**RECRUITMENT AND SELECTION**

**GUIDANCE ON OCCUPATIONAL REQUIREMENTS**

The law relating to discrimination on the grounds of religion and belief is governed by the Equality Act 2010. This Act implemented in October 2010 largely consolidated previous discrimination legislation and therefore much of the existing case law established under the previous legislation will continue to be relevant.

**Protected Characteristics**

The Act defines a number of characteristics which are protected under the legislation. These are age, sex, race, religion or belief, sexual orientation, marriage and civil partnership, disability, gender reassignment and pregnancy and maternity.

Definition of Religion and Belief

“Religion” means any religion or lack of religion.

“Belief” means any religious or philosophical belief, or lack of such a belief.

**Discrimination**

The Act provides protection against direct and indirect discrimination, harassment and victimisation in the fields of employment and vocational training to

* actual and prospective employees
* ex-employees
* apprentices
* some self-employed workers
* contract workers
* actual and prospective partners in a partnership or a limited liability partnership
* people seeking or undertaking vocational training

Four types of discrimination are prohibited

* Direct Discrimination

Person A treats person B less favourably than others because of the protected characteristic of religion or belief. This can be in relation to B’s actual or perceived religion or belief, even where the perception is wrong or to B’s association with someone who has, or is perceived to have the protected characteristic.

* Indirect Discrimination

Person A applies to person B, to B's disadvantage, a provision, criterion or practice that A applies or would apply equally to persons not of the same religion or belief as B, but which puts, or would put, persons of the same religion or belief as B at a particular disadvantage when compared to other persons and which A cannot show to be a proportionate means of achieving a legitimate aim.

* Harassment

Person A engages in unwanted conduct related to the protected characteristic of religion or belief that has the purpose or effect of violating person B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

* Victimisation

Person A subjects person B to a detriment because B has done, or A believes that B has done, or may do a "protected act".

It is as unlawful to discriminate against a person for not holding a particular (or any) religious or philosophical belief as it is to discriminate against someone for holding a religious or philosophical belief.

Discrimination can occur even where both the discriminator and the person being discriminated against hold the same religious or philosophical belief.

**Discrimination in the Appointment Process**

Under section 39 (1) of the Act

An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

Discrimination on the grounds of religion or belief (or lack of it) also applies to opportunities for promotion, transfer or training; or dismissal.

**Exceptions from the Legislation**

1. **Occupational Requirement Relating to the Nature of the Post**

In certain circumstances, it will be lawful for employers to specify that job applicants must have, or must not have, a particular protected characteristic under the Equality Act 2010. Paragraph 1 of Sch.9 to the Equality Act 2010 contains an exception from unlawful discrimination in recruitment; opportunities for promotion, transfer or training; or dismissal where a requirement to have a particular protected characteristic applies.

The grounds for using this exception are as follows

An occupational requirement will apply where, having regard to the nature or context of the work, the employer applying the requirement shows that:

* being of a particular religion or belief is an occupational requirement;
* the application of the requirement is a proportionate means of achieving a legitimate aim; and
* either the person to whom the requirement is applied is not of the required religion or belief or the employer has reasonable grounds for not being satisfied that the person is of the required religion or belief.

The explanatory notes to the Act make it clear that the requirement must be in order to pursue a legitimate aim and that the burden of showing that the exception applies rests on those seeking to rely on it.

The requirement that it must be proportionate to apply the occupational requirement may mean that, even if an occupational requirement applies to some of the duties of a job, the exception could not be relied on if there were others of the required religion or belief who could do these duties, if the work were redistributed or reorganised.

An employer seeking to rely on this general exception is not required to have a particular ethos based on religion or belief. It is likely to apply in situation where organisations providing services targeted at particular religion or belief groups have a requirement to employ people who have a particular protected characteristic, in order to ensure that the target group can access the service.

An example of a situation that fits into this category could be a chaplain in a hospital that is not a religious organisation where the service is being provided to patients who are Christian.

It should be noted that it is not enough for you to simply to decide that you prefer to employ someone who has or does not have a particular protected characteristic.

Rather, the requirement must be:

• crucial to the post, and not just one of several important factors

• relating to the nature of job in question, rather than the nature of the employing organisation

• a proportionate means of achieving a legitimate aim. If there is any reasonable and less discriminatory way of achieving your aim, it is likely that you could not claim an occupational requirement.

1. **Occupational Requirement Relating to the Ethos of the Organisation**

Paragraph 3 of Sch.9 to the Equality Act 2010 contains a special wider exception that can be relied on by an employer with an ethos based on religion or belief. This provides that a employer (A) with an ethos based on religion or belief does not contravene the provisions of the Act relating to unlawful discrimination in recruitment; opportunities for promotion, transfer or training; or dismissal by applying a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and the nature or context of the work:

* it is an occupational requirement;
* the application of the requirement is a proportionate means of achieving a legitimate aim; and
* the person to whom A applies the requirement either does not meet it, or A has reasonable grounds for not being satisfied that the person meets it.

The explanatory notes to the Act state that it is for an employer to show that it has an ethos based on religion or belief by reference to such evidence as the organisation's founding constitution.

On this basis a Christian charity with a religious ethos may be able to demonstrate that it is an occupational requirement for some roles in the organisation to be restricted to Christians.

Where you believe an occupational requirement applies to a post, this should be made clear in the advertisement. The reasoning should also be explained in any application pack and during the selection process.

An occupational requirement must be reassessed on each occasion a post becomes vacant to ensure that it can still be validly claimed. Circumstances may have changed, rendering the occupational requirement inapplicable.

1. **Organised religion**

Additional exemptions apply where employment is for the purpose of organised religion, such as being a Minister or otherwise promoting or representing the religion. In such cases, some roles can be restricted to people of a particular sex or sexual orientation, non-transsexuals, people who are not married or in a civil partnership; or people who are not divorced or married to (or in a civil partnership with) someone who has been divorced. In addition, requirements ‘related to’ sexual orientation can be imposed on certain roles, eg a requirement to be celibate if gay or lesbian. The exception only applies where either of the following is the case:

• appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or

• because of the nature or context of the employment, employing a person who does not meet the requirement would conflict with a significant number of the religion’s followers’ strongly held religious convictions. The requirement must be a proportionate way of avoiding such a conflict.

As with all occupational requirements, the requirement must be essential to the post, and not merely one of several important factors.

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