Religion, Belief and Sexual Orientation – The New Discrimination Regulations

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July 2003
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Introduction

The Government has published revised draft regulations with regard to the introduction of protection against discrimination on grounds of religion, belief and sexual orientation. These regulations will come into force on 1 December 2003 and are being made to comply with the UK’s obligations in relation to the EU Directive 2000/78/EC, which need to be implemented by Member States by 2 December 2003. The regulations adopt definitions of direct and indirect discrimination similar to those already used in the UK’s sex and race discrimination legislation, so to an extent cover familiar ground. The challenge is the interpretation of the concepts that the new regulations aim to protect.

Sexual orientation

The orientation regulations will prohibit direct or indirect discrimination on grounds of sexual orientation, but only in employment and vocational training. Especially in view of the recent House of Lords decision in Payne v Mayfield, specific protection is required, given that orientation is not covered by the UK’s existing sex discrimination legislation.

Sexual orientation is defined as being a sexual orientation to the same sex, the opposite sex or both sexes. It does not extend to sexual “practices and preferences” (eg sadomasochism). Direct discrimination can also include discrimination based on a perception of a person’s orientation, whether or not correct. A person will not, therefore, necessarily be required in litigation to disclose his or her sexual orientation (unless, in terms of credibility, evidence of the surrounding circumstances needs to be adduced). Treatment based on assumptions about a person’s orientation will suffice to found a claim.

A claim of direct discrimination will also be possible where a person is being discriminated against by reason of the sexual orientation of a third party (for example, because the person associates with, or refuses to carry out an instruction to discriminate against, homosexuals).

Indirect discrimination is defined as the application of a “provision, criterion or practice” in relation to which persons of a particular orientation are at a particular disadvantage and as a result of which the individual in question suffers. A claim can be defended if a provision, criterion or practice can be shown to be a proportionate means of achieving a legitimate aim.

Proportionality is a new concept in UK discrimination law, derived from European human rights law, and will no doubt give rise to test cases. The employer needs to show that the policy or practice which is challenged was intended to achieve an aim that was “legitimate” and not discriminatory. Proportionality has been said to involve both a “balancing test” (whereby the means must be balanced against the aim) and a “necessity test” (meaning that, if a particular objective can be obtained by more than one available means, the least discriminatory of these means must be adopted).

In relation to orientation, there is a “genuine occupational requirement” exception applying to recruitment, promotion, transfer, training and dismissal. This is similar to that contained in s. 19 of the Sex Discrimination Act 1975 in relation to employment in a church or temple (where a requirement related to sexual orientation is necessary to comply with the doctrines of the religion or avoid conflicting with followers’ religious convictions).

Religion or belief

Religion or belief is defined as being “any religion, religious belief or similar philosophical belief”. The guidance notes issued with the draft regulations state that this definition is not intended to include any political or philosophical belief; the relevant belief must be similar to a religious belief. No doubt, case-by-case guidance will need to be sought in due course from the Courts and tribunals. Again, unlawful discrimination can be by way of direct or indirect discrimination, victimisation or harassment.

Again, there is a genuine occupational requirement exception. This applies where the employer has an ethos based on religion or belief and, having regard to the nature of the employment or the context in which it is carried out, being of a particular belief is a genuine occupational requirement. Discrimination in favour of one particular religion or belief is only possible if it is genuinely necessary for the particular role in question. For example, there may be jobs where a Christian ethos is essential in relation to the key activities of the role. However, ancillary functions may not require the applicable ethos, even if the employer might wish that to be the case, in which case the exception may be difficult to rely upon.

The definition covering, as it does, “any religion” will be likely to cover fringe religions and cult memberships. The concept of a “similar philosophical belief” is similarly vague. The guidance provides that a number of factors can be considered when deciding what is a religion or belief (for example, collective worship, clear belief system, profound belief affecting way of life, or view of the world). Humanism or pacifism might therefore well fall within the scope of the regulations. Problems, however, might arise in relation to specific issues; for example, whether an abortion clinic could insist that its employees not be opposed to abortion.

General points

Both sets of regulations adopt similar formulations in relation to various ancillary matters. For example, once a prima facie case is established, the respondent has the burden of proof.

The regulations prohibit victimisation (in terms of a person being treated less favourably than others because he or she has brought or given evidence in proceedings under the regulations or because he or she has alleged a breach of the regulations). This protection does not, however, apply if the allegations made are known to be false.

“Harassment” is specifically defined as being where a person engages in unwanted conduct which has the purpose or effect of violating another person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that other. Harassment is only considered to have this effect if, taking into account all the circumstances, the conduct should “reasonably be considered” as having violated the complainant’s dignity or created an offensive environment for him or her. This includes a requirement to take into account the person’s perception of the conduct towards him.

There is a distinction between the individual’s “dignity” and his or her working environment. A one-off incident constitutes harassment just as much as on ongoing, perhaps lower-level, discriminatory environment. This formulation reflects the guidance given by the EAT in the case of Driskel v Ponsendale Business Services Limited [2000] IRLR 151 with regard to sexual harassment.

There is, therefore, some limitation to the relevance of the person’s reaction to the treatment. As the Government’s guidance notes point out, an
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oversensitive complainant who takes offence unreasonably at a perfectly innocent comment would probably not be considered as having been harassed. Whilst the definition requires that the treatment be “unwanted”, that is not sufficient for the purposes.

As is the case under existing discrimination law, employers may be vicariously liable for the acts of their employees. A person may be liable for knowingly assisting somebody to commit an unlawful act and there are exceptions for national security and specific provisions relating to barristers, the police, etc. There is also a questionnaire format similar to that applying under the existing discrimination law.

What discrimination is unlawful?

In terms of defining what discrimination is unlawful in employment and vocational training, regulation 6 of the regulations make it unlawful for employers, at an establishment in Great Britain, to discriminate against or harass job applicants and employees in a wide variety of circumstances starting with the arrangements they make for determining to whom they should offer employment and finishing with dismissal. Importantly, discrimination in provision of goods and services is not covered (although contract workers are covered).

Territorial scope

The regulations apply to work “at an establishment in Great Britain”. Work undertaken wholly or partly in Great Britain is treated as being at such an establishment. If the employee works wholly outside Great Britain, the work will only be caught if undertaken for the purposes of the employer’s establishment in Great Britain and the employee is (or was) ordinarily resident in Great Britain at the time of recruitment, or at some time during the employment or contract work.

There are specific provisions relating to off-shore and specific employments.

Post termination

In view of the recent case law extending protection of the existing discrimination legislation beyond the end of employment in limited circumstances, the regulations specifically make it unlawful to discriminate the working relationship provided that the act complained of is closely linked to the former relationship (such as refusal to give a reference).

Conclusion

Indirect discrimination is well-troddden ground and employers may find it a difficult, but at least intelligible, concept in the age and orientation contexts. The problem with direct discrimination is that it cannot be justified, so it will be interesting to see how tribunals juggle competing arguments (eg the employer says it dismissed for trouble-making and offensive harassment of colleagues; the employee says it was simply an honest expression of views and beliefs).

The Government claims that introducing the regulations at the last possible moment provides businesses with as much time as possible to prepare. The reality, however, may be that test cases may be necessary to fully flesh out the definitions used.