

THE CHRISTIAN INSTITUTE

AND THE EQUALITY BILL

ADVICE

The "New" Test

1. I have been asked to advise urgently on the scope of the Equality Bill which is presently before Parliament. The Christian Institute is particularly concerned as to the narrowing of the test at paragraph 2(8) to Schedule 9 of the Bill. The exception at paragraph 2 permits employers to discriminate in their employment practices on the basis of otherwise protected characteristics where the employment is for the purposes of an organised religion. Paragraph 2(8) thus sets out a test for whether a particular role is for the purposes of an organised religion. There is an understandable concern that the wording would narrow the scope of the existing exception so that it only applies to roles which

wholly or mainly involve leading religious worship or promoting and explaining religious doctrine.

2. The issue arises from the difference in wording in the Equality Bill from the earlier Employment Equality (Sexual Orientation) Regulations 2003.¹
3. The Institute wishes to be advised as to how paragraph 2(8) would be construed and in particular whether many pastors or ministers of churches might in fact fail the test if they do not spend as much as 50% of their time specifically leading or assisting in public worship or explaining Christian doctrine. I understand that many of them, for example, may spend a significant proportion of their time engaged in pastoral visiting, dealing with church finances, administration or staffing, running youth and children's groups, or other apparently 'non doctrinal' activities. There is concern that even preparing sermons or engaging in theological reading rather than actively explaining Christian belief may not constitute promoting and explaining religious doctrine for the purposes of paragraph 2(8). This is even though it is in effect preparatory work for doing so.
4. The concern over the perceived narrowing of the test in paragraph 2(8) to Schedule 9 of the Equality Bill derives thus essentially from two directions:
 - a. the *range* of persons covered by the exception; *and*

¹ <http://www.opsi.gov.uk/SI/si2003/20031661.htm>.

- b. whether church ministers would be covered by the exception depending upon the *nature* of the tasks they are carrying out.

I have been asked to advise only in relation to the second aspect.

5. The intention of the Government, as stated in replies made by the Solicitor General, Ms Vera Baird MP, at the Committee Stage of the Bill², is apparently *not* to narrow the *scope* of the duties attached to posts which involve ministers of an organised religion but to provide clarification on *when* the exception could apply to others who may be employed by religious bodies but are not engaged “in promoting or explaining the religion to others”. The exception is thus apparently designed so as to be narrow in order to maximise equality of opportunity in order to exclude religious organisations (faith schools/welfare services) from using the exception to justify not employing people in posts where the religious belief was not a fundamental part of the tasks being carried out (for example an accountant, cleaner etc). Ms Baird, stated for example that:

“However, contrary to what has been suggested, the new definition does not narrow the scope of the existing exceptions. There has been some confusion about what is meant by

.....
“*for the purposes of an organised religion*”,

² Public Bill Committees, 23 June 2009, 5:15 pm [Hansard Col 454].

and we have therefore included a definition of the term to clear up misunderstandings, to save courts and tribunals having to go into areas of potential religious controversy and to reduce the risk of the exception being misused. The definition is designed to make it clear that the exception applies to a very narrow range of employment, such as ministers of religion plus a small number of posts outside the clergy, including those that exist to promote and represent religion.”³

6. The exception is derived from Article 4.1 of the Equal Treatment Directive 2000/78, [2000] OJ L: 303/16 which reads as follows:

Occupational requirements

4. 1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

³ http://www.theyworkforyou.com/psc/2008-09/Equality_Bill/12-0_2009-06-23a.6.0

7. I am not aware of any particular difficulties which have arisen from the present formulation. Further I do not follow why the scope of the phrase used in Article 4.1 “the nature of the particular occupational activities concerned or of the context in which they are carried out” requires what is a great narrowing of the scope of the exception such that it requires one who is mainly involved in leading or assisting in the observance of liturgical or ritualistic practices or promoting or explaining the doctrine of the religion. There may surely in a religious context be a “genuine and determining occupational requirement” which goes beyond this narrow formulation.
8. It is noteworthy by analogy that Article 4.2 uses the term “ethos” several times in relation to public and private organisations. This may be taken to extend the protection of the exception to ancillary activities of religious organisations beyond the narrow confines of activities in preaching/sermons/church services to recognise the wider range of functions which fall within the work of religious organisations.
9. It could be argued that the *ethos* of a church embraces the *range of tasks* expected of a minister (as set out in the Instructions) which are part of the organised religion. To look at the situation from another perspective, the religion would not be recognised as an “organised religion” if it did not perform the range of functions to be expected from it.

