

THE EMPLOYMENT EQUALITY (RELIGION OR BELIEF) REGS 2003

by Simon Trigger

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REGULATIONS 2003

“The early days”

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Introduction

1. Since 2 December 2003 it has been unlawful to discriminate against workers on the grounds of religion or belief. The change in the law has been brought about by the *Employment Equality (Religion or Belief) Regulations 2003*, which implement the religious discrimination aspects of the *EC Equal Treatment Framework Directive*.
2. The aim of this paper is to provide a brief working overview of the Regulations themselves and then to highlight a number of recent cases where the Court has looked at the Regulations in order to ascertain how the Courts have approached the Regulations. Finally it is hoped that future potential areas of dispute under the Regulations can be identified.

The Regulations

3. The following forms of Discrimination are prohibited:
 - a) Direct discrimination
 - b) Indirect discrimination
 - c) Harassment
 - d) Victimisation

e) Post Employment Discrimination

4. The Regulations cover discrimination in the field of employment and vocational training

Religion or Belief: reg 2(1)

5. Religion or belief is defined rather cyclically as “any religion, religious belief or similar philosophical belief”.
6. The DTI’s Explanatory Notes suggest that tribunals may consider a number of factors when deciding what is a 'religion or belief' including whether there is collective worship, a clear belief system or a profound belief affecting way of life or view of the world.
7. It is clear that people who belong to widely-recognised or established religions and branches of a religion – eg, Jews, Catholics and Muslims - are covered. However, it is less clear whether people who subscribe to non-conventional faiths, such as alternative lifestyles are protected.
8. The term ‘any religious belief’ suggests that people holding a particular view which is part of the religion are protected.
9. The term ‘any similar philosophical belief’ means a philosophical belief similar to a religious belief. The DTI Explanatory Notes refer to ‘a profound belief affecting a person’s way of life or perception of the world’ and give as examples atheism and humanism.

Direct Discrimination: Reg 3(1)(a)

10. The definition of Direct Discrimination is similar to existing discrimination legislation. It is defined as when “**on the grounds of religion or belief A [the discriminator] treats B [the complainant] less favourably than he treats or would treat other persons**”

11. A Complainant will require a comparator: **Reg 3(2)**. The wording of Regulation 3(2) is the familiar wording: **“a comparison of B’s [the complainants] case with that of another person.... must be such that the relevant circumstances in the one case are the same, or not materially different in the other”**.
12. Regulation 3(2) adds that 'religion or belief' does not include A's religion or belief. This raises the question of whether non-believers are protected from direct discrimination because it is necessary for a religion or belief to be present (provided it is not A's) in order to trigger the direct discrimination provisions.
13. A strict reading of Reg 3 suggests that if, for example, a Christian employer (A) refused to offer a job to a non-believer (B) because he does not subscribe to Christianity, B would not be able to bring a complaint of direct discrimination because A's religion (the reason for the discrimination) could not be taken into account.
14. Both the DTI and ACAS state that the Regulations cover discrimination against someone because they do not share the discriminator's belief. The ACAS Guidance states that 'workers or job applicants must not be treated less favourably than others because they follow, or do not follow a particular (or any) religion or belief'.
15. This advice contradicts the wording of Reg 3(2) and it is not clear why the DTI and ACAS assume that non-believers are protected from direct discrimination. The proper approach might be for the complainant to show that he is an atheist, which may be a 'similar philosophical belief' under the Regulations.

Indirect Discrimination: Reg 3(1)(b)

16. Indirect Discrimination is defined as when:

“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”.

Victimisation: Reg 4.

17. The provisions for Victimisation are taken from the existing legislation. A person discriminates against another if he treats that other less favourably by reason of one of the protected acts. Regulation 4 sets out the usual protected acts, namely **“bringing proceedings under the regulation, giving evidence or information in proceedings brought under the regulations, doing anything under or by reference to the Regulations, or by alleging that an act which would amount to a contravention of the Regulations has been committed by the other”.**

18. There is a good faith defence to such a claim.

Harassment: Reg 5.

19. Harassment is defined as:

“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”.

20. The definition applies whether the unwanted conduct was intended or simply has that effect. The definition suggests a largely subjective test. Regulation 5(2) however states that conduct will only be regarded as harassment if it **“should reasonably be considered as having that effect having regard to all the circumstances”**. This of course places the onus squarely upon the Tribunal to decide what is reasonable in all the circumstances.

Post Employment Discrimination: Reg 21.

21. Pursuant to Regulation 21 discrimination, including harassment, which occurs after the end of a relevant relationship is unlawful if it arises out of or is closely connected to the relevant relationship. A relevant relationship is a relationship between the parties during the course of which an act of discrimination by one party to the other is unlawful by the provisions of the Regulations.

Liability of Employers

22. The regulations contain familiar provisions in respect of the liability of employers. Employers are liable for acts of discrimination by their employees regardless of the knowledge or approval of the employer. An employer can however attempt to raise the defence open to them that they had taken such steps as were reasonably practicable to prevent the employee from doing that act or acts of that description in their employment.

