



# HR Briefing

## Sept 2008

### **Racial and Religious or Belief Discrimination...**

Discrimination on the grounds of a person's race and/or religion or belief is unlawful. Discrimination can occur at all stages of employment, from recruitment to termination and beyond. Job applicants, employees and former-employees are all protected by anti-discrimination legislation.

At the outset, it is important to note that employers may be liable not only for their own actions but also for the actions of their employees and third parties. For example, an employer could potentially be found liable for the racist remarks of a customer that are overheard by a member of staff who finds them offensive.

There are four types of discrimination that employers need to be aware of: direct; indirect; victimisation; and harassment.

An employer may be found liable of direct discrimination where a person has been treated less favourably than another because of their race and/or religion or belief. Discrimination by association is also unlawful, so an employer may attract liability in circumstances where, for example, a person has been discriminated against because her husband is Muslim.

Indirect discrimination occurs where an employer applies a general policy or practice, which disadvantages a job applicant or an employee of a particular race, religion or belief. Examples of indirect discrimination on the grounds of race and/or religion or belief include: a policy requiring all employees to be clean shaven, this would put Sikhs at a general disadvantage; or a blanket policy prohibiting the wearing of jewellery, which may disadvantage employees who wear jewellery that is symbolic of their faith.

A person unlawfully harasses another person where on the grounds of race, religion or belief he engages in unwanted conduct which has the purpose or effect of either violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. In the case of religion or belief discrimination, those who suffer unwanted conduct on the grounds that they are not members of a particular (or any) religion are also protected from harassment.

Victimisation occurs where a person is treated less favourably than another person because they have complained (or been involved in a complaint) about race or religion or belief discrimination. It is not necessary for tribunal proceedings to have been brought for a claim of victimisation to be made. A person who makes an informal complaint about race or religious harassment or discrimination and who then suffers less favourable treatment by colleagues will be able to make a victimisation claim against their employer, the person responsible for the victimisation or both.

Several high profile cases over the last year have brought displays of religion in the

workplace and in educational establishments into focus.

### **R (on the application of Watkins-Singh)[2008]EWHC 1865**

The High Court considered a claim in respect of a Sikh schoolgirl of Punjabi-Welsh heritage asserting her right to wear a *Kara* (a 5mm plain steel bangle worn by Sikhs as a visible sign of their identity and faith) contrary to the school's uniform policy which permitted pupils to wear only one pair of ear studs and watch. The court considered a claim of indirect race discrimination and discrimination on grounds of religion and belief. Specifically, the court looked at whether the school's failure to grant the claimant an exemption from that policy was indirectly discriminatory. It was held that this was indirect discrimination on both grounds and took into account: the claimant's belief, supported by objective evidence, that wearing the bangle was of "exceptional" importance as an expression of her race and it symbolises loyalty to the Sikh culture; and the unobtrusive nature of the bangle, being narrow and the fact it cannot be observed if the wearer is wearing a long-sleeved garment. In those circumstances, the claimant suffered a disadvantage or detriment compared to other girls who might want to wear jewellery but who have no similar strong religious and cultural wish to do so. The considerations in this case are clearly relevant to employers' dress codes and policies.

### **Noah v Sarah Desrosiers t/a Wedge ET2201867/2007**

A tribunal held that a Muslim hairdresser who was refused a job after she insisted that wearing a headscarf was essential to her beliefs had been indirectly discriminated against on the basis of her religion. During an interview for the position of stylist at a hair salon, the owner of the salon had indicated that the stylist would not be able to wear her headscarf at work as it was an "absolutely basic" job requirement for stylists to have their own hair on show. The tribunal held that the salon owner had a legitimate aim but, although the matter was finely balanced, she had not shown that the practice that stylists having to have their own hair on show, was a proportionate means of achieving this aim. The tribunal rejected Ms Noah's claim of direct discrimination but awarded her £4000 for injury to feelings in connection with her successful indirect discrimination claim.

### **Sheridan v Prospects for People with Learning Disabilities ET Case no:2901366/06**

A tribunal held that a Christian charity (Prospects For People with Learning Disabilities) had unlawfully directly discriminated against one of its managers when it required him to adhere to the charity's recruitment policy which stipulated that the manager could only employ Christians and could not to promote its existing non-Christian employees. The tribunal held that the charity could not rely on the religious organisation genuine occupational requirement because it had not carried out a job evaluation for every vacant and available post and it was not proportionate to require all employees to be Christians.

It is apparent from these cases that each claim will turn on its own facts. However, it is clear that employers should take care to ensure that any policy relating to dress code does not negatively impact upon members of a particular race or religious group. If so, an employer will always need to show that there is a legitimate and important reason for the policy. As a matter of good practice, employers should always consider whether their objectives could be achieved in a less restrictive way.

## What can employers do to ensure that they do not find themselves liable for acts of racial or religious discrimination, harassment or victimisation?

Essentially, employers should remain sensitive to cultural issues at all stages of employment and take steps to ensure that they know their staff. When recruiting, employers should apply objective criteria, relating only to the person's ability to do the job (unless, of course, there is a genuine organisational reason for a person of a particular race or religion to perform the role). In order to understand the cultural and religious considerations of their workforce, employers may wish to consider issuing short questionnaires to elicit such information as the dates of religious festivals, prayer times and dietary requirements.

Crucially, employers should seek to promote a culture of tolerance in the workplace. To this end, they should implement and communicate to their staff effective equal opportunities, anti-harassment and bullying policies; train managers and supervisors on handling equal opportunities and harassment issues and take steps to deal with complaints, including taking any appropriate disciplinary action.

The argument that there is too much political correctness in the workplace, preventing employers from taking action for fear of litigation, is difficult to sustain in the face of raising discrimination claims and evidence of widespread inequality at work, particularly amongst SMEs. A diverse workforce requires an element of fair-mindedness to ensure people are treated with dignity and respect.

Those employers who are prepared to take the right kind of action, in terms of identifying conflicting and competing interests, implementing effective policies and practices and raising awareness and training staff, are more likely to avoid litigation than those who do nothing on the basis that political correctness has in some way stifled their ability to operate a motivated, harmonious and balanced workforce. Even if litigation does ensue, such employees will be put in the best possible position to defend any such claims.

To discuss how Berg Legal can assist you with these issues, please contact Alison Loveday at [alisonl@berg.co.uk](mailto:alisonl@berg.co.uk). Alternatively you can call Alison on 0161 833 9211.

**berg legal** 35 peter street manchester m2 5bg  
t. 0161 833 9211 f. 0161 834 5566 e. [help@berg.co.uk](mailto:help@berg.co.uk)  
**[www.berg.co.uk](http://www.berg.co.uk)** Regulated by the Law Society

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