

Christian
Legal Centre

Guide to the Equality Act 2010

Employing Christians under the Equality Act



Introduction

Until 2003, there were no restrictions on employers who wished to discriminate on the basis of religion or belief. However, the Equality Act 2010 states that it is now unlawful, on face value, to discriminate on the basis of religion or belief (or any of the other protected grounds).¹

Whilst Christian organisations would never wish to discriminate on certain grounds such as race or disability, it is entirely reasonable that Christian organisations should have the prerogative to choose to employ Christians for some or all posts. However, this has been controversial, as the government explained in 2003:

“From the outset, the most contentious issue has been the extent to which, particularly, religious organisations could exercise choice (or discriminate) over their appointments. On the one hand, the spirit of the legislation is to eliminate all discrimination, but on the other, there are clear cases when certain individual characteristics or attributes are an essential part of the job or, controversially, a bar to a job.”²

The law therefore allows a limited number of exceptions to the general principle of non-discrimination. However, very few cases have come before the courts—much less binding courts—and therefore the operation of the law and the exemptions is still relatively uncertain.

The purpose of this booklet is to give the reader an outline understanding of the current state of the law as it affects Christian organisations. It will focus on the exemptions provided for Christian organisations and analyse two of the most relevant legal cases that have applied the legislation.

Legal Overview

In 2000, the European Union adopted a directive on equal treatment in employment and occupation which prohibited discrimination on various grounds.³ Following on from the EU Directive, the government introduced a series of Regulations, including the Employment Equality (Religion or Belief) Regulations 2003⁴ and the Employment Equality (Sexual Orientation) Regulations 2003.⁵ These Regulations have now been incorporated into the Equality Act 2010.

The legislation makes it unlawful for employers to discriminate on the grounds of an employee's religion or belief (or lack of it).⁶ This applies to applicants as well as current employees.

Many actions are prohibited in the Act.⁷ For the purpose of this booklet, the employer must not, on the basis of religion or belief, discriminate against a person (i.e. an **applicant**) in the arrangements made for deciding to whom to offer employment or by not offering the person employment.⁸ Furthermore, the employer must not discriminate against a person (i.e. a current **employee**) in the way he affords the person access, or by not affording the person access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service or by dismissing the person.⁹

There are exceptions to these prohibitions but they are interpreted narrowly and the employer must prove that the exception applies in each specific case.

The Exceptions

The wording of the exceptions found in Schedule 9 of the Equality Act 2010 differs slightly from the 2003 Regulations. However, the government has stated on numerous occasions that the exceptions are designed to replicate the effect of the previous legislation.

Whilst there is an additional exception if the employment is 'for the purposes of an organised religion',¹⁰ the exception that will be relevant for most Christian organisations provides:

"A person (A) with an ethos based on religion or belief does not contravene a provision mentioned in paragraph 1(2) by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and to the nature or context of the work—

- (a) it is an occupational requirement,
- (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
- (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it)."¹¹

Hence, if an employer has a **Christian ethos** and it is a **requirement of the job** in question, either by its **nature or context** and with regards to the ethos, that it needs to be performed by a Christian, then discrimination is not unlawful, providing that the decision was **proportionate**. There are three main tests to be met to fall within this exception which will be discussed below.

An ethos based on religion or belief

The Christian ethos must be genuine. It is not enough to state that the organisation has a Christian ethos, nor is it enough to have the ethos in writing but not present in reality. The stronger the Christian ethos, the easier it will be to justify employing Christians.

