

A summary of the law on:
**Religious and Political
Discrimination**



THOMPSONS NI

The Fair Employment and Treatment (NI) Order 1998 (FETO) outlaws discrimination on the grounds of religious belief or political opinion in employment, education, transport and the provision of goods and services.

This information sheet is solely concerned with the employment aspects of the FETO.

Who does the FETO apply to and when?

The FETO applies to all employees and workers (including job applicants), apprentices, contract and agency workers, office holders, the police, the self-employed and members of the armed forces.

There is no qualifying period of service required under the FETO, so a worker is protected from the time they apply for a job. Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to that period of employment such as something detrimental that was said in a reference. It applies to all discrimination in the workplace such as selection for a job, promotion or transfer, training, employment benefits and dismissal or any other disadvantage such as harassment.

The protection under FETO includes protection from discrimination based on a person's perceived religious belief or political opinion (e.g. because of the area they come from), the absence of any particular religious belief or political opinion, or because of the religious belief or political opinion of another (e.g. a spouse). Political opinion is not limited solely to Northern Ireland constitutional politics and may include political opinions relating to the government or matters of policy, e.g. socialist political opinions or trade union activism. A political opinion which includes approval or acceptance of the use of violence for political purposes in Northern Ireland is specifically excluded from protection.

Who is Liable?

Responsibility for discrimination usually lies with the employer, but if another employee or worker is found to have discriminated, then the employer will normally be "vicariously" liable for them as well. This covers not only incidents of discrimination occurring in the actual work place, but may also extend to out of work activities such as Christmas parties and drinks in the pub after work. If the alleged discrimination relates to the conduct of another employee, it is advisable to name them as well as the employer in the any application to the Tribunal.

Employers can defend a complaint of discrimination if they can show that they took all reasonably practicable steps to prevent the discrimination occurring. It is rare for employers to succeed with this defence. But even if they do, claimants can still pursue their claim against the individual employee who discriminated against them.

Types of Discrimination

There are four types of unlawful religious/political discrimination in relation to employment – direct discrimination; indirect discrimination; harassment; and victimisation.

Direct Discrimination

Direct Discrimination is when an employer treats a person less favourably than another because of their religious belief and/or political opinion. The worker bringing the claim has to make a comparison between how they were treated and how a person of a different religion/political opinion (either actual or hypothetical) would have been treated. It is irrelevant whether or not the employer intended to discriminate. Once the person has shown that the employer did discriminate against them directly, employers cannot offer a defence as there is none for these claims.

The following situations and examples could give rise to a claim for direct discrimination:

- In an interview for a job the employer only asks an applicant questions about their religion/community background or political opinion.
- A person with inferior qualifications, and/or less experience is appointed to the job or the promotion for which they both applied.

Indirect Discrimination

Indirect discrimination applies to policies and practices which, in reality, disadvantage one section of the community considerably more than another although on the face of it, they seem to apply to everyone equally.

To prove indirect discrimination, Tribunals have to consider four questions:

- Has the employer imposed a provision, criterion or practice?
- Does it put a particular protected group at a particular disadvantage when compared with other groups?
- Does it disadvantage that person?
- Can the employer show that the provision, criterion or practice is proportionate to the aim they are trying to achieve?

Employers can defend indirect discrimination, but they have to show that the provision, criterion or practice:

- Can be objectively justified on grounds other than religion/political opinion
- Corresponds to a real need on the part of the employer
- Is appropriate to meeting that need
- Is necessary to meet that need

This is a particularly complex area of discrimination law and anyone considering bringing a claim will need specialist advice.

Examples of potential indirect discrimination are:

- Restricting recruitment/promotion to existing or long-serving staff where there is a historic religious imbalance in the workforce;
- Using 'last in/first out' or length of service as the sole or main criterion for redundancy selection where there is a historic religious imbalance in the workforce (as the result would be that recent recruits from the traditionally underrepresented section of the community would be disproportionately selected for redundancy)
- Applying (unjustifiable) selection criteria e.g. a practice that priority will be given to persons who have worked in the security forces or who speak the Irish language could be a greater barrier to one section of the community.

Harassment

Unlawful harassment occurs when an individual is subjected to unwanted conduct on the ground of religious belief and/or political opinion that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Even if that individual is not the butt of the unwanted conduct but feels that their dignity has been violated or that an offensive environment has been created as a result, they are also protected by the legislation.

Conduct is only regarded as harassment when all the circumstances are taken into account (including the perception of the person at the receiving end of it) and if it is reasonable to conclude that it could have had that effect.

Examples of religious/political harassment include the following:

- Verbal and written harassment – sectarian remarks, jokes, songs, e-mails, graffiti, ring tones etc.
- Displays of sectarian or political posters, flags, emblems etc.
- Isolation or exclusion from workplace related activities including social activities.
- Pressure to participate in religious or political groups

The victim does not have to demonstrate any financial or other specific loss, such as a threat of dismissal. It is enough that the working environment has become intimidating, hostile or offensive.

