

Employment Equality (Religion or Belief) Regulations 2003

The Equality Bill – a Solution or a Problem?

3 November 2009

JO SEERY



Employment Equality (Religion or Belief) Regulations 2003

Table to Contents

INTRODUCTION	3
JUST WHO IS "PROTECTED?"	4
WHAT ABOUT DIRECT DISCRIMINATION?.....	6
GENUINE OCCUPATIONAL REQUIREMENTS	12
<i>Is it genuine?</i>	12
THE GOR PROVISIONS UNDER THE EQUALITY BILL.....	13
CONCLUSION	17

Employment Equality (Religion or Belief) Regulations 2003

Introduction

Despite the fact that the Employment Equality (Religion or Belief) Regulations 2003 (“R or B”) have been in force since December 2003, the number of claims which are disposed of by Tribunals is tellingly low.

In particular, the Employment Tribunal Service statistics for 2008/2009 show that religion or belief claims make up just 0.3% of all Tribunal claims disposed of. This compares with 7% for sex discrimination and 20% for unfair dismissal.

Research conducted by the Institute of Employment Studies ¹ showed that the most common claims brought by workers under the Religion or Belief Regulations were unfair dismissal and discriminatory terms and conditions of employment especially as regards working hours and holidays where employers failed to accommodate the religious beliefs of the worker. In addition most felt under pressure to put work routines before their religion and that they were seen as the problem rather than the victim.

On this evidence it is clear that those discriminated against on the grounds of religion or belief have not been afforded the protection they perhaps thought the regulations would provide. This together with the government’s enquiries into the activities of young people in connection with their religious beliefs, ostensibly in the interests of protecting national security is not conducive to creating an environment of equal treatment when it comes to people’s religion or beliefs.

I want to look at the current provisions and whether amendments to the Equality Bill will provide the protection for workers that is currently so clearly lacking.

¹ Denvir A et al “the experiences of Sexual Orientation and Religion and Belief discrimination Employment Tribunal Claimants” ACAS London 2007 Ref 02/07.

Employment Equality (Religion or Belief) Regulations 2003

Just who is “protected?”

The protection provided by the Religion or Belief Regulations must be interpreted in light of the European Convention on Human Rights (“ECHR”).

Article 9 of the ECHR provides that everyone has an absolute right to freedom of thought, conscience and religion. There is a further qualified right to manifest religion or belief provided that it does not interfere with the rights of others.

Neither the Religion or Belief Regulations nor the proposals set out in the Equality Bill provide a definition of religion or belief other than that religion means “*any religion including a lack of religion*” and belief which means “*any religious or philosophical belief including lack of belief.*”

The Religion or Belief Regulations were amended in 2006 so that philosophical beliefs no longer had to be akin to religious beliefs. The ACAS Guide “Religion or Belief in the Workplace” whilst giving specific examples of commonly practised religions which are covered by the regulations, is conspicuously silent on examples of philosophical beliefs.

In a recent decision *Nicholson –v- Grainger plc ET Case No.2203367/08* an Employment Tribunal held that environmentalism falls within the definition of philosophical belief. In that case the Employment Tribunal had to determine at a preliminary hearing whether or not Mr Nicholson’s philosophical beliefs on climate change and the environment fell within the definition under the Religion or Belief Regulations.

In determining this point, the Employment Tribunal considered the five step test laid down in an earlier case *McClintock –v- Department for Constitutional Affairs [2008] IRLR 29*, a case concerning a Magistrate who sat on the Family Panel who resigned and claimed religious discrimination after the department refused his request not to sit on cases of adoption by same sex couples. In relation to his claim the test the Tribunal applied in order to determine whether or not Mr Nicholson’s belief was covered by the regulations was that his belief must have the following:-

- i. Sufficient contingency;
- ii. Seriousness;

Employment Equality (Religion or Belief) Regulations 2003

- iii. Cohesion;
- iv. Importance; and
- v. Worthy of respect in a democratic society.

In finding for Mr Nicholson, the Employment Tribunal rejected the employer's argument that Mr Nicholson's beliefs stemmed from empirical evidence and could therefore not amount to a philosophical belief. The Employment Tribunal held that Mr Nicholson's belief went beyond opinion as it affected his lifestyle in terms of how he lived, how he travelled, what he bought and what he ate.

