

Discrimination Based on Religion

Definition of religion or belief

Religion or belief is now defined as: 'any religion... [or] any religious or philosophical belief'. This also includes lack of religion, and lack of religious or philosophical belief.

References: Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 2(1)

Protection against discrimination on this ground is new in England and Wales and there is little guidance from the domestic courts. The DTI (now BIS) explanatory notes for the Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003 provides some helpful information and guidance on this subject.

References: DTI (now BIS) explanatory notes 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 definition includes widely recognised religions in the UK, such as Christianity, Islam, Buddhism, Sikhism, Zoroastrians and Baha'is, as well as branches of a religion, such as Baptists and Methodists within the Christian church. The ECHR has also recognised other groups as religions, including the Church of Scientology, Druids and the Divine Light Zentrum

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

According to the DTI (now BIS) explanatory notes (at paragraph 15) this 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 (unless it is justified).

References: DTI (now BIS) explanatory notes PDF Format

By contrast, 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 proper question for the Employment Tribunal always has to be posed in terms of the Regulations or the Directive:

References: EC Directive 2000/78 -- see Article 2

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

Azmi v Kirklees MBC [2007] IRLR 484, EAT

RBR 2003, SI 2003/1660, reg 3(1)(b)

- 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

- o 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)

Philosophical Belief

Originally, 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: RBR 2003, SI 2003/1660, reg 2(1)

EA 2006, s 77(1)

The original DTI (now BIS) explanatory notes (which pre-date the 30 April 2007 removal of the word 'similar' from the definition) state (at paragraph 13) that to be protected, the belief must be similar to a religious belief, not in the sense that it includes a faith in any god, but because it occupies 'a place in the person's life parallel to that filled by the god/gods of those holding a particular religious belief'. In order to be protected, the belief must have 'a certain level of cogency, seriousness, cohesion and importance'. The DTI (now BIS) explanatory notes give examples of beliefs which generally meet this description, such as atheism and humanism, and examples which do not, such as support for a political party and support for a football team.

References: DTI

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 Religion or Belief Regulations, and derived the following limitations from caselaw relating to the European Convention on Human Rights and from previous EAT caselaw:

References: *Grainger v Nicholson* (UKEAT/0219/09/ZT)

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

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 membership of a particular political party would probably not amount to a philosophical belief (usually it would at most 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* (UKEAT/0219/09/ZT)

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

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 Religion or Belief Regulations. After all, those domestic Regulations on their face purport, 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 -- see HRA 1998, Sch 1, Pt I

RBR 2003, SI 2003/1660, reg 2(1)

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 Religion or Belief Regulations, 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.

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:

References: Grainger v Nicholson (UKEAT/0219/09/ZT)

- 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.

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

DTI (now BIS) explanatory notes PDF Format

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

The original formula to define direct discrimination was that person A discriminates against person B if, '*on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons*'. On 30 April 2007, this formula changed to '*on the grounds of the religion or belief of B or of any other person except A (whether or not it is also A's religion or belief) A treats B less favourably than he treats or would treat other persons*'. It was always clear that A will discriminate unlawfully if he acts on grounds of B's religion or belief. However, this change makes it explicitly clear that A will also unlawfully discriminate against B if A acts 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. This type of discrimination was arguably covered by the original definition, but there is now no room for doubt.

References: RBR 2003, SI 2003/1660, reg 3(1)(a)

EA 2006, s 77(2)