

May 2009

# Law at work



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# Features

## Religion and belief: Out of the corner and into the spotlight

According to statistics, more than 50% of the UK population consider themselves to belong to a religion. Since October 2004 it has been unlawful to discriminate on grounds of religion or belief (or lack thereof) in the UK, in accordance with EU Council Directive 2000/78/EC. Headlines have brought cases such as British Airways' ban on a cross necklace into the public eye.

Although the most recent Tribunal statistics (reported in April's Law at Work) show that there remain relatively few cases each year, this should not lull anyone into a false sense of security as numbers appear to be rising. Furthermore, as awards for religion or belief discrimination are (like other forms of discrimination) uncapped, it is important to provide a workplace in which people of all religions and beliefs feel valued – not only in terms of managing litigation risk, but also attracting the best people with the skills to do the job, whatever religion or belief they may hold.

## Why is it important to take account of religion or belief in the workplace?

Not only is it the law - it is not possible to insist that religious faith should be a private matter that remains out of the workplace. Firstly, some religions have requirements such as prayers at certain times which may fall during working hours; secondly, a person's faith may affect the way in which they interact with others or operate at work.

In any event, there is evidence that inclusive organisations benefit from improved morale, retention rates and productivity, whilst reducing the risk of costly litigation and negative publicity.

## Who is covered by the Regulations?

Under the Regulations, individuals (including employees, partners, and self-employed contractors) are protected from discrimination on grounds of their religion or belief (or lack thereof). Belief is defined as "any religious or philosophical belief" and the original proposal for this definition to read "any religious or similar philosophical belief" was removed before the law was passed. Beliefs such as atheism and humanism could fall within this definition.

Until now, there do not appear to have been any domestic cases reported in which a non-religious philosophical belief was held to be protected although in *Campbell & Cosans v United Kingdom (1982) 4 EHRR 293* the test for determining whether views could properly be considered to fall into the category of a philosophical belief was "whether they have sufficient cogency, seriousness, cohesion and importance and are worthy of respect in a democratic society". This was a decision under Article 9 of the ECHR.

Although it is only an Employment Tribunal case and therefore not binding on other tribunals, in *Nicholson v Grainger PLC and others (ET/2203367/08)* a London tribunal considered whether that at a preliminary hearing the claimant's views on the environment were covered by the Regulations. The claimant had given evidence that his green beliefs affected every aspect of his life "including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and fears.... I no longer travel by aeroplane. I have eco-renovated my home. I have reduced my consumption of meat, I compost my food waste."

The employment judge concluded that Mr Nicholson's beliefs gave rise to a moral order similar to those of most religions and that it went beyond "mere opinion" as his beliefs affected his whole way of life.

Despite their decision, the Tribunal was keen to stress that Mr Nicholson would still need to show he had been discriminated against on grounds of his beliefs in order to succeed in his claim, and that "this decision should not be seen as the thin end of the wedge" for similar cases. His employer has indicated that they intend to appeal this decision but, if it stands, it means that others with strongly-held non-religious beliefs (for example, perhaps those who are vegan for moral reasons to end animal suffering, who give up animal products not only in food but more widely in their lives?) could be protected if they can be shown to have been treated less favourably because of their beliefs.

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Associative discrimination also widens the sphere of potential claimants further. Where, as in *Saini v All Saints Haque Centre and others* [2008] UKEAT/0227/08/2410, an employee is treated in an unfavourable way because of his connection to another employee who is of a particular religion on grounds of that person's religion, the first employee will have a claim.

### Conflict with sexual orientation

The European Commission never intended that one protected ground should be treated with more respect than another, but this conflict was never fully resolved in the UK Regulations. Several recent cases have looked at the uneasy relationship between the rights not to be discriminated against on grounds of sexual orientation and religion or belief and evidence how careful employers must be not to fall foul of the law.

In *London Borough of Islington v Ladele* [2008] UKEAT 0453/08/1912, the claimant was a practising Christian and a registrar of births, deaths and marriages. She refused to carry out civil partnership ceremonies. Her employer, Islington council, offered a compromise whereby she would be excused from ceremonies as long as she worked on other civil-partnership administration, but when she refused this offer she was told that she was at risk of dismissal. Although she was successful before an Employment Tribunal, the EAT held that the tribunal had confused Islington's reasons for its actions with Ms Ladele's reasons for her actions. The Council expected all registrars to officiate at both marriages and civil partnership ceremonies, and she was threatened with dismissal because she had refused to carry out a legitimate request, as any registrar would have been, so there was no case of direct discrimination.