In terms of whether or not Mr Nicholson's environmental beliefs were worthy of respect in a democratic society, the Employment Tribunal decided that climate change beliefs "*commanded the highest respect in democratic societies as can be seen from the conduct of modern global politics.*"

The employer has appealed the decision. In the meantime, there are concerns amongst some commentators that in finding for Mr Nicholson the Employment Tribunal based its decision on what was popular thought and as such, could open the floodgates for other equally popular but unacceptable beliefs being covered by the regulations. Case law has held that veganism falls within the definition of belief under Article 9 of the European Convention of Human Rights². Perhaps more significantly the question as to whether political beliefs are covered arises again under that article.

Some of you may recall the decision in the case of *Serco –v- Redfearn [2006] IRLR 623* where the Court of Appeal held, in a claim of race discrimination, that less favourable treatment on racial grounds did not extend to the protection of a worker whose membership of the BNP was not compatible with the fact that the majority of the workforce was also Asian. However, as that was a case under the Race Relations Act 1975 ('RRA') it does not necessarily mean that a claim of discrimination on grounds of political belief could not be brought under the Religion and Belief Regulations.

The Government stated in debate when the Religion and Belief Regulations were amended to remove the word "similar" preceding the words "philosophical belief", that this did not apply to support of a political party. Arguably though there are some political

² X v UK CA App No 18187191 10th February 1993

Employment Equality (Religion or Belief) Regulations 2003

beliefs which are also philosophical beliefs such as pacifism, communism and socialism which could be covered. But if that is the case does it also mean that beliefs such as fascism and BNP membership would also be covered? If the test in *McIntock* is adopted then arguably not on the basis that such beliefs are not worthy of respect in a democratic society. However, in considering Article 9 Lord Nicholls in *R (on the application of Williamson) -v- the Secretary of State for Education and Employment [2005] 2 AC 246* stated that “it is not for the Court to embark in an inquiry into the asserted belief and judge its “validity” by some objective standard as the source material the Claimant focuses his belief... Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some.”

It may be that the Employment Appeal Tribunal in *Granger* provides some clarity as to what or when a belief will attract protection under the R or B Regs given that some Tribunals are doing what Lord Nichols advised they should not.³ There is certainly no proposal to make specific provision in the Equality Bill and the explanatory notes to the Bill state that “political beliefs and beliefs in scientific theory are not religious or philosophical beliefs”.

What is clear is that in order to succeed in a claim for religion or belief discrimination the person must demonstrate that they have a religion or belief and that is that which is the reason for the less favourable treatment.

It is also perhaps worth noting that those who do not have a religious belief, including atheists and agnostics are also protected. This would mean that a single mother who applies for a job at a Christian book shop may have a claim against the book shop if she is refused employment on the basis that she is not a Christian.

What about direct discrimination?

Direct discrimination occurs where, on the grounds of religion or belief A treats B less favourably than he or she treats or would treat other persons in the same or not materially different circumstances.

³ In the case of *Devine -v- Home Office Case No 2302061/2004* the Employment Tribunal held that a worker who argued that his sympathy for disadvantaged asylum seekers was a demonstration of the Christian virtue of charity, was not covered by the regulations, since his beliefs were too vague and ill defined.

Employment Equality (Religion or Belief) Regulations 2003

The Religion or Belief Regulations not only give protection to those treated less favourably on grounds of religion or belief but also those who are subject to discrimination on the basis of a person's perceived religion or philosophical belief or because of their association with someone from a particular religion or philosophical belief.

This is different from the protection from discrimination provided under the Sex Discrimination Act 1975 ("SDA"). Section 1 of the SDA provides protection for those treated less favourably on the grounds of "their" sex, whereas, under the R or B Regulations protection is provided on "on grounds of" religion or belief and is therefore much wider in scope and protects those who may be perceived to be of a particular religion because of their appearance.

Equally, someone who is discriminated against because of their association with another such as a work colleague who is a member of a particular religious group, is also protected⁴. This broader definition, which also applies to age, sexual orientation, race and disability (following the EAT's decision in *EBR Attridge Law –v- Coleman 2009 UKEAT 0071/09* handed down on 30th October 2009) will be extended to apply to discrimination on the grounds of sex, gender reassignment, marital and civil partnership status and pregnancy discrimination.

