

# Religion or belief Discrimination



## Religion or belief

### **NB: THIS PRACTICE NOTE COVERS THE LAW WHICH APPLIES ON OR AFTER 1 OCTOBER 2010 (EQUALITY ACT 2010)**

For information on the law which applied before 1 October 2010, refer to Definition of religion or belief instead.

### **Protected characteristics**

The Equality Act 2010 provides protection against discrimination which relates to certain listed characteristics which people may possess. Some protections relate specifically to only one of those characteristics. Others provide the same protection in relation to all the characteristics, which are collectively referred to as 'the protected characteristics'.

Each protected characteristic is listed and (with the exception of pregnancy and maternity) defined in the Act:

References:

- o age -- see Age for further information  
References: EqA 2010, s 5
- o disability -- see Disability for further information  
References: EqA 2010, s 6
- o gender reassignment -- see Gender reassignment for further information  
References: EqA 2010, s 7
- o marriage and civil partnership -- see Marriage and civil partnership for further information  
References: EqA 2010, s 8
- o pregnancy and maternity
- o race -- see Race for further information  
References: EqA 2010, s 9
- o religion or belief -- see the remainder of this practice note, below, for further information  
References: EqA 2010, s 10
- o sex -- see Sex for further information  
References: EqA 2010, s 11
- o sexual orientation -- see Sexual orientation for further information  
References: EqA 2010, s 12

### **Definition of religion or belief**

'Religion' under the Equality Act 2010 means 'any religion', and any reference to 'religion' also refers to a lack of religion.

References: EqA 2010, s 10(1)

'Belief' means any religious or philosophical belief, and any reference to 'belief' also refers to a lack of belief.

References: EqA 2010, s 10(2)

Protection against discrimination on this ground is relatively new in England and Wales and there not a great deal of guidance from the domestic courts. The Equality Act Explanatory Notes provide some helpful information and guidance on this subject.

References: Equality Act Explanatory Notes, revised Aug 2010 PDF Format

## **Religion**

The wording of the Regulations suggests that a broad approach will be taken to what constitutes a religion.

Decisions by the European Court of Human Rights on freedom of religion under Article 9 can be useful. The Explanatory Notes state that the main limitation for the purposes of Article 9 is that the religion must have a clear structure and belief system. The definition includes widely recognised religions in the UK, and the Explanatory Notes state that the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism are all religions for the purposes of the Equality Act 2010, as well as denominations or sects within a religion, such as Protestants and Catholics within Christianity. The ECHR has also recognised other groups as religions, including the Church of Scientology, Druids and the Divine Light Zentrum.

References: ECHR, Article 9

Equality Act Explanatory Notes, paras 51-53 PDF Format

Employers should be aware that members of organisations which could be described as cults or fringe groups may well be protected by the legislation, even though the employer may consider the beliefs of such groups extreme or unpalatable.

## **Religious belief**

Because the definition includes specific protection for 'religious belief' (and not just for 'religion'), it is unlawful to treat someone unfavourably on account of specific beliefs they hold.

## **Manifestations of religious belief**

Protection of religious belief arguably does not cover manifestations of religious belief such as particular clothing or a requirement for breaks from work in which to pray. Unfavourable treatment on these grounds will however often constitute indirect discrimination (see Indirect discrimination, unless it is justified (see Justification).

However, the EAT commented in *Azmi v Kirklees* that deciding whether the discrimination was on ground of religious belief, or alternatively a manifestation of religious belief, is *not* determinative of whether or not the discrimination could be argued to be direct (the distinction between direct and indirect discrimination is very important, as only in the latter case may justification be argued as a defence -- see Justification). The proper question for the Employment Tribunal always has to be posed in terms of the Equality Act or the Directive:

References: Equal Treatment Framework Directive, 2000/78/EC, Art 2

Azmi v Kirklees Metropolitan Council: ET decision (2MB file) PDF Format

Azmi v Kirklees MBC [2007] IRLR 484, EAT

- o where a provision, criterion or practice (PCP) is not 'apparently neutral' or is one which the employer would not apply equally to a person not of the same religion or religious belief, then the case would **not** be one of indirect discrimination. Conversely, it would be likely to constitute direct discrimination
- o where a PCP *is* apparently neutral, or applied equally to persons not of the same religion or belief, it is likely that it **is** indirect discrimination, thus attracting the defence of the justification. It would be unlikely to constitute direct discrimination as well (with no possibility of that defence)

For further information, see our reports of *Azmi* (a claim by a teaching assistant who wished to wear the niqab full veil) here (ET decision) and here (EAT judgment).