10. There is indeed a strong duty upon English courts and tribunals to give effect to the primacy of EU law and to interpret English law to give effect to EU law. Thus, in any case of uncertainty, the EU Directive would provide an underpinning interpretative guide to the Equality Bill exception. However, this may not help if the actual wording of paragraph 2(8) is clear but more restrictive than the Directive necessarily requires. The fact that it is narrower may be demonstrated by the conclusion in *R (on the application of Amicus MSF Section) v Secretary of State for Trade and Industry* [2004] EWHC 860 that the existing reg 7(3) was compatible with Article 4.1.

Use of the exception to dismiss a Minister

11. One situation in which a church would be seeking to rely on the genuine occupational requirements (GORs) would be where the minister has, in the view of the church, "gone off the rails" morally (e.g. that he has entered a same sex relationship, has divorced and re-married, or has decided to live in a different gender) and has thus been asked to relinquish his duties. There is concern that such a minister might subsequently challenge the church in an employment tribunal by way of a discrimination claim. In that situation, having been in charge of his own time, it is feared that he might be better placed than the church to argue before the tribunal about what proportion of his time was spent specifically teaching doctrine and/or in leading worship and therefore as to why the church cannot claim the exception in paragraph 2 to Schedule 9 of the Bill. The church would be at a serious practical disadvantage in responding to that sort of claim.

12. The arguments made above in relation to the scope of a “requirement” and the notion of “ethos” attached to the religion apply here in terms of justifying *why* an employee no longer satisfies the “requirements” for the post.

13. The concern stems from (and is heightened by) the Employment Tribunal decision in *John Reaney v The Hereford Diocesan Board of Finance* decided in 2007 where an award of £47,345 was made against the Hereford Diocese⁴. Mr Reaney, a gay man, had been refused employment as a youth worker for the Diocese of Hereford. Despite reassurances that he would remain celibate, the Bishop of Hereford refused to employ Mr Reaney on grounds of his “practice and lifestyle”. The Employment Tribunal held that the Sexual Orientation Regulations 2003 do not distinguish between “the mere fact of being gay and expressing that sexual orientation in behaviour”. It also held that the genuine occupational requirement defence available to organised religions was not valid in this case.

14. I understand that most church pastors and ministers view their role less in terms of a ‘job’ and more in terms of a ‘calling’ or vocation. As such, they may not make a clear distinction between time spent in their job and their private time, neither are they likely to have a job or role description. Instead, they are there to be called upon to provide

⁴ ET 1602844/2006. There was much publicity and calls for the Bishop of Hereford to resign. Mr Reaney’s case was funded by Stonewall.

spiritual and practical help where opportunities or needs arise.

Therefore, in terms of the actual number of hours for which they are “on duty”, the time spent on the narrow range of tasks envisaged by the new test may be a relatively small proportion – certainly not “wholly or mainly.”

15. Whether a particular minister spends most of his time leading or assisting in church services or in promoting or explaining the doctrine of his religion will be determined on the facts. If a particular minister is spending more than half of his time on tasks unrelated to such matters, then a church facing a discrimination claim in the circumstances described above would have difficulties availing themselves of the exception set out in paragraph 2 of Schedule 9 to the Bill. The fact that the most significant task which the minister may carry out is, for instance, preaching and leading services might not qualify for the church to invoke the exception at paragraph 2 if less than 50% of his time was devoted to such activities.

16. It is thus clear that there may be significant difficulties for churches posed by paragraph 2 of Schedule 9 to the Bill, notwithstanding the explanation from the Solicitor General and the wording of the Directive. It seems to me that the current wording of paragraph 2(8) fails to reflect that the overriding role of a church pastor or minister (whatever his precise tasks – which may not involve specifically doctrinal activities) is devoted to promoting the ethos and standards of his church.

17. I would be happy to advise further if required.



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