Although the Equality Bill adopts a broader definition which will apply to all strands of discrimination, there are some special provisions within the proposed harmonised definition. In particular, proposed clause 13 specifically provides that less favourable treatment because of race includes segregating a worker from others where the protected characteristic is race. There is no such specific provision for those who may equally be segregated on the grounds of their religion or belief.

The special provisions clause in the definition of direct discrimination which applies to religion and belief merely mirrors the existing regulation so that protection from less favourable treatment will apply where the discriminator is of the same religion or holds the same belief as the victim.

⁴ See the case of *Saini –v- All Saints Haque Centre [2008] UKEAT 0227/08* where the Claimant brought a claim for harassment under the R or B Regulations on the ground he had been subject to bullying and intimidation because the employer wished to use him to dismiss another colleague because he was a Hindu.

Employment Equality (Religion or Belief) Regulations 2003

As can be seen, these special provisions neither recognise true difference nor do they fully harmonise the definition of direct discrimination.

The most significant change to the definition of direct discrimination under the Equality Bill is the change from less favourable treatment “*on the grounds of*” to less favourable treatment “*because of*.”

Although the Government has professed that this will not lead to any changes in the way in which the Employment Tribunals will apply the legislation and that use of the word “*because of*” is clarification of the existing provisions and how these have been applied. There is some concern that some Tribunals may introduce a new test when determining whether or not someone has been subject to less favourable treatment. At present, the key to determining whether or not a worker has been subject to less favourable treatment on grounds of religion or belief, is for Tribunals to ask the question, “*What is the reason for the less favourable treatment?*” The answer to the question is essentially one of fact. For example, was the reason a woman who was not offered a job, for example, due to the fact that she was a Hindu or due to some other factor?

If Employment Tribunals are asked to consider whether or not someone was treated less favourably “because of” their religion and belief there is a danger that Tribunals will now consider the motive of the discriminator in order to determine whether or not that treatment was because of that persons religion or belief. This could have some serious consequences. Take, for example, the recent case of *Amnesty International –v- Ahmed UKEAT 0447/08*. In that case, the Claimant was of northern Sudanese origin and applied for a research post which would involve her travelling to Sudan. The employer withdrew the offer on the grounds of health and safety. In particular, Amnesty was concerned that if it was to appoint her as a northern Sudanese woman, she may be regarded with suspicion by other Sudanese or as a traitor if she came into contact with other northern Sudanese whilst on assignment and this could affect the reputation of Amnesty as well as the health and safety of herself and her other colleagues.

In finding for the Claimant in that case, the Employment Appeal Tribunal (“EAT”) held that the employer’s motive, albeit benign, was irrelevant and that ultimately the reason that she was not appointed to the post was because of her ethnic origin, i.e. being of northern Sudanese origin.

Employment Equality (Religion or Belief) Regulations 2003

Applying the definition of direct discrimination in the Bill to this case there could be a risk that an Employment Tribunal would take into account the employer's motive. If that was the case it is unlikely that they would have found she had been discriminated against. This is because arguably the employer's motive was concern about her health and safety and that of her colleagues and therefore could not amount to race discrimination. As you can see, the subtle introduction of what appears to be simplification of the legal language set out in the R or B Regulations could lead to a finding that a person was not discriminated against on the grounds of their religious belief. This amendment is likely to lead to make it even more difficult for claims of religion or belief to succeed.

Comparators

Despite numerous objections on the consultation the definition of discrimination under the Bill would still require a worker to show she or he has been treated less favourably in comparison to others in not materially different circumstances. Use of the comparator as a legal test to determine liability rather than as an evidential matter has been used by Tribunals to limit the protection from discrimination. The most well known example, is in the case of *Azmi-v- Kirklees Metropolitan Borough Council [2007] IRLR 484*. This is the case of the teaching assistant who claimed she had been discriminated against on the grounds of her religion when she was asked to lift her veil when she was in the classroom. The Tribunal in finding against her claim for direct discrimination made the embarrassing comparison with a woman who would have covered her face with a balaclava. In an Employment Tribunal case *Hussain -v- Bhullar Brothers t/a BB Supersave ET Case no. 1806638* the Tribunal held that a Muslim employee who was refused a request for time off was not discriminated against in comparison to a non Muslim employee. However, this decision fails to take into account the fact that different religions have different practices for dealing with bereavement. Under the Muslim faith burial must take place as soon as possible following death and so may occur at short notice.