Furthermore, although devout Christians were placed at a disadvantage by the requirement that all registrars should carry out both types of ceremony, there was no indirect discrimination because Islington was justified in insisting all registrars perform a service allowed for and prescribed by law. The EAT commented that Ms Ladele could not "pick and choose" which of her duties she wanted to perform, especially when doing so was itself an act of sexual orientation discrimination.

Similar principles were considered by the Employment Tribunal in *Macfarlane v Relate Avon Limited (2009)* 1401179/08, where Mr Macfarlane was a relationship counsellor for Relate. He was also a devout Christian and, although he was prepared to offer relationship counselling to gay couples, he was not willing to offer sex therapy advice. Relate dismissed him because he was unable to comply with the requirements of his role and Relate's own policy to provide counselling on a non-discriminatory basis.

As the EAT held in *Ladele*, the Tribunal in this case held that although he was placed at a disadvantage, the requirement was a proportionate means of achieving a legitimate aim and therefore he did not succeed. In both cases, being of a particular religion did not exempt the employee from carrying out the duties for which the employee was employed. Before disciplining or dismissing an employee, employers should establish why an individual is behaving or being treated as they are – if the reason has nothing to do with religion, then the employee should not succeed in a claim for discrimination.

### Conclusion

Cases such as *Ladele* demonstrate the conflict that can arise between different forms of discrimination protection, notably between the right not to be discriminated against on grounds of religion or belief, and the right not to be discriminated against on grounds of sexual orientation. The EAT said in *Ladele* that both rights were equal and neither should be allowed to trump the other – which can create difficulties for employers who need to balance the competing rights of employees. However, where the employer provides a service to third parties, such as relationship counselling in *Macfarlane* or civil partnership registration in *Ladele*, those who receive the service can be given priority.

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### **Practical advice for employers:**

- Create a workforce profile and audit your policies to spot any disproportionate effects.
- Employees should not be permitted to exercise their religion or belief in a way that breaches the law in other respects.
- Employees should not be permitted to impose their religious views on others, especially if this may cause offence or breach internal policies and procedures.
- look at an area of concern from all angles, and measure the impact of all the options
- If asked to make an adjustment, don't be afraid to say yes or no.

In the second part of this article we will consider recent decisions on dress codes and behaviour at work and discuss what practical advice can be drawn from these for employers.

*Rachel Farr*

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# Case law update

## Employee had right to be legally represented at internal disciplinary hearing

***R on the application of G v the Governors of X School and Y City Council [2009] EWHC 504 (Admin)***

### Why care?

Employees have the legal right to be accompanied by a trade union official or a colleague at disciplinary and grievance meetings. In this case the individual argued that he had the right to a legal representative under Article 6 of the European Convention of Human Rights (ECHR). Article 6 provides for the right to a fair trial and provides that everyone is entitled to a "fair and public hearing" in relation to the determination of civil rights or obligations or criminal charges.

### The case

The Claimant was employed as a music assistant at X School. Disciplinary proceedings were brought against him following allegations that he had behaved inappropriately with a 15-year-old pupil in September 2007 and the police were informed.

On legal advice, the Claimant announced that he would take no part in disciplinary proceedings until the police investigation had been concluded. He was warned that if the School found that the allegations were true, it was obliged to report its findings to the Secretary of State for Schools, Children and Families who would determine whether he should be entered on "List 99" (a register of those considered unsuitable for work with children).

The Crown Prosecution Service decided to take no further action and in February 2008 the Claimant was invited by the School to attend a disciplinary hearing at which he was entitled to be accompanied by his trade union representative or a work colleague. His solicitors wrote to the School pointing out that he was not a member of a trade union and was a part-time casual employee without a colleague to represent him, and that given "the lifetime disadvantage" to him of an adverse finding, asking in the circumstances that he be permitted legal representation at the hearing. That request was denied and in the event the Claimant was accompanied by his father.

The Claimant was dismissed for gross misconduct and appealed the School's decision, requesting once again that he be permitted legal representation. Whilst that appeal was ongoing, the School reported the dismissal to the Secretary of State. The Claimant brought his claim for judicial review that his Article 6 rights had been breached by not allowing him legal representation and the internal appeal proceedings were stayed pending the High Court's decision.