In the case of *Sheridan v Prospects* (2006),¹² the Tribunal concluded that the description of Prospect's ethos 'does not accurately reflect the actual ethos of the organisation'.¹³ Furthermore, it was held that:

*'The Tribunal must reach some broad conclusions about the nature of the ethos. That must be an objective assessment – it is not for Prospects to define for itself an ethos that does not accord with the reality on the ground.'*¹⁴

This can be contrasted with the case of *Muhammed v The Leprosy Mission International* (2009),¹⁵ where the Tribunal found in favour of the Christian organisation. The Tribunal held that:

*"It is clear to us that the Respondent's Christian belief, and in particular belief in Jesus Christ and the power of Christian prayer to achieve its goals, is central to its work and activities. The ethos based on the Christian religion permeates the Respondent's work, and daily life and activities in the workplace."*¹⁶

Hence, the ethos must be genuine and clearly visible, bearing in mind that it may one day be scrutinised by an Employment Tribunal. Clear documentation is a good start but the ethos must also exist in the day to day reality of the organisation.

The 'Occupational Requirement'

This used to be known as a 'genuine occupational requirement' ("GOR") or a 'genuine and determining occupational requirement'. However, the Equality Act 2010 omits 'genuine' and 'determining' from the provisions. The Explanatory Note to the Act states that: *'The requirement must be crucial to the post, and not*

*merely one of several important factors. It also must not be a sham or pretext.*¹⁷ Hence, it must still be genuine, even if it is not stated on the face of the Act.

The basic question that needs to be asked is: “why does a *Christian* need to do this *particular* job?” If the employer cannot satisfactorily answer that question, they will have failed to establish an occupational requirement.

Appendix 1 of the ACAS guide entitles ‘Religion or belief and the Workplace’,¹⁸ gives the following guidance:

- GORs should be identified at the beginning of the recruitment, training or promotion process, before the vacancy is advertised. Advertisements and material sent to potential applicants should clearly show that the employer considers that a GOR applies and the point should be reiterated during the selection process.
- Applicants who do not agree that there is a GOR for the post holder are at liberty to make a claim to an Employment Tribunal because they believe they have been prevented from applying for the post on the grounds of religion or belief. It would be for the employer to show that such a GOR is justified.
- If an employer wishes to claim a GOR, he must consider what the duties are, for which an exemption is to be claimed; a GOR cannot be claimed unless some or all of those duties, or the totality of the role, are covered by a specific exemption and an assessment has been made showing that it would be unreasonable to require other employees of the appropriate religion or belief to undertake those duties. Also it must be shown that those duties must be carried out to achieve the objectives of the job.
- Where the organisation has a religious ethos, a GOR exemption cannot be claimed if the nature of the role [or]¹⁹ the context within which it is carried out is not of sufficient profile or impact within the organisation to affect the overall ethos of the organisation.
- Each job for which a GOR may apply must be considered individually; it should not be assumed that because a GOR exists for one job it also exists for jobs of a similar nature or in a similar location. The nature or extent of the relevant duties may be different or, for instance, there may be other employees who could undertake those duties.

- A GOR 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 GOR inapplicable.
- A GOR cannot be used to establish or maintain a balance or quota of employees of a particular religion or belief.
- The burden of proof lies with the employer to establish the validity of a GOR by providing evidence to substantiate a claim.
- Only an Employment Tribunal or a higher court can give an authoritative ruling as to whether or not a GOR is valid.²⁰

In the case of *Leprosy Mission* the Tribunal held:

*“We next considered whether being a Christian is a genuine occupational requirement for the job, having regard to the context in which it is carried out. We are satisfied that it is. A Christian belief, and in particular a belief in the biblical account of Jesus healing lepers, and a belief in the power of Christian prayer to achieve the Respondent’s goals are at the core of its work and activities. Among other matters, this is manifested by the daily acts of Christian worship in which all members of staff participate, and acts of prayer in response to requests for Christian prayers from abroad.”*²¹

However, the Tribunal in *Prospects* held that: “it cannot have been a ‘requirement’ for all Support Workers to be Christian, since Prospects had been perfectly content to operate for a number of years with a significant number of non-Christians in these roles.”²²

To answer the question: “why does a Christian need to do this particular job?” the employer can point to the ethos of the organisation and the nature of the work or the context of the work.

