs which generally do not are support for a political party, support for a football team.”

25. The ACAS Guidance is that, until the Courts and Tribunals have had an opportunity to consider which religions or beliefs are covered by these Regulations, it is not possible to provide *definitive* guidance. It lists some of the most commonly practised religions and beliefs in Britain. It confirms that its list should not be considered to be exhaustive. It lists the following:

Baha’i, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Islam, Other ancient religions (Druidry, Paganism, Wicca), Parsi / Zoroastrianism, Rastafarianism, Sikhism.

26. Note also the European Court of Human Rights jurisprudence as regards ECHR Article 9 (“everyone has right to freedom of thought, conscience & religion ...to manifest his religion or belief, in worship, teaching, practice and observance”):

Arrowsmith v. UK (1978) 3 EHRR 218 ECHR: Pacifism as a belief falls within the scope of protection of A9;

Kokkinakis v. Greece (1993) 17 EHRR 397: a Jehovah Witness had a right to proselytise even though a Greek court described his activities as an attempt to intrude on beliefs of orthodox Christians with the intention of undermining them;

Buscarini v. San Marino (1999) 30 EHRR 208: A9 covers the freedom not to hold religious beliefs or practise a religion.

27. Note also that Parliament has legislated (impliedly on the meaning of) "religion or belief" previously:

Fair Employment (NI) Act 1976, s. 57(2)

Anti-Terrorism, Crime and Security Act 2001, s. 39

This may suggest that the Regulations do not cover a lack of belief.

28. In the Employment Tribunal so far, various 'religions and beliefs' have been advanced (non-exhaustive list):

Williams v South Central Limited [2005] UKET (loyalty to a national flag);

Devine v. HQ (sympathy for underprivileged asylum seekers / disadvantaged people);

Baggs v. BNP [2005] UKET (activism in the BNP).

Genuine Occupational Requirement:

29. The Regulations provide that:

[as regards direct and indirect discrimination against applicants or employees, it is not unlawful to discriminate against a person re:

the arrangements for the purpose of determining to whom employment should be offered;

refusing to offer, or deliberately not offering, him employment;

the opportunities which are afforded for promotion, a transfer, training, or receiving any other benefit;

refusing to afford, or deliberately not affording, any such opportunity; and

dismissing, or subjecting him to any other detriment]

7(2) ... where, having regard to the nature of the employment or the context in which it is carried out -

(a) being of a particular religion or belief is a genuine and determining occupational requirement;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either -

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,

and this paragraph applies whether or not the employer has an ethos based on religion or belief.

7(3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -

(a) being of a particular religion or belief is a genuine occupational requirement for the job;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either -

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

30. The DTI explanation of the provisions of the Regulations explains that:

- A requirement is stronger than something which is merely a factor, a preference, or a qualification for the job – it is something which is essential for the person to be able to perform the functions of the job.
- It must also be a determining requirement – that is, the requirement must be crucial to the post, and not merely one of several important factors.
- The fact that it must be an occupational requirement emphasises the necessary connection to the job in question.

- And it must be a genuine occupational requirement for that job – in other words, the employer cannot simply create a requirement on a whim because she does not like persons of a particular religion or belief.

31. As concerns 7(2)(c)(ii), the DTI explanation of the provisions of the Regulations explains that if the applicant states that he / she is of the specified religion or belief, it is very unlikely that a mere suspicion on the part of the employer that this was not correct would be sufficient to establish that it was reasonable for him not to be satisfied that the requirement was met. The employer would probably need a good reason which would cast doubt on the applicant's statement if he were to prove to a tribunal that it was reasonable for him not to be satisfied¹.
32. The DTI explanation of the provisions of the Regulations also explain that requiring regard to be had, when considering if a GOR applies, to "the nature of the job" or "the context in which it is carried out" effectively means that the functions of the post in question must be considered. The reference to context serves to demonstrate that the nature of the job is not to be considered narrowly, but can include wider elements related to the job.

Proportionate application:

33. Requiring the employer to show that the GOR is applied 'proportionately' in the particular case means, in addition to all else, it has to be shown that it is both an appropriate and necessary means of achieving the legitimate aim in question.

Ethos:

34. The 7(3) GOR is slightly broader than the GOR in Regulation 7(2), because the employer is not required to show that religion or belief is a determining (i.e. decisive) factor in selection for the post in question.

¹ Note that in *R (on the application of AMICUS) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin), 26 April 2004, Richards J. accepted the rationale behind the provision. Perceived [religion or belief] will sometimes be important: 'In those cases where being of a particular [religion or belief] is a genuine and determining occupational requirement, it cannot be right that an employer, having asked the plainly permissible initial question whether a person meets that requirement, is bound in all circumstances to accept at face value the answer given or is precluded from forming his own assessment if no answer is given' (para 80).

35. The case of *Glasgow City Council v. McNab* [2007], EAT concerned a GOR, and an employer having an ethos based on religion or belief. M, an atheist, applied for the post of 'Acting Principal Teacher of Pastoral Care'. The Respondent said that being a Roman Catholic was a genuine occupational requirement of the post of Acting Principal Teacher of Pastoral Care.
36. The EAT considered that the Respondent had failed to establish that the position of the Church was that a pastoral care post at the school was a reserved post (i.e. for which being a Roman Catholic was a genuine occupational requirement). The EAT also held that the Respondent could not show that they were an employer who had "an ethos based on religion or belief".

Following the end of the relationship

37. The Regulations provide that:

21(2) Where a relevant relationship has come to an end, it is unlawful for A -

- (a) to discriminate against B by subjecting him to a detriment; or*
- (b) to subject B to harassment,*

where the discrimination or harassment arises out of and is closely connected to that relationship.

38. Certain forms of discrimination and harassment against ex-employees, probably in the context of appeals against dismissal and the writing of references, are therefore within the scope of the Regulations.

Burden of proof

39. The Regulations provide that:

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent -

(a) *has committed against the complainant an act [in respect of which the ET has jurisdiction]; or*

(b) *is by virtue of regulation 22 (liability of employers and principals) or 23 (aiding unlawful acts) to be treated as having committed against the complainant such an act,*

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

40. The case of *Mohmed v. West Coast Trains Ltd* [2006], EAT, considered, inter alia, Regulation 29. It concerned M, who was employed by West Coast Trains Ltd as a Customer Services Assistant from 4 June 2003 until his dismissal on 2 February 2004. He is a Muslim of Indian origin. His religious beliefs required that his beard be a minimum of one fist's length. When interviewed for the CSA position in June 2003 he said that he was asked whether he would trim his beard. The 'beard issue' persisted after he commenced employment.

41. The EAT upheld the ET's decision that discussion about the beard issue had not taken place in or after December 2003. It also noted the ET's findings that the Respondent employs staff from many ethnic origins at Euston Station, and there is a male Sikh employee whose religion prevents him from cutting or trimming his beard at all, and that the Respondent had discussed M's beard with him, they had agreed that his beard needed only to be kept tidy, and that they had agreed that it would be kept to one fist's length. M's claim failed at 'stage 1'.

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