Had there been no legal test for a comparator then these claims for direct discrimination may have succeeded.

Employment Equality (Religion or Belief) Regulations 2003

The failure to remove the legal requirement for a comparator in the Equality Bill goes against the grain of case law which has more recently⁵ held that identifying a comparator detracts from the question “*what is the reason for the less favourable treatment?*” and that the comparator is a matter of evidence rather than liability.

Manifestations of Religion or Belief.

Unlike the Human Rights Act 1998 discrimination legislation contains no specific provisions in manifestations of religion or belief.

The Equality Bill does not introduce any specific provision to protect those who may be discriminated against because of the manifestation of their belief. It therefore remains to be seen whether the amended definition of direct discrimination (where less favourable treatment occurs because of someone’s religion or belief) would be interpreted to provide such protection.

In the case of *R (on the application of Amicus now Unite) –v- Secretary of State for Trade and Industry (now Department for Business Innovation and Skills – BIS for short) [2004] IRLR 430* the High Court held that the provisions on the genuine occupational requirement under reg 7 (3) (b) SOR which refers to an employer applying “a requirement **related to** sexual orientation” considered that this was wide enough to cover sexual behaviour, “the protection against discrimination on grounds of sexual orientation relates as much to the manifestation of that orientation in the form of sexual behaviour as it does to sexuality as such.”. However, that view seems only to apply to the particular wording of that section and the current case law has varied in its approach to claims of discrimination which arise from a manifestation of religion or belief.

Existing case law in claims of direct discrimination seem to suggest that, when considering the reason for the difference in treatment, this should be differentiated from the reason for the worker’s actions. So that in the case of *Azmi* although the reason she wore the niqab (veil) was due to her religious belief this was not the same as the reason why the employer refused to allow her to wear to it in the classroom, which was because it interfered with her effectiveness as a teaching assistant. Similarly the EAT held in *London Borough of Islington-v- Ladele [2009] IRLR 154* that the reason why the Council

⁵ See the decision of Elias J in *London Borough of Islington –v- Ladele* EAT 0453/08 in which a president comments obiter that a Employment Tribunal’s fixation with identifying a comparator detracts from the question “what is the reason for the less favourable treatment?” and that the comparator is a matter of evidence rather than liability.

Employment Equality (Religion or Belief) Regulations 2003

disciplined Ms Ladele when she refused to perform civil ceremonies was not the same as her reason for refusing to perform them. Her reason was because of her religious belief which holds that the sanctity of marriage is between a man and a woman whereas the employer's was because of her refusal to perform those duties.

In the recent case of McConkey and anor-v- Simon Community Northern Ireland [2009] ICR 787 the House of Lords held that discrimination on grounds of political opinion does not extend to the manifestation of political opinion, "It is not concerned with discrimination on ground of actions that the person may take in support of that religious belief or political opinion." However, it can be argued that the Lords decision is limited to its facts and the specific provisions of the Fair Employment and Treatment (Northern Ireland) Order 1998 which specifically excludes from protection from discrimination, "political opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland." However, the approach by their Lordships who considered the effect of the manifestation of the political opinion on those who refused to employ him raises questions about how the test could be applied in other cases where someone was discriminated against on the grounds of their manifestation of a religion or belief. Would it be the case that this would depend on the effect on others?

Although in Ladele, the EAT held that the Employment Tribunal had applied the wrong test in upholding her claim of indirect discrimination, because it had balanced the rights of one group against another, the answer to this question would effectively be "Yes", where the manifestation of that belief resulted in actions which conflicted with the employer's policy "to provide an effective civil partnership service as a public sector employer which is wholly committed to the promotion of equal opportunities and to fight discrimination." Similarly in Azmi a provision criterion or practice that teachers and teaching assistants should not cover their face when teaching or assisting could be justified on the basis of the effect on the education of the children.

