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EMPLOYMENT EQUALITY REGULATIONS 2003

5th December, 2003

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1. INTRODUCTION

On Monday 1st December, 2003 the new Employment Equality (Sexual Orientation) Regulations 2003 (the "Sexual Orientation Regulations") came into force. On Tuesday 2nd December, 2003 the new Employment Equality (Religion or Belief) Regulations 2003 (the "Religion Regulations") came into force.

This briefing paper ("Briefing Paper") seeks to highlight the effect of these two sets of regulations from an employer's perspective. This Briefing Paper is intended for churches, Christian charities and other organisations which may consider themselves to be Christian organisations (collectively "Christian Employers").

Although this Briefing Paper includes certain recommendations which Christian employers may find helpful, it should not be relied on as legal advice and the Lawyers' Christian Fellowship accepts no liability for its contents. If you have any doubts about your particular legal rights or obligations, you should consult an employment solicitor or contact us and we will seek to put you in contact with one.

In this Briefing Paper:

"Christian Employer" includes Bible and theological colleges (but excludes church schools in relation to the Religion Regulations);

"Employee" means a worker (whether or not an employee), job applicant or potential job applicant, as the context requires;

"Regulations" means the Religion Regulations and the Sexual Orientation Regulations;

"religion" includes belief; and

"Section" refers to sections of this Briefing Paper.

Summary tables are set out in the Annexes.

It should be borne in mind that the Regulations are open to different interpretations and have not been tested in the Courts. It is possible that the courts will adopt a more restrictive and onerous interpretation of the Regulations than that set out in this Briefing Paper.

2. EFFECT OF THE REGULATIONS

The broad effect of the Regulations is that they make discrimination or harassment against Employees on the grounds of religion or sexual orientation unlawful. However, certain exemptions allow Christian Employers to discriminate lawfully in limited circumstances either because the employees do not share their faith or their sexual orientation/practice (discussed below in Section 3). Christian Employers should take the Regulations into account during recruitment (including during interviews and even before a job is advertised), during the Employee's period of employment, and also when considering dismissing an Employee.

(1) Discrimination

Unlawful discrimination includes direct discrimination and indirect discrimination. Direct discrimination is where, on the grounds of religion or sexual orientation, a Christian Employer treats an Employee less favourably than he treats or would treat someone else. For example, a stipulation that only heterosexuals can apply for a particular post would directly discriminate against homosexuals because the Christian Employer is treating homosexuals less favourably than heterosexuals in not allowing them to apply for that post.

The key idea behind indirect discrimination is where a Christian Employer applies a condition to an Employee that would put people of his religion or sexual orientation at a particular disadvantage when compared with other people. For example, a requirement that an Employee must have a good knowledge of the New Testament would indirectly discriminate against Muslims. Although it is

possible that a muslim can have a good knowledge of the New Testament, they are put at a disadvantage when compared to Christians.

(2) Harassment

Christian Employers must also ensure that Employees are protected from harassment on the grounds of religion or sexual orientation. Harassment is unwanted conduct which has the purpose or effect of (a) violating the Employee's dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Employee. Harassment can be caused directly by a Christian Employer or indirectly by specific individuals working for the Christian Employer. A Christian Employer may be held liable for the actions of individuals under its control if it failed to take reasonable steps to prevent the harassment from occurring.

Christian Employers will therefore need to be aware of Employees' sensitivities; examples might include some expressions of religious belief by other employees.

3. EXEMPTIONS WHICH MAY BENEFIT CHRISTIAN EMPLOYERS

Notwithstanding the above, Christian Employers may benefit from certain exemptions that allow them in limited circumstances to discriminate lawfully against Employees on the grounds of religion or sexual orientation. Generally, the exemptions depend on whether the discrimination is on the grounds of religion or sexual orientation, whether the Christian Employer has an ethos based on Christianity and whether the employment is for the purposes of an organised religion.

There are no exemptions specific to Christian Employers justifying harassment of Employees as described in Section 2(2).

(1) Religious discrimination

(a) Christian Employers with a religious ethos need to prove a 'genuine' occupational requirement
A Christian Employer may lawfully discriminate against an Employee on the grounds of religion if it can prove that it has a Christian ethos and, having regard to that ethos and to the nature of the employment or the context in which it is carried out (a) being Christian is a 'genuine occupational requirement' for the job; (b) it is proportionate to apply that requirement in the particular case; and (c) either (i) the Employee does not meet it, or (ii) the Christian Employer is not satisfied, and in all the circumstances it is reasonable for the Christian Employer not to be satisfied, that the Employee meets it.