### **Philosophical Belief**

Under the original version of the Employment Equality (Religion or Belief) Regulations 2003 (the predecessor of this part of the Equality Act 2010), the definition of 'religion or belief' was 'any religion, religious belief, or similar philosophical belief'. From 30 April 2007, the word 'similar' disappeared from the definition: ie philosophical beliefs no longer have to be similar to religious beliefs in order to qualify for protection. This would appear to have widened the range of beliefs that are protected, but the exact ambit of protection is not precisely defined.

References: EA 2006, s 77(1)

However, in *Grainger v Nicholson*, the EAT concluded there was no doubt at all that there must be some limit placed upon the definition of 'philosophical belief' for the purpose of the Employment Equality (Religion or Belief) Regulations 2003, and derived the following limitations from caselaw relating to the European Convention on Human Rights and from previous EAT caselaw:

References: *Grainger v Nicholson* [2010] IRLR 4

*Grainger*: Lexis@PSL news analysis

European Convention on Human Rights

*Arrowsmith v United Kingdom* [1978] 3 EHRR 218

*W v United Kingdom* (Application 18187/91)

*Campbell and Cosans v United Kingdom* [1982] 4 EHRR 293

*R (Williamson) v SoS for Education and Employment* [2005] 2 All ER 1, [2005] 2 AC 246

Mcclintock v Department Of Constitutional Affairs [2008] IRLR 29

Eweida v British Airways [2009] IRLR 78

- o the belief must be genuinely held
- o it must be a belief rather than an opinion or viewpoint based on the present state of information available  
References: Mcclintock v Department Of Constitutional Affairs [2008] IRLR 29
- o it must be a belief as to a weighty and substantial aspect of human life and behaviour
- o it must attain a certain level of cogency, seriousness, cohesion and importance
- o it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (paragraph 36 of *Campbell* and paragraph 23 of *Williamson*)  
References: Campbell and Cosans v United Kingdom [1982] 4 EHRR 293

R (Williamson) v SoS for Education and Employment [2005] 2 All ER 1, [2005] 2 AC 246

The Equality Act Explanatory Notes now reproduce these criteria in explaining how to determine whether a particular belief will qualify as a 'philosophical belief'. The Notes add that:

References: Equality Act Explanatory Notes, para 52 PDF Format

- o any cult involved in illegal activities would not satisfy these criteria
- o beliefs such as humanism and atheism would be beliefs for the purposes of this provision, but adherence to a particular football team would not be

### **Political and objectionable beliefs**

One potentially difficult issue is the extent to which *political* beliefs may be protected.

In *Grainger*, the EAT made it clear that although support of a particular political party might not amount to a philosophical belief (it might be a manifestation of that belief, rather than the belief itself), a political *philosophy* or doctrine, such as Socialism, Marxism, Communism or free-market Capitalism, could well qualify for protection.

References: Grainger v Nicholson [2010] IRLR 4

When addressing the potentially crucial question of whether persons espousing political philosophies that were viewed as vile and obnoxious by the majority of society might be protected by the Religion or Belief Regulations, the EAT's 'solution' in *Grainger* was simply that any belief which was not '*worthy of respect in a democratic society*' or was not '*consistent with basic standards of human dignity or integrity*' (see *Williamson* and *Campbell*) would not qualify for protection.

References: Campbell and Cosans v United Kingdom [1982] 4 EHRR 293

R (Williamson) v SoS for Education and Employment [2005] 2 All ER 1, [2005] 2 AC 246 would suggest that this is a bold judicial assertion. The fact that ECHR caselaw (*Williamson and Campbell*) relating to the interpretation of Article 9 of the Convention (freedom of thought, conscience and religion) finds that such vile and obnoxious philosophies are not protected by Convention rights does not lead automatically to a consequent conclusion that such philosophies would not be protected by the domestic legislation. After all, that domestic legislation on its face purports, without further qualification, to protect 'any religion' or '**any** religious or philosophical belief', and the Directive which those regulations purport to implement contains similarly wide and unqualified wording. Neither the Regulations nor the Directive contain a 'get-out clause' excluding beliefs which most people would find objectionable.  
References: ECHR, Article 9

EqA 2010, s 10(1)-(2)

#### Equal Treatment Framework Directive

Thus, it would seem at the very least arguable that if an employee, were, say, dismissed because he admitted to his manager that he had a strong belief in eugenics, but that employee had in no way taken any concrete action to manifest his belief, he would be able to bring a discrimination claim under the Equality Act 2010, even though his philosophical belief was obnoxious. By contrast, of course, an employee who *manifested* that belief in eugenics by kicking a fellow employee from a different racial group could clearly be dismissed lawfully on grounds of the assault, rather than on grounds of the belief which gave rise to it.