Having said this there must though be some evidence in any justification defence of a legitimate aim and that the discrimination is proportionate to that aim. In Ladele even though the EAT agreed that the decision to pursue Ms Ladele through the disciplinary process was justified they did not rule out pragmatic ways of resolving conflicts in the workplace. So that in a case where a worker requests time off for religious worship, an employer may not be justified in refusing time off, where this would not interfere with the needs of the business, even if other employees may feel put out by having to cover her

Employment Equality (Religion or Belief) Regulations 2003

or his shift. Indeed in the case of Noah –v- Desrosiers (T/A Wedge) a provision, criterion or practice of requiring a hairdressing assistant to display her hair at work was held by an Employment Tribunal not to be justified when the salon owner herself could display her hair and so promote the businesses style. In distinguishing this case from Azmi the Tribunal said that the wearing of a headscarf in a hairdressing salon was not an intrinsic element of a core function of the job and customers would have been well aware of her reason for wearing the headscarf. But would a justification defence which focused on the nature of the job prevent workers from being indirectly discriminated against?

As can be seen a very fine line has been drawn in the sand in terms of determining the reason for the difference in treatment where a worker has suffered direct discrimination as a result of the manifestation of their religion or belief. The Equality Bill does nothing to clarify how Tribunals should determine claims of manifestations of belief. It is therefore likely to be the subject of expensive litigation unless the Court of Appeal in Ladele provides that clarification.

Genuine Occupational Requirements

Is it genuine?

Under the Religion or Belief Regulations, employers are able to discriminate:-

- where being of a particular religion or belief is a genuine, determining occupational requirement and it is proportional to apply that requirement; or
- where an employer has an ethos based on religion or belief and having regard to that ethos to the nature of the employment or the context in which it is carried out and it is proportionate to apply that requirement.

These are better known as the genuine occupational requirement (“GOR”) exception.

The first exception is very narrow as it only applies where there is a very clear connection between the nature of the job and the religion or belief.

Employment Equality (Religion or Belief) Regulations 2003

The second exception is the one which caused the most concern when it was first introduced as it was thought that an employer may escape liability for discrimination by simply claiming that they had an ethos based on religion or belief.

However, the cases applying the test have generally applied it narrowly. In particular, in the case of *Glasgow City Council –v- McNab [2007] IRLR 476* the Employment Appeal Tribunal rejected the local authority’s argument that it was a genuine occupational requirement for the post of acting principal of pastoral care to be of a Roman Catholic denomination (Mr McNab was an atheist and had been denied an interview for the post). The EAT held that a local education authority with specific statutory functions including the appointment and approval of teachers, could not have a religious ethos.

In the combined cases *Sheridan and Hender –v- Prospects for People with Learning Disabilities* (against the same employer) an Employment Tribunal also applied the genuine occupational requirement narrowly. In that case a Christian charity providing support services for people with learning disabilities argued that it had a Christian ethos and was involved in supporting people in church activities, offering spiritual support and representing the charity in the Christian community. The Tribunal accepted that the charity had a religious ethos. However, having regard to the nature of employment and the context in which it is carried out the Tribunal rejected the charity’s assertion that it primarily existed to serve Christ, and so required Christian staff to fulfil this ‘mission’. The Tribunal found that the charity’s primary objective was to provide support services to people with learning difficulties, and spirituality was just one of the principles underpinning its work.

The GOR provisions under the Equality Bill

These decisions are helpful. The explanatory notes to the Bill provide further confirmation that these exceptions should be applied narrowly. In particular, the explanatory notes state that the GOR exception would apply to, the recruitment of a head of a religious charity where the person to be appointed represents the views of the organisation but not to other employees, such as an administrative assistant who would not necessarily represent the views of the organisation. It is disappointing that clarification is not in the Bill itself where it would have had more of an impact than it will being confined to an explanatory note.