23. A person who knowingly aids another person to do an unlawful act of discrimination is liable for that act. There is the usual defence of reasonable reliance on a statement.

24. An employee or agent for whose act an employer is liable or would be liable but for the reasonable steps defence is taken to be knowingly aiding their employer or principal in their own act of discrimination.

Defence: Genuine Occupational Reasons

25. There are essentially two Genuine Occupation Requirement exceptions to the Regulations. The two Genuine Occupational Requirement Exceptions are the General Exception and the Religious Organisations Ethos Exception.

General Exception

26. In order to rely on the Genuine Occupational Requirement being of a particular religion or belief must be a genuine and determining occupational requirement. The test appears to be narrower than the traditional exception in discrimination legislation. Furthermore the Requirement must be proportional in order to be relied upon.

27. Finally the employer must not be satisfied and it is reasonable for him not to be satisfied that the person meets the genuine occupational requirement. This may appear strange as without actual knowledge of a persons religion or belief an employer can only determine a persons religion or belief by reference to appearance and stereotype.

Religious Organisation Ethos Exception

28. This limb of the Genuine Occupational Requirement applies where the employer has an ethos based on religion or belief (eg churches, denominational schools) and the General GOR defence criteria is established then the employer will be able to apply a GOR to employment where in other circumstances such a requirement would not apply.

Enforcement

29. There is a three month time limit for the bringing of an action . However the Tribunal will have the power to extend this time where it is just and equitable to do so. A questionnaire procedure in the familiar form is also included in the Regulations.

Recent Cases

30. The Courts have looked at the regulations in a number of cases:

22. Copsey v WBB Devon Clays [2004] Unrep EAT.

- a) This is a rather disturbing case. Mr Copsey was a devout Christian. His employers had introduced a seven day shift pattern in agreement with the Unions and the majority of employees. Mr Copsey refused to work on Sundays. The employer offered alternative employment that did not require Sunday work. Mr Copsey rejected these and he was dismissed.
- b) It was held on appeal that he was dismissed not by reason of his religious beliefs but as a result of his decision not to work the alternative shifts offered to him. The argument was also raised that the reasonableness of the employers decision had to be assessed by reference to Article 9 of Freedom of Religion.
- c) The EAT held that if this was correct then the decision of *Stedman v UK* was on all fours and was sound on principle. The EAT held:

“The circumstances the Commission was considering are in essence identical to those relating to Mr Copseys dismissal as found by the Tribunal. If the employee takes the view that his employers work requirements are incompatible with the due exercise and manifestation of his religious beliefs he is entitled to resign...Mr Copsey was not obliged to agree to the seven day shift pattern or indeed to work for Devon Clays at all and he was free to resign if he concluded that his religious commitments were incompatible with the hours of work that Devon Clays wanted of him. As he had that choice nothing that Devon Clays did or proposed amounted to an infringement of his Article 9 rights”

- d) In other words the EAT appears to have held that it is a defence to a claim in discrimination to say that the employee could have resigned. This appears woefully inadequate. It is tempting to suggest that had the religion not been

Christianity the decision reached on this point would have been different. The Court of Appeal is due to hear the matter soon.

23. Ferri v Key Languages case number 2302172/04. 9/08/2004.

- a) Ms Ferri attended for a work interview wearing three gold Christian necklaces. Ms Ferri was successful at interview. The day prior to commencing work Ms Ferri was told that she ought not to wear all three of her necklaces to work as they were loud and overtly religious symbols. However it was indicated that Ms Ferri could wear these necklaces on the weekly dress down day. Ms Ferri was subsequently dismissed for poor work performance.
- b) The tribunal held that the dismissal was on the grounds of the poor work performance and the application was dismissed. However the Tribunal held that the background facts were sufficient to give rise to the drawing of adverse inferences.

24. Williams v South Central Limited case number 2306989/03 22nd June 2004.

- a) Mr Williams wished to wear a stars and stripes badge to reflect his pride in his country of origin, the USA. The respondent refused to permit the badge to be worn on a reflective jacket arguing that their own rules dictated that nothing ought to be worn on the reflective jacket. Eventually as a result of his refusals to remove the badge Mr Williams was dismissed.
- b) Mr Williams claimed that his dismissal was due to him standing up for his beliefs as an American citizen and that he had been treated less favourably as a result of those beliefs.
- c) The Tribunal referred to the dictionary definition of belief as “*persuasion of the truth of anything or opinion or doctrine or recognition of an awakened sense of a higher being controlling power or powers and the morality connected therewith, rights of worship or any system of such belief or worship*”. Held that loyalty to a flag and/or a country did not fit this definition.

Future Developments

34. Regulations are expected to widen the scope of discrimination on the grounds of religion to the provision of goods facilities services and premises. This appears to be a loophole in the law that Government has indicated will be addressed.

35. Litigation is likely over regulation 3(2) that the discriminators religion is to be disregarded. This may give rise to potential claims by atheists, humanists etc as the discriminator may well seek to argue that it is the absence of belief (in the discriminators religion) that is the basis for the discrimination rather than the individuals own beliefs/religion.

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