

# Religious and Belief Discrimination

## Overview

The Equality Act 2010 (“the Act”) provides protection against discrimination because of religion or belief.



## The definition of religion or belief

In the Act, ‘religion or belief’ is defined as being any religion, religious belief or philosophical belief. Individuals with no religious beliefs, such as atheists, are also protected. Major religions and beliefs (such as Christianity, Islam, Judaism, Hinduism, Sikhism, Humanism, Secularism and Paganism) are covered by the Act.

To amount to a philosophical belief under the Act, the individual must genuinely hold the belief, and meet the following, fairly vague, criteria:

- It cannot be a mere opinion on information currently available, it must be an actual belief
- It must relate to a weighty and substantial aspect of human behaviour
- It must attain a certain level of cogency, seriousness, cohesion and importance
- It must be worthy of respect in a democratic society, not be incompatible with human dignity, and not conflict with the fundamental rights of others
- It must be similar to a religious belief (only in the sense of status or cogency, but not in ideas).

Case law has established that the definition covers a belief in the need to cut carbon emissions to avoid climate change, or pacifism, or veganism, although not a belief in Jedi Knights. It can even extend to political beliefs such as Marxism, Communism or free-market Capitalism, but not merely to membership of a political party.

Scientific beliefs can also be covered, for example a belief in Darwinism, if this is the basis for discrimination suffered. A belief also need not be shared by others to constitute a ‘belief’ under the Act.

It remains unclear how far the Act will provide protection to those people who follow less traditional faiths. Consideration is given to whether there is collective worship, whether there is a clear belief system and whether there is a profound belief affecting way of life or view of the world in determining whether the religion or belief is covered by the Act.

## The protection provided by the Act

**Who is protected?** - In the police sphere, the Act applies to recruitment, service and vocational training. It is unlawful to discriminate against someone because of religion or religious belief, from the initial job application process through to termination of service. Under the Act, ‘employment’ is widely defined to include the police service.

**What is prohibited?** - The Act outlaws direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the force. The Act also extends in limited circumstances to discrimination after the working relationship has ended.

## Discrimination, Victimisation & Harassment

### Direct discrimination

It is unlawful to treat a person less favourably because of religion, or belief, or lack of a religion or belief. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably because of religion or belief
- That you can compare your treatment to someone (actual or hypothetical) with similar characteristics to yourself save for the religion or belief in issue
- That you were subject to disadvantage or detriment as a result of that treatment.

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There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the religion or belief of the individual being discriminated against.

The Act requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone of a different religion, known as a comparator. Your comparator must be a person who in all other respects is in a similar or 'not materially different' position to you. The comparator can be a real person or hypothetical. A useful test is the 'but for' test: for example would I have been treated the same way 'but for' the fact that I am a Christian?

The less favourable treatment does not necessarily have to be because of your own religion or belief. For example, someone who is treated less favourably because of his wife's religion would be protected. The Act also protects those who are treated less favourably because of their perceived religion or belief. One example of this is where someone who is non-Muslim is treated less favourably because he is perceived to be a Muslim.

### Indirect discrimination

The Act provides that a force also discriminates if an arrangement or feature relating to the service (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all officers, but –

- Puts people of a particular religion, belief or lack of religion at a particular disadvantage when compared with people of another religion or belief;
- Puts the complainant at that disadvantage; and is not a proportionate means of reaching a legitimate aim (in other words the PCP is not objectively justified).

The PCP must have been applied universally to all. For example, a PCP that all officers must work on a Friday evening would probably adversely affect those of the Jewish faith compared to other religions. Whether or not the PCP puts one religious group at a particular disadvantage compared to another will often depend upon the 'pool' of people considered. The force must satisfy the tribunal that the PCP can be objectively justified. If this is established, a discrimination claim will fail.



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In the case of *Cherfi v G4S Security Services Ltd* (2011), for example, the EAT ruled that the employer did not discriminate against by refusing an employee time off work each Friday to attend Friday prayer at his local mosque. The EAT ruled that due to the nature of the work required it was essential that the security guard was on site and the refusal was a proportionate means of achieving a legitimate aim.

