

# Religion or Belief discrimination



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## Introduction

The European Equal Treatment Framework Directive (2000/78/EC) prohibits direct discrimination, indirect discrimination, harassment and victimisation in the workplace in respect of various characteristics including religion, religious belief and philosophical belief. This is implemented through the Equality Act 2010.

This Inbrief provides a general summary of the main features of the law and highlights some practical issues for employers to consider.

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## Basic concepts

### Who is protected?

Protection from religion or belief discrimination used to come from the Employment Equality (Religion or Belief) Regulations 2003 (the "Religion or Belief Regulations"). However, on 1 October 2010, the Equality Act 2010 ("the Act") took effect, bringing together and amending the various strands of discrimination legislation, including rules relating to religion and belief discrimination.

The Act defines religion and belief so that 'religion' means any religion; 'belief' means any religious or philosophical belief; and a reference to religion or belief includes a reference to a lack of religion or belief as the case may be.

There is no list of the groups who are protected. ACAS has drawn up guidance on the Act ([www.acas.org.uk](http://www.acas.org.uk)) and attached as an appendix to this is a description of commonly practised religions setting out, for example, prayer obligations and the dates of the main festivals. However, the protection of the Act extends well beyond this to include lesser known faiths.

It is unlawful to discriminate against:

- **Job applicants** — in relation to recruitment arrangements and decisions, harassment and victimisation
- **Employees** — in relation to terms, promotions, transfers, training, benefits, dismissal, harassment and victimisation
- **Ex-employees** — where the discrimination is closely connected to their employment

Types of discrimination

- **Direct discrimination** — less favourable treatment because of religion or belief
- **Indirect discrimination** — applying a provision, criterion or practice which disadvantages an employee/job applicant, and would put others of the same religion or belief at a particular disadvantage, and which is not a proportionate means of achieving a legitimate aim (i.e. not justified by the employer)
- **Victimisation** — subjecting someone to a detriment for making a complaint or bringing or assisting with a claim

- **Harassment** — unwanted conduct related to religion or belief which violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment

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## Direct discrimination

Under the Act, direct discrimination covers any less favourable treatment that is 'because of' the religion or belief of the person discriminated against or that of any other person.

The new definition in the Act covers **associative** discrimination – less favourable treatment because of the religion or belief of someone else with whom the employee associates (for example, an employee's Muslim wife) – and **perception** discrimination – less favourable treatment because an employer perceives that an employee holds a certain belief (for example, an employer may think that an employee is a Roman Catholic, whereas he is actually an atheist).

Under the Religion or Belief Regulations, discrimination solely on the grounds of the religion or belief of the discriminator was not covered. For example, where a religious employee discriminated against a colleague, who has children born outside marriage, as an expression of his religious views. It is less clear that this exclusion remains under the Act.

Direct discrimination cannot be justified in legal terms save in very limited circumstances where there is an occupational requirement for a person to be of a particular religion. For more about this, see below.

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## Other types of discrimination

### Indirect discrimination

This is the application of a provision, criterion or practice ("PCP") which on the face of it applies equally to all but which in fact puts or would put those of a particular religion or belief at a disadvantage. The person complaining of it must actually have been disadvantaged. An employer has a defence if it can show that the PCP is a proportionate means of achieving a legitimate aim. Indirect discrimination is probably the area in which the impact of the laws is felt most by employers. Examples are given below under the heading 'Religious observance'.

## Victimisation

The definition of victimisation is the same as that used for other strands of discrimination. This means that anyone who makes (or intends to make or is suspected of making or intending to make) a complaint of discrimination (whether to the employer or to a tribunal), or assists someone else's complaint, is protected from being treated unfavourably as a result.

## Harassment

It is unlawful to harass job applicants, employees and ex-employees. Harassment is specifically defined in the Act. It takes place where a person is subjected to unwanted conduct related to religion or belief which has the purpose or effect either of violating dignity, or of creating an offensive environment. Both single acts directed at a particular person and more general behaviour that creates an inappropriate environment can fall within the definition of harassment.

As with direct discrimination, harassment may be based on the religion or belief of another person with whom the victim associates. It may also be based on the victim's perceived religion or belief.

However in contrast to direct discrimination, harassment which is solely on the grounds of the religion or belief of the discriminator is clearly prohibited under the Act. For example, where a devoutly religious employee continually refers to her colleagues as "heathens", those colleagues may have a claim for harassment.

Harassment does not need to be directed at anyone in particular. Telling religious jokes which cause offence to some of the workforce could potentially be considered harassment.

Nor does the harasser need to intend the harassment — it is enough if their conduct has a harassing effect. In determining this, a tribunal will take into account all the circumstances including the point of view of the victim. This means that a single act may be harassment where it is reasonably obvious that the behaviour in question was inappropriate.