Nature of the Work

The nature of the work would include any role where being a Christian is essential because of the very nature of the tasks involved. The Equality Act 2010 Explanatory Note states:

*“A religious organisation may wish to restrict applicants for the post of head of its organisation to those people that adhere to that faith. This type of discrimination could be lawful. This is because to represent the views of that organisation accurately it is felt that the person in charge of that organisation must have an in-depth understanding of the religion’s doctrines.”*²³

However, less central roles will not be covered by this provision, and the Explanatory Note goes on to say: 'other posts that do not require this kind of in-depth understanding, such as administrative posts, should be open to all people regardless of their religion or belief'—that is, providing they are not covered by the "context" provision below.

Hence, in *Leprosy Mission* it was held that:

"The core requirements of the job of Finance Administrator are finance and administrative matters which do not have any connection to Christian belief²⁴ and likewise, in *Prospects* it was held that support officers were not covered by this provision as 'the overwhelming proportion of the support given was secular in nature.'²⁵

Hence, only where the nature of the work is 'Christian' will this provision apply, with some positions within the organisation seemingly requiring a Christian more than others (in the eyes of a secular court).

Context of the Work

As a great many jobs would not be specifically 'Christian' in their very nature, there is a second provision which allows an exception based on the context of the work. In *Leprosy Mission* it was held that the Finance Director's job did fall within this provision because of the 'Christian' context of the employment.

The Tribunal pointed out that:

"Every working day begins with at least half an hour's collective prayer, gospel reading, and shared reflections on the work of Jesus Christ. All members of staff actively participate in this shared time, offering prayers for specific or general aspects of the Mission's success. Members of staff take it in turns to lead the act of collective worship."²⁶

However, in *Prospects* it was held that as 'a significant number of non-Christian staff²⁷ were employed, there was not a genuine 'Christian' context of employment. Furthermore, there were very few prayer times or other explicitly 'Christian' activities within the working day.

Proportionality

'Proportionality' means that the requirement to employ a Christian for the role must be objectively justified and reasonably necessary, notwithstanding

its discriminatory effect.²⁸ This requires a balancing exercise to be done—weighing the justification for the discrimination against its discriminatory effect. In *Leprosy Mission*, the Tribunal held that:

"...employing a non-Christian would have a very significant adverse effect on the maintenance of the Respondent's ethos, and the sense of religious community cohesion in the workplace. In arriving at that conclusion, we weighed the discriminatory effect of the requirement on the Claimant against the needs of the Respondent. In our view the balance lies in favour of the Respondent. The effect on the Claimant is that he could not be employed by the Respondent, but there are countless other employments where he can exercise his skills. On the other hand, the absence of the requirement would undermine the Respondent's ethos and activities."²⁹

The balance lay in favour of the Christian employer in the *Leprosy Mission* case because of the strength of the organisation's Christian ethos and the Christian context of the work. The balance may lie in favour of the prospective employee if this is not the case – for example, if the ethos is not particularly strong or there are other non-Christians doing a similar role within the organisation. It will be more difficult to win this balancing exercise for less central roles. One discrimination lawyer has commented:

"Religious requirements imposed on ancillary staff are thus only likely to be proportionate if it can be shown that all such staff participate in the religious purposes of the organisation. For example, if all staff offer religious support to each other, or participate in common prayers or other religious observance, then it may be proportionate to require a common religion across the workplace. However, a mere preference for working with those of the same religion will be unlikely to be sufficient."³⁰

Summary

- In order to qualify for the exception, the stronger Christian ethos an organisation has the better. Clear documentation is a good start – for example, a statement of faith, articles of association and/or trust deed, mission statement etc.
- There must be evidence that a Christian ethos exists in reality as well as on paper. Are there regular prayer meetings and/or times or worship? Is everyone expected to attend? Is everyone expected to contribute?