We expect all Christian Employers to have a Christian ethos. Nevertheless, we would recommend that this is put beyond doubt (see Section 4 below). Otherwise, Christian Employers will have to face a much more difficult test (see Section 3(1)(b) below).

A 'genuine occupational requirement' can exist where it is desirable, although not necessary, to be a Christian to do the particular job. For example, it could be a genuine occupational requirement that a waitress in a Christian outreach coffee shop be Christian, if it is desirable for her to meet and talk to customers about her Christian faith and to pray with them. It is not necessary for a person to be a Christian to be a waitress, but, as described above, it may be desirable that a waitress in a Christian coffee shop is Christian to maintain its ethos.

Christian Employers may also need to consider whether, in relation to those people who are Christians, a specific belief (for example, acceptance of the Nicene Creed) or practice evidencing that belief is a genuine occupational requirement. For example, a Christian Employer might wish to discriminate against Seventh Day Adventists, Christian Scientists, Mormons, those in mainline denominations who interpret scripture in a liberal manner or against persons involved in organisations which, though orthodox in belief, have characteristics of a cult. It is not clear that the Christian Employer could lawfully do this in all or any of these cases, but a carefully worded specific belief statement would enhance its prospects of being able to do so.

Even if it is a genuine occupational requirement, it must still be proportionate to apply it. For example, if the preference is for an Employee to be a Christian because of certain duties, the Christian Employer must consider whether it is possible to assign those duties to a Christian so that a suitably qualified non-Christian can be employed and the ethos unaffected.

(b) Christian Employers without a religious ethos need to prove a 'genuine and determining' occupational requirement

If the Christian Employer cannot prove that it has an ethos based on religion, in order to discriminate lawfully against the Employee, not only must it still satisfy conditions (a) to (c)

mentioned in Section 3(1)(a) above, it must also prove that that being Christian is a 'determining' occupational requirement for the job. The idea behind this is that it is "necessary" to be a Christian to do the job.

It is very difficult for an employer without a Christian ethos to prove that it needed a Christian to do a particular job, but one example might be where a magazine publisher which, for the purpose of journalistic integrity, needed a practising Christian columnist to write its Christianity columns. Other examples will be rare, and highlight the importance of Christian Employers making clear their Christian ethos.

As in Section 3(1)(a) above, even if it is a genuine and determining occupational requirement, it must still be proportionate to apply that requirement.

(2) Sexual orientation discrimination

(a) Employment for the purposes of an organised religion

A Christian Employer may lawfully discriminate against an Employee on the grounds of sexual orientation if: (a) the employment is for purposes of an organised religion; (b) the Christian Employer applies a requirement related to sexual orientation either (i) so as to comply with Christian doctrines, or (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid 'conflicting with the strongly held religious convictions of a significant number of the religion's followers'; and (c) either (i) the Employee does not meet the requirement, or (ii) the Christian Employer is not satisfied, and in all the circumstances it is reasonable for the Christian Employer not to be satisfied, that the Employee meets it.

We hope that 'organised religion' will be interpreted as including any genuine manifestation of Christian belief. However, it is possible that it could be more narrowly construed by the courts as meaning Christianity only insofar as it is connected with a mainstream denomination. On this basis, a para-church organisation such as a Christian charity (unless attached to a denomination) or a Christian business would not fall within the definition.

In relation to condition (b)(i), it will be necessary to state correct Christian doctrine on sexual orientation which falls within the wider context of marriage, and sexual fidelity within marriage. Christian Employers should be willing to employ celibate people, of whatever sexual orientation, but not (unrepentant) sexually active unmarried people, of whatever sexual orientation.

The expression "conflicting with the strongly held religious convictions of a significant number of the religion's followers" in condition (b)(ii) is not defined. However, when read with 'because of the nature of the employment and the context in which it is carried out', it is arguable that this exemption will only apply if the employment would upset a significant proportion of fellow employees.

The requirement need not be proportionate.