The High Court held that the School was required to have regard to Article 6 of the ECHR, and as a public sector body, its employees were entitled to rely directly on the ECHR. It also held that the School's internal disciplinary and appeal procedures must be viewed as part of the same procedure as the Secretary of State's procedures relating to the register of those unsuitable to work with children. The consequence of his dismissal would be the entry of the Claimant's name on that register. The Claimant should therefore be permitted legal representation at the hearings and that, in this case, the Claimant could not fairly be expected to represent himself, and being accompanied by a trade union official or colleague would not be sufficient.

Neither the Claimant's right to claim unfair dismissal nor to appeal against a decision to put him on List 99 were an appropriate remedy in the circumstances, said the Court. The Claimant's ability to make representations to the Secretary of State and to appeal against entry on List 99 would not provide sufficient procedural protection to meet the requirements of fairness in this case.

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### What to take away?

Employees are entitled to be accompanied at internal disciplinary and grievance hearings by a colleague or trade union representative. On occasion, employees do request legal representation but an employer is not usually under any obligation to agree.

In this case, the employer was in the public sector and therefore the employee could rely directly upon Article 6 of the ECHR. This would not apply to private sector employees, but those employees would still be able to argue that existing law (such as the right not to be unfairly dismissed) must be interpreted in accordance with the ECHR and that they should therefore be entitled to legal representation.

The Court stressed that this decision was taken on the specific facts of the case, but where the seriousness of the conduct and its consequences, if proven, are as severe as in this case, representation at the hearing may be very important and the principle that in such circumstances legal representation should be permitted, may have wider implication.

Both parties have been given permission to appeal.

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### **Where the central allegation in a claim was a deliberate lie, it is perverse for a Tribunal to conclude that this was not "unreasonable behaviour" by the claimant in considering whether to award costs**

#### ***Daleside Nursing Home Limited v Mathew UKEAT/0519/08***

### Why care?

Employment Tribunals should consider a costs award, and may choose to make such an award, against a paying party if it had acted unreasonably in bringing the proceedings, or in conducting the proceedings, or the bringing or conducting of the proceedings by the paying party has been misconceived.

### The case

Mrs Mathew was employed by a nursing home for the elderly and following her resignation, brought claims for direct race discrimination, unfair deductions from wages (alleging she was paid 50 pence less per hour after the home had been sold to new owners), and constructive dismissal.

Her claim for direct race discrimination was based upon three incidents, two of which were described by the EAT later as "neutral incidents", and the third being a telephone conversation with her manager in which she claimed to have been called a "black bitch". The manager denied this. The Tribunal found that Mrs Mathew would not have waited until three weeks later when she resigned because she was facing disciplinary proceedings to complain about this incident, and Mrs Mathew could not explain the delay.

Mrs Mathew produced a number of letters written by her to her employer complaining about the reduction in her salary, none of which the employer admitted receiving. The Tribunal found that these had not been received but did not find that Mrs Mathew had fabricated these letters.

The Tribunal dismissed all Mrs Mathew's claims and rejected a costs application from her employer on the grounds that she had not acted unreasonably in bringing or conducting the proceedings, because she had a genuine (although wrong) belief that she had a claim.

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The nursing home appealed, arguing that it was inconsistent for the Tribunal to find that a deliberate lie was not unreasonable behaviour. The EAT found that the Tribunal's finding that the allegation of explicit racial abuse was false and made up some weeks later was in the EAT's judgment "a finding by the Tribunal that it was a deliberate and, to an extent, cynical lie". If it had been true, it would have affected the way in which the other two neutral incidents were perceived, making it of particular importance at the heart of Mrs Mathew's case. The Tribunal's finding that it was not unreasonable behaviour was therefore perverse.

The case was remitted to the same Tribunal for an assessment of costs.

## What to take away?

Costs orders remain relatively unusual in the tribunals, with 134 orders being awarded to the claimant and 327 to the respondent according to the 2007/2008 tribunal statistics.

The EAT was at pains to stress that this was a decision taken on its facts, and was not intended to set out any general statement of legal principle. It seems the EAT put great store on the lie being a "central allegation" in the case.

In this case, the employer had spent more than £20,000 defending the claim, but the EAT reminded the parties and the Employment Tribunal in its judgment that although it was "plainly a case where some order for costs ought to have been made", in order for the amount to be decided it would be necessary to have a detailed breakdown of how the employer's costs had been incurred and information on Mrs Mathew's means of paying, particularly where the sums involved were so great. Employers should not therefore necessarily expect to receive the whole, or the greater part, of their legal expenses to be paid even in a case such as this.