- For the central roles of the organisation, it will be relatively straightforward to apply an occupational requirement that staff members are Christian. This will become more difficult for ancillary positions.
- The burden of proof is on the employer to show that the occupational requirement is really necessary for each and every post. The employer should ask themselves each time a position becomes available, “why must a Christian be employed to this particular post?”
- A blanket ban on non-Christians is unlawful and each post must be looked at and assessed individually.
- If a Christian organisation wishes to ensure that all staff members are Christian, the context in which each post is carried out must contain a significant ‘Christian’ element to it, sufficient to demonstrate that only a Christian could fulfil the role.
- Although the ‘occupational requirement’ exception is interpreted narrowly, it is possible to rely upon the exception and maintain an exclusively Christian workplace, as demonstrated by [Leprosy Mission](#).
- However, care should be taken, as maintaining an exclusively Christian workplace goes against the principle of equal treatment and therefore the exceptions are narrow and the legal burdens are against the employer.

Can the Christian Legal Centre help?

Yes. Please contact us if you would like more information on this topic. We can be contacted on 020 7935 1488 or at info@christianlegalcentre.com.

The Christian Legal Centre takes up cases affecting Christian values and freedoms in the UK and also supports individuals who have been persecuted for their faith.

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If you want to help us promote Christian values in the public sphere, then you can do so by joining more than 65,000 people who support the work of the Christian Legal Centre and its sister organisation, Christian Concern.

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The team at Christian Concern conduct research into, and campaign on, legislation and policy changes that may affect Christian freedoms or the moral values of the UK.

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Please visit our website at www.christianconcern.com to join our mailing list and to find out how you can join in with our campaigns.

Important Note

If you have any specific queries arising from this booklet, please contact the Christian Legal Centre or seek the advice of a solicitor. This booklet is designed to give you a clearer understanding of the law in this area. Please note, however, that it is not legal advice and we will not be held liable for any inaccuracies or for anything said or done in response to its contents. This is a specialist field of law and each case is dependent upon its own facts.

References

- 1 The protected grounds are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation.
- 2 Research Paper 03/54, House of Commons, 'Employment Equality Regulations: Religion and Sexual Orientation', 9 June 2003, p.3
- 3 Article 1 of the Employment Directive 2000/78/EC
- 4 SI 2003 No. 1660
- 5 SI 2003 No. 1661
- 6 'Religion means any religion and a reference to religion includes a reference to a lack of religion.' s.10 EA2010
- 7 For employment purposes, the prohibited acts are: Direct Discrimination; Indirect Discrimination; Harassment, and; Victimisation.
- 8 S.39(1)(a) and (c) EA 2010
- 9 S.39(2)(b) and (c) EA 2010
- 10 Sch 9, pt. 1, s.2 EA 2010. Employment 'for the purposes of an organised religion' is not defined in the Act but the government stated during the passing of the 2003 regulations that: "...we had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion." House of Lords, Hansard, Col. 779-780, 17 June 2003
- 11 Sch 9, pt. 1, s.3, EA 2010
- 12 Sheridan and Hender v Prospects for People with Learning Disabilities ET 2006, Case No. 2901266/06. As an Employment Tribunal case, this judgment is not a binding authority. Hence, other courts and tribunals are not compelled to follow its legal reasoning.
- 13 Para 4.2.11
- 14 Para 4.2.12
- 15 ET 2009, Case No. 2303459/2009. Again, this case is not binding on other courts and tribunals.
- 16 Para 28
- 17 Para 755
- 18 This has now been updated without the Appendix, but the old guidance is still useful.
- 19 The original guidance says "and" instead of "or", however, this is an incorrect interpretation of the exemption. The difference between "and" and "or" is significant.
- 20 See http://www.acas.org.uk/media/pdf/f/l/religion_1.pdf
- 21 Para 31
- 22 Para 4.2.18
- 23 Para 765
- 24 Para 30
- 25 Para 4.2.13
- 26 Para 10
- 27 Para 4.2.15
- 28 See Hardy & Hansons Plc v Lax [2005] EWCA Civ 846
- 29 Para 33
- 30 L Vickers, 'Religious Freedom, Religious Discrimination and the Workplace', (Hart Publishing: Oregon) 2008, p.137