Employment Equality (Religion or Belief) Regulations 2003

The Equality Bill has though clarified genuine occupational requirement provided for under the Sexual Orientation Regulations 2003 ('SOR'). Some of you may recall that Amicus (now Unite) had challenged the provisions under the SOR⁶ which provide that employers can effectively exclude employing gay men and lesbians if the employment is "*for the purposes of an organised religion*", on the grounds that this was incompatible with the Framework Directive 2000/78. In rejecting the union's challenge the High Court held that "*for the purposes of organised religion*" was to be interpreted narrowly. The Court stated this was different from "for the purposes of a religious organisation" and, by way of example, stated that employment of a teacher in a faith school is likely to be for the purposes of a religious organisation. The teacher therefore would not fall within the exemption. The Equality Bill while not going so far as to remove the exemption altogether does at least limit the application by providing a definition of when employment is "*for the purposes of an organised religion.*" This is where employment wholly or mainly involves:-

- leading or assisting in the observation of liturgical or ritualistic practices of the religion or
- promoting or explaining the doctrine of the religion (whether to followers of the religion or to others),

This definition effectively, limits the type of employers who will be able to rely on the exemption to those engaged in church activities. This is borne out by the government's explanatory notes to the Bill which provide that the definition would apply to the requirement for a catholic priest to be a man but not to a requirement that a church worker should be a heterosexual. This has led to a number of Christian organisations interpreting the provisions as amounting to a requirement on churches to employ homosexuals. However, such a provision would amount to positive action and is clearly not the intention nor the purpose behind the amended provisions in the Equality Bill.

Rather, the Bill provides clarification for employers who may try to claim that they have a religious ethos as a pretext for not employing other categories of workers whom they would **prefer not to employ** because of their own discriminatory beliefs.

⁶ ante page 9

Employment Equality (Religion or Belief) Regulations 2003

Positive Action

The proposals on positive action under the Equality Bill are unlikely to have any significant benefit to those discriminated against on the grounds of their religion or belief. In particular, as you may have already noted, an employer can select or promote someone with a particular protected characteristic where the employer reasonably thinks there is under representation of those of a particular religion or belief or that they are at a disadvantage. However, an employer can only recruit or promote someone of a particular religion if they are “*as qualified*” as the other candidate and provided the employer does not have a general preference policy.

This raises two issues:-

1. As for sexual orientation, a person may not readily declare their religion or belief and;
2. Even if they do declare their religion or belief, those of a particular religion or belief may be less qualified or experienced as other candidates.

In the absence of any provisions which will specifically protect those of a particular religion or belief such as a provision which protects people from being discriminated against because they have requested time off in accordance with their religion or belief, the positive action duties are unlikely to have any practical benefit for those of a particular religion or belief.

Dual Discrimination

As we have seen the limitations of the current law are unlikely to be addressed by the Equality Bill. However, the Bill proposes protection for those discriminated against on more than one ground. Although this is limited to claims of direct discrimination and to two grounds it is a welcome development in the right direction. This is likely to be of particular benefit to Muslim men who have been discriminated against because they have not been offered a post because of stereotypical assumptions branding all Muslim men as terrorists. A claim that they have been discriminated against on the grounds of their religion or belief because they are a Muslim may not succeed because the employer may be able to successfully argue that a non Muslim would have been treated in the same way. Similarly, a claim that they have not been appointed to a post because of sex discrimination, for example could also equally be defended on the grounds that a

Employment Equality (Religion or Belief) Regulations 2003

Muslim woman with similar qualifications and experience would not have been appointed. Whereas, a claim of dual discrimination which would involve a comparison with how they would have been treated had they been a non Muslim woman with the same qualifications and experience may arguably have more chance of success.

Employment Equality (Religion or Belief) Regulations 2003

Conclusion

The potential for further litigation, where rights conflict and where the manifestation of a belief does not fit in with established codes based on fundamentally Christian beliefs, look set to continue under the proposed Equality Bill.

What the Bill fails to address is the particular requirement to protect those whose religion or belief may conflict with not only established norms but the rights and interests of others.

One might say that this is an inevitable consequence where there is one Equality Bill to cover all strands of discrimination. However, that fails to take on board the fact that legislation can and does address particular nuances.

Indeed, following the decision in the disability discrimination case of *Malcolm* the Equality Bill has, whether successfully or not, attempted to address the particular needs of those with a disability in recognition of the fact that protection required for disabled employees is different, but importantly no less significant, than those who are discriminated against on other grounds.

Equally, the Bill should address the particular nuances which arise in relation to those who have been subject to discrimination because of their religion or belief. In particular, the Equality Bill should include a proposal to provide protection for those subject to discrimination as a consequence of their manifestations of belief not only in terms of dress codes but also in terms of the right to time off in accordance with their religion or belief which does not coincide with the Christian norm.