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## Hot topics

### **UK working time opt out to remain**

It was announced at the end of last month that the UK's opt out from the Working Time Directive (which means that workers can agree to work more than a 48 hour working week on average) will remain in force after the European Commission's efforts to revise the Directive failed when EU Member States could not agree. It was also impossible to reach an agreement on changes to on-call time and where workers have more than one contract.

In theory, it is possible that the European Commission will now introduce another proposal to reform the Directive, but given the disagreement between member states, it is thought unlikely that any new proposal would be accepted either.

### **Extension of registration scheme for Eastern European workers**

Although it had been expected to end on 30 April 2009, the Worker Registration Scheme is to be extended for two more years until 30 April 2011.

The Scheme requires employees from the Czech Republic, Estonia, Latvia, Lithuania, Slovenia, Slovakia, Poland and Hungary to be registered with the Home Office until they have completed 12 months' work in the UK. Any employer who fails to ensure compliance by their employees can be fined up to £5,000.

### **National Minimum Wage rate to rise to £5.80 an hour**

The government has announced that the UK minimum wage will rise by 7p in October 2009. It also announced that from October 2010, the adult rate of NMW would also apply to 21 year olds.

### **Statutory redundancy payments to increase**

As has been widely reported, the Chancellor of the Exchequer announced in last month's Budget that the current cap of £350 on a week's wage for statutory redundancy payment calculations is to be increased to £380. Although the amount is usually increased in February each year, it is unusual for another increase to be announced. The decision follows lobbying from trade unions and employee organisations that the maximum should be £500 per week.

The date of the change has not yet been confirmed formally but is expected to be October 2009. It is not yet known whether it will also apply to the calculation of basic awards for unfair dismissal purposes.

### **New guidance on managing long-term sickness absence**

The National Institute for Health and Clinical Excellence (NICE), which forms part of the NHS, has issued new public health guidance for healthcare organisations and employers on the management of long-term sickness absence and incapacity for work. A survey carried out for the CBI last year showed that although 95% of all absences last for less than 20 days, the remaining 5% accounted for 40% of all time lost through sickness or incapacity.

The guidance aims to reduce the number of employees on long-term sickness absence, and to encourage those who have been absent to return to work, including those on incapacity benefit.

The recommendations include assessing and recording the employee's occupation, main duties and fitness to undertake those duties, followed by initial enquiries of the employee after 2-6 weeks' absence to explore the reasons for their absence and what barriers there may be to their return. Depending on the outcome of those enquiries, a detailed assessment may then take place, resulting in further actions such as referral to specialists, psychological therapies, and workplace modifications.

Further details of the guidance can be found [here](#).

### **BERR issues consultation paper on implementation of Agency Workers Directive**

BERR has issued a consultation paper on the implementation of the Agency Workers Directive. It proposes to implement the Directive on the basis of the CBI/TUC agreement of May 2008 which allows for equal treatment to apply after a temporary agency worker has been in a job for 12 weeks. The key objectives are to ensure appropriate protection for temporary agency workers whilst maintaining a flexible labour market. BERR are seeking views on proposals which include:

- applying any new regulations to people finding temporary work through an "employment business";
- using the current definition of "worker" but adjusting it to reflect the distinctive triangular relationship between an agency worker, the employment business and the hirer and exclude workers who are genuinely self employed;
- defining the 12 week qualifying period as 12 calendar weeks regardless of working pattern and that a new qualifying period would only begin if a new assignment with the same employer was substantially different, for example;
- primary liability for compliance resting with the agency whilst acknowledging that the agency will inevitably be reliant on information from the hirer.

Responses to this consultation must be received by 31 July 2009. A copy of the consultation paper can be downloaded [here](#).

### **The Equality Bill**

The Equality Bill has recently been published and has had its second reading in the House of Commons. Further details can be obtained [here](#). It has two main purposes - to harmonise discrimination law under one Act and to strengthen the law to support progress on equality. It also proposes:

- a new Equality Duty on public bodies;
- to extend the circumstances in which a person is protected against discrimination, harassment or victimisation because of a protected characteristic;
- create a ban on age discrimination outside the workplace;
- greater scope for employers to use positive action, for example during recruitment in favour of those disadvantaged by reason of a protected characteristic when faced with candidates who are otherwise equally qualified; and
- stronger powers for employment tribunals to make recommendations to respondents who have lost discrimination claims.

The Government states that the legislation is expected to come into force in the autumn of 2010. It has also published a consultation considering the possibility of making provision for "multiple discrimination" in the Equality Bill in which claimants would have to demonstrate that they have suffered direct discrimination because of a combination of protected characteristics which could be any of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

Further details can be found [here](#).

# Contacts

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