



Sexual orientation and religious discrimination

Employment, pensions and benefits: briefing 101

Executive summary

New rules come into force at the beginning of December prohibiting discrimination against employees based on their sexual orientation, religion or beliefs. Most aspects of the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003 are familiar from existing discrimination rules.

This briefing outlines the regulations' main provisions and highlights areas where employers should review their policies to reduce the risk of claims.

What do 'sexual orientation' and 'religion or belief' mean?

Sexual orientation is defined as sexual orientation towards people of the same or the opposite sex, or towards people of either sex. Employees are protected against discrimination on grounds of their sexual orientation, whether they are heterosexual, homosexual or bisexual.

Religion or belief is defined as 'any religion, religious belief or similar philosophical belief', and will probably cause more difficulties for employers in practice. The width of the definition will mean that both well recognised religions such as Islam or Christianity, and less well known beliefs such as Humanism, will be recognised. ACAS guidance indicates that when deciding whether a particular set of beliefs can be said to amount to a religion or belief, tribunals will have regard to whether there is 'collective worship, a clear belief system, a profound belief affecting the way of life or view of the world'.

What amounts to discrimination?

Direct discrimination

Direct religious or sexual orientation discrimination occurs when, on grounds of religion/sexual orientation, A treats B less favourably than he treats or would treat other persons. In relation to sexual orientation, the less favourable treatment does not have to be on grounds of B's sexual orientation. If the less favourable treatment is on the grounds of A's sexual orientation, B will still be protected. For example, if A is gay and will only promote other gay people, heterosexual B will be able to bring a

claim of direct discrimination relying on A's sexual orientation as the reason for his treatment. In contrast, as regards religious discrimination, the reason for the less favourable treatment must be B's religion or belief.

Indirect discrimination

Indirect discrimination will occur where A applies a provision, criteria or practice to people of different religions/sexual orientations which:

- puts people of B's religion/sexual orientation at a particular disadvantage;
- puts B at that disadvantage; and
- cannot be shown to be a proportionate means of achieving a legitimate aim.

To put this into context, indirect religious discrimination claims could arise in relation to working hours. For example, employees of a particular religion or belief may claim that having to work at a particular time puts them at a disadvantage when compared to people of other religions. Orthodox Jews may need to leave work earlier than usual on a Friday afternoon to reach home by the start of the sabbath. Requiring staff to work to 5.30pm on a Friday could amount to indirect discrimination against Jews.

An employee does not need to show that a particular proportion of people of his religion are disadvantaged by the practice in comparison with other religious groups. He only needs to show that both he and people of his religion are disadvantaged. It is not clear whether a practice that only disadvantages a minority of members of a religion will still amount to indirect discrimination.

If it does, employers will need to alter the practice in question, unless it can be shown to be a proportionate means of achieving a legitimate aim.

The indirect discrimination provisions of the sexual orientation regulations were originally expected to have an impact on access to work related benefits for partners of employees. In the future it will obviously be direct discrimination to offer benefits (such as private health insurance) to opposite sex partners of staff but not to same sex partners. However, it will not be direct discrimination only to offer such benefits to the spouses of staff (because discrimination is on grounds of marital status, not sexual orientation).

It was thought that indirect discrimination provisions would assist same sex couples – they would be able to argue that imposing a marriage criteria put them at a particular disadvantage and, in the absence of justification, that it amounted to indirect discrimination. However, the sexual orientation regulations say that it is not unlawful to limit benefits on grounds of marital status. This means that only providing benefits to spouses of staff will not be indirectly discriminatory. It seems likely that this provision will be challenged as incompatible with the Equality Directive.

Another key issue is how far an employer will need to go to justify a practice that is otherwise indirectly discriminatory. The regulations say that the practice must be a proportionate means of achieving a legitimate aim. This indicates that the practice must reflect a real business need on the part of the employer. The government's explanatory memorandum on the regulations indicates that a test of proportionality involves balancing the discriminatory effects of the measure with the importance of the aim pursued. Although ACAS guidance states that there must be 'no alternative means available' of meeting the business need, this is not what the regulations say and appears to be wrong.

Victimisation

As with other discrimination legislation, victimising someone on grounds that he has made a complaint (whether to a tribunal or otherwise) that his rights under the regulations have been breached, will be discrimination. An individual will also be protected if he

has complained that someone else's rights have been breached or has supported someone else's complaint.

Harassment

Harassment is included in the regulations as a free-standing cause of action. Harassment will occur where, on grounds of religion or belief or sexual orientation, A engages in unwanted conduct that has the purpose or effect of violating B's dignity or creates a hostile, degrading, humiliating, intimidating or offensive environment for B.

It is clear from the definition that conduct does not have to be intended to create a hostile working environment, it simply has to have that effect. For example, if a devout Christian is expected to work in a workplace where there is a great deal of blasphemy, the employer could be liable for harassment of the employee, even though there was no such intent on the part of other employees.

It is also clear that the conduct does not have to be directed at B's sexual orientation or religion. For example, the ACAS guidance gives the example of a man who is teased in the workplace because his son is gay. Such behaviour will constitute harassment, even though it is on grounds of someone else's sexuality, not that of the individual himself.

Employers should also be aware that they can be liable for the conduct of their employees where harassment has occurred outside work, for example at a work-related social function. If an employee is harassed on grounds of religion or sexual orientation at events such as leaving drinks or a Christmas party, the employer may still face a claim of harassment, as long as there is sufficient connection between the employment and the event.