For these reasons, we would suggest that it is unlikely that *Grainger v Nicholson* is the last word in resolving what the legal position is where an individual is treated less favourably on grounds of holding beliefs that have the potential to infringe on other individuals' fundamental human rights, such as those who espouse racist or homophobic philosophies.

Since *Grainger*, the European Court of Human Rights has ruled in the case of *Redfearn*:  
References: *Redfearn v United Kingdom* (ECHR, Application no. 47335/06)

- o Mr Redfearn, who is white, was employed as a driver. The majority of his passengers were ethnically Asian
- o there had been no complaints about his work or conduct at work and his supervisor, who was Asian in origin, had nominated him for the award of 'first-class employee'
- o Redfearn was elected as a local councillor for the BNP
- o the employer summarily dismissed him as a result, citing potential health and safety risks to employees and passengers, and stating that his continued employment would give rise to considerable anxiety among passengers and could jeopardise the employer's reputation
- o Redfearn had less than one year's employment (the qualifying period that applied at that time -- see Qualifying period for unfair dismissal), so was unable to claim unfair dismissal

The ECHR held that, because of its failure to take reasonable and appropriate measures to protect employees with less than one year's service from dismissal on the grounds of political opinion or affiliation, the United Kingdom has violated Article 11 (right to freedom of association) of the European Convention on Human Rights. In the Court's view, appropriate protection could have been achieved either by creating:

References: ECHR, Article 11

- o a further exception, in the case of dismissals for that reason, to the unfair dismissal qualifying period, or
- o a free-standing protection against unlawful discrimination on those grounds

At the time of Redfearn's dismissal, the definition of 'religion or belief' was still 'any religion, religious belief, or **similar** philosophical belief'. Hence, now that the definition has apparently been widened (by removal of the word 'similar' -- see above), it is possible that, were a similar situation to arise now, the employee concerned would be able to mount a discrimination claim on the ground of religion or belief, in a way that was not open to Mr Redfearn at the time.

References: RBR 2003, SI 2003/1660, Reg 2(1)

In light of the ECHR's judgment in *Redfearn*, it seems quite possible that UK courts and tribunals will now strain towards a liberal interpretation of 'philosophical belief' under the EqA 2010 so as, where possible, to protect political beliefs, and perhaps also membership of a political party, under the Act, in order to read and give effect to the EqA 2010, so far as it is possible to do so, in a way which is compatible with Article 11 rights under the Convention (as is required by the Human Rights Act 1998), so as to provide an alternative means of redress that addresses the 'gap' in unfair dismissal protection which the ECHR identified in *Redfearn*.

References: Redfearn v United Kingdom (ECHR, Application no. 47335/06)

### **The evidence required to show a religious or philosophical belief**

Where a claimant asserts a religious belief, he may only need to show that he is an adherent to a particular religion. The tribunal will need to ensure an assertion of religious belief is made in good faith, but it is not for the tribunal to embark on an enquiry into the asserted belief, and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief, or the orthodox teaching of the religion in question, or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.

References: R (Williamson) v SoS for Education and Employment [2005] 2 All ER 1, [2005] 2 AC 246, at para 22

By contrast, to establish a philosophical belief, the claimant will need to:

- o adduce evidence directed to the genuineness of the belief (if that is in doubt)
- o adduce evidence from which the tribunal could conclude that what was done was done on the grounds of his belief

- o be cross-examined on both those areas of evidence

### **Discrimination for not belonging to a particular religious group**

It is also unlawful to discriminate on the grounds that an employee is not a member of a particular religious group. It would be unlawful discrimination for an employer to refuse to appoint anyone who was not a Christian, or to refuse to appoint an atheist.

### **Discriminating against someone because of a third party's religion or belief**

The formula for direct discrimination, which states that '*a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*', is designed to be (and almost certainly is) wide enough to cover the situation where A discriminates against B because of the religion or belief of a third party. For instance, where A treats B badly because B's wife (but not necessarily B) is a Hindu, that too will be unlawful discrimination.

References: EqA 2010, s 13(1)