

Occupational requirements

The issue of religion or belief as an occupational requirement when recruiting staff has not been the subject of litigation in recent years. But with the abolition of employment tribunal fees in July 2017, this is set to rise.



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Lucy McLynn explains why it is time to revisit this topic, and the cardinal rules to apply

Readers will undoubtedly be aware of the provision in Schedule 9 of the Equality Act 2010 which permits organisations with an ethos based on religion or belief to require an employee to be of a particular religion or belief if:

'having regard to that ethos and to the nature or context of the work...it is an occupational requirement [and] the application of the requirement is a proportionate means of achieving a legitimate aim'.

In the years after the introduction of the (predecessor) legislation there were a couple of significant cases in which occupational requirements (ORs) were not upheld as being lawful.

In *Sheridan v Prospects for People with Learning Disabilities* (2901366/06), the employer was a charity motivated by the Christian faith providing housing and day care provision for persons with learning disabilities. The employer's recruitment policy was not to appoint or promote anyone who was not a practising Christian (other than to posts of cook, gardener, cleaner and maintenance assistant). The claimant refused to follow the policy and in turn resigned. The Employment Tribunal held that the policy did not amount to an OR. The employer had failed to evaluate each job specification and instead implemented a blanket policy. The tribunal held that requiring all employees to be practising Christians was not a proportionate means of achieving a legitimate aim.

Similarly, in *Glasgow City Council v McNab* (UKEATS/0037/06), an atheist teacher was refused an interview for the post of Acting Principal Teacher of Pastoral Care in a Catholic school on the assumption that the Roman Catholic Church would not approve the appointment. The position was not on the list of posts that had previously been agreed between the council and the church that would require that specific approval be sought from the church and/or for the teacher to be Roman Catholic. As the position was not on the list, there should not have been an

assumption that the church would not approve the appointment. Further, the Principal Teacher of Pastoral Care position was a guidance teaching position not limited to religious guidance, but involved elements of curricular, personal and vocational support. The Employment Tribunal held that an OR did not apply. This was upheld by the Employment Appeal Tribunal (which also held that an educational authority does not, in any event, have a religious ethos and so cannot take advantage of this exemption).

Then, in 2009, there was the case of *Muhammed v The Leprosy Mission International* (2303459/09). Here, a blanket policy by the employer of only recruiting Christian staff in its UK head office was found to be a legitimate OR, given the context of this being an organisation in which, although the charity's work was not evangelistic in nature, prayer played a central role, and was a daily part of the work of every employee. This was an encouraging outcome for faith-based organisations, indicating that ORs would be upheld in appropriate cases, even if applied widely.

Since this time there has not, to our knowledge, been any further tribunal case challenging the legitimacy of an OR. This may well initially have been indicative of prospective claimants having been put off by the Leprosy Mission judgment (the case was very well known at the time). But such deterrent effects of case law are seldom long-lived.

In the longer term, it is likely that the real reason for the lack of subsequent OR cases was due to the introduction of Employment Tribunal fees in July 2013. As OR cases are generally about recruitment they are essentially speculative, as the complainant will not know whether the successful candidate was in any event better qualified than them. An unsuccessful candidate for recruitment, who is applying for many jobs, (and who may well not be earning) is precisely the sort of claimant who would be deterred from bringing a tribunal challenge against one particular organisation where their job application has not progressed because of the need to pay a fee.

In July 2017, Employment Tribunal fees were abolished, and we believe it will be open season again

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for such claims. Faith-based organisations should be ready for more challenges on their recruitment practices. This is not a reason for employers to feel that the legal exemption that exists for ORs should not be used, but you should ensure that it is being used appropriately.

We set out below what we consider to be the cardinal principles to be taken into account when applying ORs.

1. Be clear about whether you are relying on the ‘nature’ or the ‘context’ of the job (or both – but both are not necessary).
2. If the occupational requirement is due to the ‘nature’ of the job then the faith in question must be integral to that post, not just a ‘nice to have’.
3. The ‘context’ of a job can be specific to that post, for instance – potentially – where it is based (eg, in a place of worship).
4. Context can also apply to an overall context of an organisation. As the Leprosy Mission case demonstrated, where prayer is an integral part of the organisation’s work, a blanket occupational requirement could apply to all posts.
5. If you are applying an OR you should be upfront about it and declare it in the job advertisement or at least in the application paperwork. Organisations may be concerned that this may, in itself, expose them to claims from litigants who are looking for a dispute of this kind, but if you are clear that a post is subject to an OR you should not waste the time of non-eligible candidates in applying for that post. If you do, you should not expect much sympathy from a tribunal, which will, in all likelihood,

consider that the fact the OR is being applied in a less than transparent way demonstrates its lack of legitimacy.

6. Keep your ORs regularly under review to ensure that they are still legitimate, as organisational circumstances and roles change over time.
 7. Consider alternatives to applying an OR. Would it suffice to have staff sign up to a set of shared values instead? This will be relevant to the question of the proportionality of the OR.
 8. If you are applying an OR to a certain type of post, do not make exceptions for individual staff members who do not meet the OR (unless there are reasons to do so specific to their post, rather than their personal circumstances) or you will undermine the need for the OR for the other posts.
 9. Define clearly what the ‘faith’ is that you require. If your faith requirement is broad (for instance, ‘Christian’), would members of all denominations be acceptable in your organisation (for instance, Jehovah’s Witnesses)?
 10. Keep a paper trail that demonstrates the basis for the OR, and that this was established before any challenge was made. It is always helpful to have minutes of trustee board or senior management meetings at which the need for an OR was carefully considered before being applied to a job.
- By following the above advice organisations should minimise the risk of tribunal claims – or be well positioned to defend them if and when they do arise.

Find out more

BWB acted for The Leprosy Mission in the case of *Muhammed v The Leprosy Mission International*, in which it was successfully argued that recruiting only Christian staff was a legitimate OR in the circumstances. Please click here for a summary of the case: www.bwbllp.com/knowledge/2018/01/23/muhammed-v-leprosy-mission