(b) Employment not for the purposes of an organised religion

If the employment is not for the purposes of an organised religion, a Christian Employer may only lawfully discriminate against an Employee on the grounds of sexual orientation in circumstances similar to those set out in Section 3(1)(b) above, namely, where, having regard to the nature of the employment or the context in which it is carried out, being of a particular sexual orientation (e.g. heterosexual) is a 'genuine and determining occupational requirement' and it is proportionate etc.

We expect this exemption to be of limited use. Where the employment is not for the purposes of an organised religion, it will be very difficult for a Christian Employer to argue that a heterosexual was needed to do the job. One example might be a sexual health centre that requires a heterosexual female counsellor to give advice to heterosexual women who have specified such a counsellor.

As in Section 3(1)(a) above, even if it is a genuine and determining occupational requirement, it must still be proportionate to apply that requirement.

(3) The exemptions are specific to each set of regulations and are not interchangeable. Using the wrong exemption in relation to the wrong set of Regulations will lead to unlawful discrimination. Thus, if a Christian Employer is being sued under the Sexual Orientation Regulations, then it will not be a defence for it to show that it has a Christian ethos. Having a Christian ethos is relevant to the Religion Regulations, but is irrelevant to the Sexual Orientation

Regulations. For the Sexual Orientation Regulations, the key issue is whether the employment is for the purposes of an organised religion.

Therefore, the first question a Christian Employer should ask itself is: are we discriminating on the grounds of religion or on the grounds of sexual orientation?

§ If religion, then the next question to ask is: can we prove that we have a Christian ethos?

§ If sexual orientation, then the question should, instead, be: will non-believers consider the employment to be for the purposes of an organised religion?

4. RECOMMENDATIONS

In the light of the above, Christian Employers may find the following recommendations helpful.

(1) General recommendation

§ Make it clear from the outset, especially to non-Christians, that you have a Christian ethos and that you expect Employees to model Christian behaviour. Review and update your key documents (trust deeds, articles of association, contracts of employment, codes of conducts, policies, job advertisements etc.).

§ Any changes you make should be seen as organic changes that flow naturally out of your Christian ethos. If many drastic changes are made, the courts are likely to regard them as artificial devices to try to suggest that you have a Christian ethos to avoid liability under the Regulations. This will weaken your defence.

(2) Specific recommendations to consider

§ Consider including key words such as 'Christian' or 'for Christ' in your name, logo, motto etc.

§ Place Christian literature and motifs in prominent places around your place of employment.

§ Specify clearly that Employees must be practising Christians, and that you expect them to model Christian behaviour.

§ State that you are seeking to employ people who are either sexually celibate or married .

§ For posts with any teaching responsibility, confirm an explicit duty to teach, preach and promote Christian doctrine and abstinence education (sexual fidelity within marriage and abstinence outside).

§ Where collective prayer or Bible study is a feature at your workplace, you may consider requiring every Employee to lead sessions from time to time so as to contribute to the Christian ethos.

§ Be mindful of Employees' sensitivities.

§ Obtain legal advice if you are unsure about your legal rights or obligations.

5. NEXT STEPS

The Regulations have been controversial. They were originally drafted without much of the protection for Christian Employers contained in the exemptions. When these exemptions were introduced in later drafts, certain interest groups objected. The overall effect of the Regulations is that it is more difficult to discriminate on the grounds of sexual orientation than on the grounds of religion. More worryingly, what little protection Christian Employers have from the exemptions contained in the Sexual Orientation Regulations is being legally challenged by the TUC, which is seeking to have most of these protections removed on the grounds that they infringe the human rights of homosexuals. The TUC is seeking to abolish all discrimination where the employment is not for the purposes of an organised religion. In relation to employment that is for the purpose of an organised religion, the TUC seeks to restrict the exemption to senior posts only.

The LCF helped organise an intervention in the challenge to ensure that the views of Christians are heard. We will keep you informed of significant developments as appropriate.

If you would like to help support the intervention or receive further information on it, please do not hesitate to contact us. Alternatively, you may wish to contact the solicitors acting on this matter directly (Paul Conrathe and Mark Jones of Coningsbys Solicitors, 0208 680 5575).

(2) A requirement that applicants be married is indirect discrimination in that it is a condition that fewer homosexuals can comply with than heterosexuals. Therefore this must be justified by the nature of the job.

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