However, it may not be harassment where it is not reasonably obvious that the victim could regard it as offensive — for example, if a person reacts very sensitively to something that most would not regard as inappropriate conduct. If

the victim has made it clear that such behaviour is unwanted, any repetition of the behaviour will be harassment.

## Occupational requirements

The Act provides a defence to discrimination on grounds of religion or belief, where being a particular religion or belief is an 'occupational requirement' of the job. This means that it can be lawful for an employer to specify for example that a Catholic or a Muslim is needed for a particular job. An occupational requirement can be used to justify decisions not to recruit, train or promote and to justify dismissals.

The test for occupational requirement

In order to reject someone for a job on grounds of their religion or belief, an employer must look at the nature of the employment, or the context in which it is carried out, and then show that:

- the requirement to be of a particular religion is an **occupational requirement** — i.e. it is crucial to the post, and not one of several factors or merely a sham or pretext
- applying the requirement must be a **proportionate means of achieving a legitimate aim** — i.e. alternatives have been considered by the employer, and this is the only realistic solution
- the person in question does not meet the requirement, or it is reasonable in all the circumstances to be satisfied that they do not meet the requirement

There is a further exception for employers which have an 'ethos based on religion or belief', albeit that they will still have to comply with all limbs of the test. This broadened version of the exemption may be of use to organisations such as church-run schools, hospitals and care homes, although employment tribunals are likely to interpret it narrowly. Finally, there is an exemption for employment which is for the purposes of organised religion.

The burden is on the employer to show that an occupational requirement applies in a particular case.

The ACAS guidance in this area suggests employers:

- identify the requirement at the start of the recruitment, training or promotion process

making it clear to all applicants

- consider whether the requirement applies to certain duties of the post only and whether those duties could readily be undertaken by someone else
- periodically review, and reassess each time a new role becomes vacant, whether the requirement is really necessary

## Equality in the workplace

### Equality policies

Religion or belief as a potential basis for discrimination should be included in all diversity policies/equal opportunities policies. The ACAS guidance recommends that these policies should be reinforced by:

- making clear to staff what behaviour is unacceptable, including the fact that discrimination on the grounds of religion or belief is unlawful
- making sure that staff know what to do if they think discrimination or harassment is taking place, whether it is directed at them or someone else
- ensuring that staff are trained in equality issues, including issues relating to religion or belief

An equal opportunities policy, backed up by appropriate training, will help an employer to show that it has taken all reasonable steps to prevent employees from discriminating against or harassing other employees. This is essential if the employer is to avoid being held liable for the discriminatory conduct of its employees.

### Equal opportunities monitoring

There is no obligation in the Act (or elsewhere) to collect information from employees as to their religion and similarly no obligation not to do so. Employers who do decide to collect it should do so on a voluntary basis and explain why the question is being asked and what the information will be used for. For most purposes it will be possible for the information to be used for. For most purposes it will be possible for the information to be gathered confidentially and anonymously and this may persuade employees to co-operate. Remember that this will be 'sensitive information' for data protection purposes and should be treated accordingly.

**Religious observance**

There are numerous ways in which the rules may affect practical arrangements at work. For example: availability of prayer facilities; dress codes; canteen food; rest breaks; working hours; and particular days off for religious festivals. Whilst the Act does not deal specifically with any of these matters it is possible that unwillingness (rather than inability) to accommodate reasonable requests could give rise to complaints of direct or indirect religious discrimination.

**Dress codes.** A ponytail ban for men may on the face of it affect all men equally, but may in practice disadvantage Hindu men who wear one as part of their religious observance; or a head gear ban may disadvantage a Sikh who wears a turban. Unless the requirement can be justified as a proportionate means of achieving a legitimate aim (say on health and safety grounds) it could well be discriminatory

**Hours of work, rest breaks and holidays.** An observant Jew who must be home before sunset may need to leave work early in the winter and therefore to be allowed to work flexible hours; or a Muslim who wishes to pray at a particular time of day may ask to take rest breaks to coincide with this; or a Druid may ask for holiday to celebrate the Summer Solstice. Training events and meetings should be arranged so as not to coincide with a time when a religious employee needs to be absent for religious reasons

**Canteen food.** A Buddhist may request a vegetarian option or a Muslim may ask to store food separately to ensure it does not come into direct or indirect contact with pork

**Social interaction.** Some religions require followers to avoid alcohol. This can cause problems where employees are required to entertain clients or take part in other work-related social activities which are based around drinking. Simply not requiring their attendance at such events may not be enough where this could, for example, have a negative effect on career progression. It may be necessary to engineer changes to the culture of the workplace and give other opportunities for interaction with colleagues and clients which do not involve alcohol.

Remember that not all followers of a particular religion will worship in the same way. This, together with the fact that employers may not even know which if any religion their staff follow, emphasises the importance of creating a culture in which employees feel able to raise issues relating to their religion, confident that they will be dealt with sympathetically and in accordance with the letter and spirit of the law.

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