

SURVIVING THE EQUAL TREATMENT DIRECTIVE

At the moment employers are generally free to discriminate against employees and prospective employees on the basis of their religious beliefs¹ or their sexual orientation. The Equal Treatment Directive will generally make it unlawful for employers to refuse to employ someone on the grounds of religion or belief, disability, age or sexual orientation.

Draft versions of the Regulations which will implement the Directive have now been published. Of most interest to LCF members will be the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003. These Regulations will generally make it unlawful to discriminate against an employee or a potential employee on the grounds of their religion or belief or their sexual orientation respectively.

Exemptions relating to religion or belief

The Regulations include two exemptions. The first is where, having regard to the nature of the employment or the context in which it is carried out, being of a particular religion or belief is a genuine and determining occupational requirement and it is proportionate to apply that requirement in the particular case. The second exemption applies where an employer has an ethos which is based on religion or belief and is somewhat broader in that the employer need not demonstrate that being of a particular religion or belief is a "determining" occupational requirement.

The exemptions are only available in certain situations. They may be used to justify a decision not to offer employment to someone on the grounds of religion. They may also be used to justify discrimination in the opportunities which an existing employee is afforded for promotion, a transfer, training or receiving any other benefit. (This assumes that when Reg 7(1)(b) refers to Reg 6(3)(b), which does not exist, it is intended to refer to Reg 6(2)(b).) However, as currently drafted the exemptions could not be used to justify the dismissal of an employee, subjecting the employee to any other detriment or the refusal to afford him an opportunity for promotion, a transfer, training or any other benefit.

I am concerned that if Christian organisations can properly use the exemptions to justify a refusal to offer employment to someone of another religion, they should also be able to use the exemptions to justify the dismissal of an employee who professed to be a Christian but who subsequently converted to another faith. There are also some Christian organisations who allow non-Christians to hold certain posts while restricting other posts to Christians. The exemptions could not be used to justify a refusal to allow a non-Christian to be promoted or transferred to a post which is restricted to Christians.

¹Northern Ireland already has laws dealing with religious discrimination and the Regulations will not therefore apply to Northern Ireland.

The following examples illustrate potential problems of the proposed wording.

The LCF has a vacancy for an administrator and decides that the post should be filled by a Christian. The post will involve substantial contact with Christians and participation in prayer meetings. It may therefore be possible to justify the decision that the post be held by a Christian. A Christian lady is appointed to the position but after a few months she renounces her faith and converts to Islam. The LCF could not then rely on the exemption to justify dismissing the administrator.

A Christian care home requires only its managers to be Christians. Managers speak about the work of the home at churches and provide counselling from a Christian perspective to staff and patients. The policy that managers be Christians may therefore be justified but the fact that other staff will be denied the opportunity to be promoted to managerial level could not be justified.

Exemptions relating to sexual orientation

Many Christian organisations would wish to retain the right not to employ practising homosexuals and to take action against employees whose private lives were contrary to the ethos of the organisation. Faced with a claim under the Regulations from a practising homosexual who was rejected for a post because of his sexual practice, a Christian organisation might argue that they rejected the candidate not because of his sexual *orientation* but because of his sexual *practice*. A secular court or tribunal may not recognise this distinction and an organisation in this position would then have to rely on the exemption in the Regulations.

The draft Regulations provide that an employer can only discriminate in relation to sexual orientation where it can demonstrate that being of a particular sexual orientation is a genuine and determining occupational requirement. This is a very narrow exemption, particularly since it cannot be used to justify dismissing an employee. The exemption would not therefore be available to an organisation which dismissed an employee because of homosexual practices.

The Equal Treatment Directive stated that it would not prevent organisations whose ethos is based on religion or belief requiring individuals working for them to act in good faith and with loyalty to the organisation's ethos. The draft Regulations do not include this important clarification. It would be open to the government to include this exemption in the Regulations dealing with sexual orientation to allow organisations to deal with employees whose sexual conduct is contrary to the ethos of the organisation.

Harassment

Both sets of Regulations include provisions prohibiting harassment on the grounds of an employee's religion or belief or their sexual orientation. Bullying and haranguing of employees is clearly wrong and must be caught by the new laws. However, it would not be appropriate for reasonably stated views relating to religion or sexual orientation to be caught

by this legislation. The Regulations define harassment as unwanted conduct which has the purpose or effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim. The Regulations go on to state that conduct shall be regarded as having this effect if having regard to all the circumstances, *including in particular the perception of the victim*, it should reasonably be considered as having that effect. This appears to be a very subjective definition which raises the spectre that reasoned presentation of evangelical Christian views could amount to harassment of, for example, a Muslim or a homosexual. To guard against this, the Regulations could be amended by requiring employment tribunals to consider whether a "reasonable person" would regard the conduct as violating the dignity of the victim.

Government consultation

The government is currently engaged in a consultation exercise on the form of the Regulations. The government has limited room for manoeuvre in drafting the Regulations since it must work within the constraints of the Directive. However, the Directive would not prevent the government widening the exemptions to cover dismissals and failures to promote or transfer employees because of their religion or belief. I would therefore encourage you to take part in the consultation exercise by asking the government to widen the exemptions in this way by extending Reg 7 to include Regs 6(2)(c) and (d). We should also ask the government to confirm that Reg 7 should refer to Reg 6(2)(b) rather than Reg 6(3)(b). You may also wish to make submissions in relation to the draft Regulations on sexual orientation. The form for submitting responses to the DTI may be downloaded from www.dti.gov.uk/er/equality/index. You will also be able to find a copy of the Regulations themselves on that website. You haven't got much time though. The consultation period closes on 24 January 2003. The Regulations themselves will become law on 2 December 2003.

Post Script: What about Christian law firms?

Many members of the LCF (myself included!) work for a Christian practice. What impact will the Regulations have on such firms? In respect of employees, the draft Regulations described above will apply. In respect of partnership issues the Regulations state that it will be unlawful for firms to discriminate on the grounds of religion or belief in the arrangements they make for determining who should be offered partnership, in refusing to offer partnership, in the terms on which partnership is offered or in expelling someone from the partnership.

Similar exemptions are available in relation to partners (and potential partners) as are available in relation to employees. Christian practices should therefore be prepared to justify why it is an occupational requirement that all partners are Christians. However, as the Regulations are currently drafted, it would not be possible to expel from a Christian partnership a partner who renounced their faith. The exemptions may be used to justify a refusal to offer partnership to a non-Christian employee on the basis of their religion. Thankfully it therefore appears that Christian practices will be able to refer to the exemptions to defend claims that senior non-Christian employees should be invited to join the partnership.

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