There is some comfort for employers that relatively trivial acts that have caused offence will not necessarily amount to harassment. Conduct is only harassment if, in all the circumstances, it is reasonable to consider it as creating a humiliating or hostile work environment. A tribunal will have some discretion to decide that an individual has been over-sensitive in taking offence at particular conduct and that it should not be regarded as harassment. However, once an employee has made it clear that conduct, whether trivial or otherwise, is unwelcome, it will almost certainly be regarded as harassment, if it continues.

When will the regulations apply?

To whom do the regulations apply?

The regulations apply to people employed under a contract of employment or a contract personally to do any work, which means that a wide group of individuals are covered by the regulations. Contract workers are also protected by the regulations, as are a number of other groups (such as office holders) who are outside the scope of this briefing.

In the employment context, it is unlawful for an employer to discriminate in the arrangements made for offering employment or the terms on which employment is offered. It is also unlawful to discriminate against employees in their terms of employment, access to promotion, training or any other benefits, and by dismissing them or subjecting them to any other detriment.

There are certain limited exceptions in the regulations where it will not be unlawful to discriminate on grounds of sexual orientation or religion. These exceptions apply where the nature of the employment or context in which it is carried out makes the sexual orientation or religion of the employee a genuine and determining occupational requirement. It must also be proportionate for the employer to apply that requirement. The genuine occupational requirement defence is obviously narrow and is of limited practical application for most employers.

What is the scope of the regulations?

It is unlawful to discriminate against people employed 'at an establishment in Great Britain'. An employee is treated as being employed at an establishment in Great Britain where his work is conducted wholly or partly in Great Britain.

He will also be covered by the regulations in some circumstances where he is employed wholly outside Great Britain. If the employer has a place of business in Great Britain, the work the employee does is for the purposes of the business carried out there, and the employee is ordinarily resident in Great Britain either when he applied for or was offered the job, or during the period of employment, the regulations apply. Overseas employees may therefore be protected against discrimination under the regulations.

Do the regulations apply to former employees?

Former employees may also be covered by the regulations. It will be unlawful for an employer to discriminate against a former employee by harassing him or subjecting him to a detriment after the end of the employment relationship. The detriment or harassment must arise out of, or be closely connected to, the employment relationship.

The biggest impact of the provision is likely to be in appeal hearings and requests for references. It will be unlawful for an employer to discriminate in the context of an appeal against dismissal, even though the employment relationship has already come to an end. Similarly, if an employer refuses to provide a reference for a former employee, or provides a bad reference on one of the protected grounds, that will amount to unlawful discrimination.

The regulations also cover post-employment discrimination in respect of employment relationships that come to an end before the regulations come into force. For example, once the regulations come into force, a reference request from an employee who left employment some time ago will be covered by the new regulations. However, former employees will not be able to bring claims about matters that occurred before the regulations came into force.

How are the regulations enforced?

The regulations are enforced in the usual way, by application to an employment tribunal. Claims must be brought within three months of the act complained of, although the tribunal can extend the time for presentation of a complaint if it is just and equitable to do so.

The regulations take a broad approach to the burden of proof. Where the complainant proves facts from which the tribunal could conclude that discrimination had occurred, it must uphold the complaint unless the respondent proves that discrimination did not occur.

Where a complaint is upheld, the tribunal can award unlimited compensation and make recommendations that the employer take certain acts within a prescribed period to reduce the adverse effect of the discrimination or harassment on the complainant. Compensation can be

increased if the employer fails to comply with the tribunal's recommendations.

An employee can also question the employer about alleged discrimination using the discrimination questionnaire procedure. The replies to the questionnaire can be relied on in evidence and must be provided within eight weeks of service of the questionnaire. If there is no response to the questionnaire within that period, or the response is equivocal or evasive, the tribunal can draw an adverse inference, including an inference that discrimination has occurred.

What steps do employers need to take now?

The first step for any employer is to review its equal opportunities policy to ensure that it covers discrimination on grounds of religion or belief or sexual orientation. Employers should also check that equal opportunities training for staff includes information about discrimination on grounds of religion or belief or sexual orientation.

However, reviewing equal opportunities policies and training will not be sufficient in itself, and employers will want to take a more proactive approach if they are to minimise the risk of claims. This means reviewing the aspects of their working policies that are particularly likely to give rise to claims and assessing what changes can be made to avoid such problems.

For example, one area in which challenges may arise is in the context of indirect religious discrimination. Different religions obviously have different requirements in terms of dress, diet, the need for prayer, and time off for religious festivals. Before an employer can conduct an adequate review of its working practices, it will need a reasonable understanding of the requirements of the major religions. The ACAS guidance contains a useful summary of the main requirements of some of the major religions. Once it has that information, it should review matters such as catering, dress codes, rest periods and its procedures for making holiday requests. The review should identify areas where staff from different religions may be disadvantaged and then consider how those arrangements could be changed to overcome those disadvantages.

This process is likely to be relatively time consuming. However, it will enable employers to avoid claims by eliminating the practices that are most likely to be challenged. Even if the business need is such that changes to particular policies cannot be made, by going through such a review process the employer should improve its chances of being able to justify a particular practice if called upon to do so.

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