The extent to which employment tribunals will continue to focus on whether there is group disadvantage in an indirect discrimination claim is unclear following a recent decision of the European Court of Human Rights in *Eweida and others v UK*. The claimants unsuccessfully brought employment tribunal claims and complained to the ECHR that their rights under Article 9 of the European Convention on Human Rights had been breached. Article 9 provides that there is a right to freedom of thought, conscience and religion. The right includes a qualified right to manifest religion or belief. Ms Eweida won her case. British Airways had not permitted her to wear a cross. The Court held that British Airways' desire to protect its corporate image did not justify the interference with her right to manifest her religious belief. The Court's focus was on religion as a matter of individual thought and conscience and whether the interference by the employer was justified and proportionate. This contrasts with the emphasis to date in UK tribunals on the need to show disadvantage to a group.

The other claimants lost on the basis their employers' stance was justified. For example an NHS trust could refuse to allow nurses to wear a cross on health and safety grounds. The remaining claimants are appealing to the higher chamber of the ECHR.

### Victimisation

It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under the Act or the 2003 Regulations; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under the Act or the 2003 Regulations; or
- Doing anything in relation to the discriminator or any other person under or by reference to the Act or the 2003 Regulations; or
- Making allegations that the discriminator or any other person has committed an act which contravenes the Act or the 2003 Regulations. This would include raising a grievance of religious discrimination.

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So for example, if you have made a complaint about religious discrimination and are later treated unfavourably for doing so, you should be covered by the Act. A protected act must be done in good faith.

### Harassment

Harassment related to religion, belief or lack of religion is a form of discrimination. It is defined as being:

- Unwanted conduct related to religion or belief that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

A claim can also be brought if harassment occurs because of an association with someone of a particular religion or belief, or if someone is perceived to hold a particular religion or belief.

### Exceptions

Discrimination in employment is generally prohibited. However, in certain circumstances, the Force may have a defence to an act of discrimination that is otherwise unlawful.

The general occupational requirement exception. This is available where, having regard to the nature or context of the work, being of a particular religion or belief, is an occupational requirement. The defence will only succeed if the application of the requirement is a proportionate means of achieving a legitimate aim.

There are two positive action provisions:

1. The general positive action rule can apply where the Force reasonably thinks that persons with a particular protected characteristic are disadvantaged, have different needs or are disproportionately under-represented. In those circumstances, the Force can take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation
2. The provision concerning positive action in recruitment and promotion. This applies where a Force reasonably thinks that persons with a particular protected characteristic are disadvantaged or disproportionately under-represented. In those circumstances, the Force can treat a person with the relevant characteristic more favourably than others in recruitment or promotion, as long as the person with the relevant characteristic is "as qualified as" those others.

Otherwise positive action is generally outlawed.

### Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, the Act provides that the claimant is required to establish clear facts which could enable the tribunal to conclude that discrimination has occurred. It is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-religious/belief based explanation from the respondent, the tribunal must draw an inference of discrimination. Where a force has failed to comply with relevant statutory Codes of Practice, the tribunal may also draw inferences from this failure.



### Time limits and the correct legislation

Most claims will need to be brought in the employment tribunal within three months less one day of the treatment you are complaining about.

Where that treatment amounts to a continuing course of conduct by the force, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on.

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## Remedies

If the tribunal finds that you have been unlawfully discriminated against, it may grant whichever of the following remedies it considers just and equitable:

- A declaration of the rights of the parties
- A recommendation that the force take a particular course of action and,
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by the force's discrimination as found by the tribunal.

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Officers who experience harassment related to religion or belief at the hands of a third party in the course of their duty can claim against the force if it can be shown that (i) the force knew that the officer had been subjected to harassment on more than 2 occasions and (ii) the force failed to take reasonable action to prevent a further act of harassment by the same or another third party. Third parties can include customers or contractors

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