



"NEW DISCRIMINATION LAWS COME INTO FORCE"

Introduction

On 1st December 2003 the **Employment Equality (Sexual Orientation) Regulations 2003** discrimination on grounds of sexual orientation is outlawed. These Regulations will be followed immediately on 2nd December 2003 by the **Employment Equality (Religion or Belief) Regulations 2003** which will introduce unlawful discrimination on grounds of religion or belief. The Regulations apply to all areas of recruitment and employment as well as vocational training.

Institutions of Further and Higher Education are also covered in that discrimination against students on either of the new grounds will also be unlawful.

Definition of "Religion or Belief"

The first question is what is a "religion or belief"? The Regulations do not provide a list of protected faiths. A "religion or belief" is simply defined as being any religion, religious belief or similar philosophical belief. In trying to judge what might be a religion or belief in the event of a dispute arising, Employment Tribunals will consider such things as whether or not there is collective worship, a clear belief system as well as trying to assess whether there is a profound belief affecting a way of life or affecting views of the world. As a result any philosophical or political belief will not be covered unless it is quite similar in nature to a religious belief and will not include any political beliefs.

There is currently concern that the Regulations will not protect an employee who has no adherence to any particular religion. An agnostic however, might be covered as long as those beliefs are sufficiently strongly held.

Definition of "Sexual Orientation"

"Sexual orientation" is given a wide interpretation and specifically covers employees who have a sexual orientation towards persons of the same sex or persons

of the opposite sex as well as anyone who is bisexual. But sexual practices (such as sado-masochism) are excluded.

What will be unlawful?

It will be unlawful for employers to : -

- treat employees/applicants less favourably than others on grounds of their religion or belief or sexual orientation (i.e. direct discrimination).
- apply a criterion, provision or practice which disadvantages employees/applicants who are of a particular religion or belief or sexual orientation and which cannot be justified as a proportionate means of achieving a legitimate aim (i.e. indirect discrimination)
- harass employees/applicants on grounds of his or her religion or belief or sexual orientation (i.e. harassment).
- victimise employees/applicants who have made a complaint or allegation under the Regulations (i.e. victimisation).
- discriminate against employees/applicants after their employment has ended where the discrimination or harassment arises out of and is closely connected to that relationship (i.e. post employment discrimination).

Discrimination can occur where someone treats an employee less favourably because of a perception that an employee is of a particular religion or sexual orientation even if that perception is wholly wrong. Accordingly, the Regulations will protect an employee who is thought to be gay even if they are not. The will also protect an employee say, who is discriminated against because of her association with say, a Muslim colleague.

Manifestations of a workers religion or belief will also be covered so failure to accommodate the requirement of certain employees to pray at certain times of the day or to leave early on a Friday may be unlawful as may a failure to provide an appropriate meal in the staff canteen. It is not so clear however if the Regulations will apply to manifestations of someone's sexuality such as a homosexual man being asked by his manager not to be openly affectionate with his partner during the annual works party. Further clarity on these sorts of issues will come from the Tribunals as the case law develops.

Harassment will be unlawful the purpose or effect of any treatment violates an employees dignity or creates an intimidating or hostile environment.

With the Religion or Belief Regulations, "harassment" may also extend to the need to ban football colours – such as scarves - from the workplace, as certain football clubs are associated with particular religions and may therefore cause an intimidating environment to others who are not of the same religion.

Genuine Occupational Requirement (GOR)

There are certain specific situations where an employer can insist that an employee must be of a particular sexual orientation or religion to do a job. But these exceptions apply only in the following specific cases subject to a "proportionality" test:

1. where the nature of the job or the context in which it is done means that whoever does that job must be of a particular religion or belief or sexual orientation but this must be a genuine and determining requirement to do the job
2. where the employment is for the purposes of an organised religion, the employer can insist that an employee is of a particular sexual orientation in order to comply with the doctrines of the religion or because of the nature of the job and the context in which it is carried out makes it necessary to have someone of a specific orientation doing the job to avoid conflict with the strongly held religious convictions of a significant numbers of the

religions followers. A number of Unions have however launched a legal challenge to this part of the Sexual Orientation Regulations already on the basis that it might, for example, enable faith school to discriminate against homosexual teachers.

3. where the employer has an ethos based on a particular religion and having regard to that ethos and to the nature of the employment or the context in which it is being carried out, being of a particular religion is a determining requirement for doing the job. Ethos based organisations will include the obvious religious organisations but it is also likely to include schools, church run organisations etc.

Conclusion

These Regulations are a positive step building on existing discrimination legislation and employers who treat all their employees with dignity and respect should have nothing to fear. However, employers should review their Equal Opportunities policies to ensure they are up to date. They should also review any practices that might not accommodate, say, employees wishing to practice their faith at certain times of the day or week.

Managers may require training to ensure that they are aware of the new rights and employers will also need to consider adding "sexual orientation" and "religion or belief" to any existing monitoring of applicants for new posts and current employees. Useful Guides have also been produced by ACAS.

Although the Regulations should not prove problematic for most employers, it is still worth remembering that in the event of a successful claim being brought, Employment Tribunals can still award unlimited compensation.

For further advice on any discrimination matter please contact: **Jill Bell or Chris McDowall at Spectrum, Anderson Strathern's Discrimination Law Service on 0131 625 7246 or e-mail spectrum@andersonstrathern.co.uk**