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Dear Ian

CAB advice about discrimination on grounds of religion or belief

Thank you very much for your letter of 28 July, and for sending me a copy of the guidance on discrimination on grounds of religion or belief for CAB generalist advisers, as provided on the Electronic Information System.

In most respects this guidance seems clear and accurate, and it is good to see that there are a number of places where, because there is doubt over the interpretation of the Employment Regulations, advisers are referred to other texts or advised to refer workers to a specialist employment adviser.

I do however have concerns about some sections, which I would suggest need to be revised, and I hope that my detailed comments below are helpful.

Paragraph 11: The final sentence of this paragraph does not follow from the previous two. What Lord Sainsbury said in the House of Lords indicates that the Government regards Humanism, atheism and agnosticism as 'similar philosophical beliefs', and that people holding these beliefs would therefore be covered by the Regulations. (This is also in keeping with human rights law, where European and UK case law has confirmed that Humanism, atheism and agnosticism are covered by the phrase 'religion or belief'.) It is a wholly different (but arguable) approach to say that one can argue discrimination on the grounds of lacking a particular belief. Of course, if an atheist can argue that s/he was discriminated against because s/he is not a Christian (rather than because s/he is an atheist), a similar argument could certainly also be made by a Muslim who is discriminated against because s/he is not a Christian.

Paragraph 27: The second and third sentences seem to be contradictory, and I am even wondering if a "not" is missing from sentence 2 ("...B could not bring a claim of ..."). However, while this would be consistent with the third sentence, which suggests that a claim of discrimination against an unbeliever based on not being Jewish would not be successful, and that the only recourse would be to argue that atheism is a belief, it would contradict the argument in paragraph 11. Although the Government clearly intended "religion or belief" to cover atheism, no one yet knows how tribunals will deal with such cases. In these

circumstances it would seem important to indicate that there are two alternative approaches, and that it is not yet clear which argument a tribunal is more likely to accept.

Paragraphs 36 – 43: I do not feel that this section does differentiate clearly enough between the “genuine **and determining** occupational requirement” (GDOR) that applies in any organisation, and the “genuine occupational requirement” (GOR) that applies to organisations with an ethos based on religion or belief. I am not at all surprised at this, since the ACAS Guide does not differentiate properly either, and no one has yet provided a clear explanation of the difference that the inclusion of the word “determining” will make in practice.

Paragraph 36: I find the use of the word "any", and the emphasis on it, rather odd. Does this mean “any type of” (job), as suggested in paragraph 37? I would suggest that it may be more helpful to say that jobs may be restricted under the Regulations to people with a particular religion or belief provided that there is a GDOR or (in the case of employers with an ethos based on religion or belief) that there is a GOR, as specified in the following paragraphs.

Paragraph 37: Should "from certain types ..." be "for certain types ..."?

Paragraph 38: This is where the distinction between GDORs and GORs must be made, e.g: “There are two types of GOR. With the first, which is available to any employer, the requirement has to be a "determining" one. With the second, which only applies to employers with an ethos based on religion or belief, the "determining" requirement is dropped, but employers must still be able to demonstrate a genuine occupational requirement for the particular job to be carried out by a person with particular religious or non-religious beliefs. I also think it would be important to clarify that the GOR does not only apply to religious organisations: it also applies to organisation with an ethos based on non-religious beliefs. (For example, the British Humanist Association, which I would say is an organisation with an ethos based on a non-religious belief, should surely be able to require certain posts to be filled by a humanist.) The shorthand “religious organisation” used in paragraph 38 and the heading before paragraph 42 is misleading, and I think it should be changed.

Paragraph 40: Re the chaplain, I would suggest saying “... to argue that following the Christian religion is a genuine and determining occupational requirement.” The church-run care home example is a good one, but belongs in the section on GORs for organisations with an ethos based on religion or belief.

Paragraph 41: Can I suggest adding "determining", in brackets, after "essential".

Heading before paragraph 42: change to “GOR for organisations with an ethos based on religion or belief”

Paragraph 43: This is misleading since maintained faith schools are largely exempted from the regulations. If you want to use a school as the example, it should say “a private Christian school”, but I suspect that the issue about whether a physics teacher in a private faith or sectarian school needs to be of the “right” religion is likely to be a contentious one. You could use the church-run care home example here instead. Or, indeed, a humanist association, which could justify requiring its chief executive and education officer to have

humanist beliefs, since both jobs involve explaining and promoting humanist beliefs, but could not justify requiring its finance officer to share these beliefs.

Paragraph 51, final sentence: I am not sure it is correct to say that the requirement is not discriminatory (as the guidance makes clear in paragraph 59) – it does discriminate, but it can be justified. It may be simpler to say that it may not be unlawful.

Paragraphs 67-74: I appreciate that this section is taken straight from the ACAS guide. However, I am concerned that there is almost no mention of the impact of some of these provisions on non-religious employees, and in some cases on employees with different religious beliefs. For example, if some staff are given time off for prayers, other employees might be able to claim that they are discriminated against by having to work longer hours. Issues may also arise if certain staff are not required to work on Saturday or Sunday, while others have to work on a rota that includes weekend working, and actually have to work more weekends than they would if all staff were included in the rota, or if rest rooms become monopolised by religious employees. We have mentioned these concerns to ACAS.

Paragraph 82 and heading above: Most of this paragraph applies to the religious (with a different religion to that of the person harassing them) as well as to non-believers, so the heading needs to be changed. As noted above re paragraph 11, I do not think it is right to say “This means that non-believers are protected ...”, since humanists, atheists and agnostics are covered by the “belief” part of “religion or belief”. I would suggest that this paragraph needs to be written in terms of different religious and non-religious beliefs, and that there should then be a separate paragraph stating that it is also unlawful to harass people for their non-religious beliefs.

The guidance mentions possible links between discrimination on grounds of religion or belief and on grounds of race, and that a worker may be discriminated on both grounds, and refers to the CRE. However, although Jews and Sikhs are mentioned in various examples, there is no mention of their particular situation as ethnic groups under race legislation, and I would suggest that this is probably worth a separate paragraph, or at least a mention where the examples are given. Shouldn't CAB advisers be advised to go to the EIS section on race discrimination when dealing with these clients?

I really am very grateful to you for sending me the EIS advice on religion or belief, and I do hope my comments are helpful to you.

Having been quite critical on the specific issues above, I think I should also emphasise that I do think the EIS guidance is generally good. I do of course also appreciate that many questions will only be resolved by case law.

Finally, I think a “mystery shopper” test would be a great idea, and I would certainly be interested in the results. I would also be very happy to contribute ideas for the situations non-religious “shoppers” could present. Do please let me know if there is anything I can do to help.

With best wishes,

Hanne Stinson
Executive Director