Single incidents can constitute harassment, though generally speaking, a one off incident would have to be more serious.

Victimisation

Some workers may be deterred from exercising their rights under the FETO or from supporting others who wish to exercise their rights in case they are victimised by their employer. The Order guards against this by making it unlawful for an employer to victimise an individual because they have brought a discrimination claim, given evidence in a discrimination case or made an allegation of discrimination (whether it has been upheld or not).

To succeed in a victimisation case, the person has to show that they were treated less favourably than someone who had not taken any of these steps, and that their treatment was because they had pursued a discrimination case, had given evidence or had made allegations of discrimination.

Exceptions

There are a number of situations in which the FETO does not provide protection against discrimination including:

- Essential nature of the job requires a person holding/not holding a particular religious belief or political opinion
- Minister of religion
- Recruitment as a school teacher
- Training for, and measures to encourage applications from, an under-represented community where the employer is taking lawful affirmative action
- 50/50 recruitment provisions for Police Trainees and Police Support Staff
- Political opinions involving the approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland

Proving Discrimination

Proving discrimination is not straightforward. A person complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them on the grounds of their religious belief/political opinion. This means that the Tribunal does not have to be certain, but they have to think it more likely than not that their treatment was on the grounds of religious belief/political opinion.

Once an employee has established facts from which a Tribunal could conclude that there had been discrimination then the burden shifts to the employer to show that they did not discriminate.

Not surprisingly, it is rare to find overt evidence of direct discrimination. Few employers are prepared to admit that they have discriminated against someone and those who are aware of the law may have taken steps to appear to have acted lawfully. Whether or not discrimination can be proved will often depend on what inferences a Tribunal can draw from the primary facts. However, there usually will need to be some factual basis upon which the Tribunal can make its finding. It therefore helps if the claimant can produce any relevant letters or documents. In cases of harassment, it is useful if the claimant makes a note of the key incidents and the dates on which they took place.

Serving a Questionnaire

Given the difficulty of proving discrimination, claimants are allowed to serve a Questionnaire on their employer to obtain information to ascertain the strength of their claim and to establish as far as possible, what the facts are and the reason for their treatment. This information can be used as evidence at any Tribunal hearing. If the employer fails to answer the questions within eight weeks, or does so in an evasive or equivocal manner, a Tribunal may use such facts to draw an inference of unlawful discrimination. Questionnaires have to be served within three months of the act of discrimination, or within 21 days of lodging a Tribunal application (although an extension of time can be sought from the Tribunal if this is missed). Serving a Questionnaire does not count as raising a formal grievance.

Tribunal Claims and Time Limits

The time limit for lodging a claim with the Tribunal is three months from the act complained of (or the last act complained of if a series of acts can be considered as a single continuing act of discrimination e.g. ongoing sectarian harassment). No extensions are available unless the Tribunal considers it just and equitable in the circumstances of the case. This is relatively rare.

Lodging a Grievance

While it is not a legal requirement that a person lodges an internal grievance prior to bringing a claim for discrimination, it is strongly advisable to do so. This creates the possibility that the matter might be successfully resolved in the workplace. In the first instance a worker should try to resolve the matter informally with their employer. If it is not possible to resolve the matter informally, the worker should, without unreasonable delay, raise the matter formally, in writing, setting out the nature of the grievance and how it might be resolved. Even if any such workplace resolution is unlikely, it is still advisable to lodge a grievance with the employer as any failure to do so may result in any compensation awarded if the claim is successful being reduced by up to 50%.

It should be noted that lodging a grievance does not result in the time limit being extended - the time limit remains three months from the act complained of even if the grievance proceedings are not completed when the three month deadline expires.

Code of Practice

The Equality Commission produces a Code of Practice on Fair Employment and Guidance on the prevention of sectarian harassment. While these do not impose formal legal obligations, evidence of any departure by the employer from good practice as recommended by the Code can be put in evidence before Tribunals and must be taken into account. While a Tribunal is not obliged to take account of any departures from the Guidance, it will generally do so. Copies can be obtained from the Equality Commission for Northern Ireland: www.equalityni.org.

What Remedies are Available?

There are three remedies available to a Tribunal:

- Declaration
- Compensation
- Recommendations

Declaration

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit on the amount of compensation, which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination. The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination. Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim. Compensation may be reduced by up to 50% if the claimant failed to use the internal grievance procedure.

Recommendations

The Tribunal's powers to make recommendations are limited to actions that will benefit the individual employee and lessen the effect of the discrimination. They must be practical, have a time limit and avoid or reduce the effect of the discrimination complained about. For instance, they might include a requirement for all members of management to be trained in equal opportunities, or for the employee who has been discriminated against to be provided with additional training or mentoring, or to be invited to interview in relation to future job applications. If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.

Equality Duty

In addition to obligations under the FETO, Section 75 of the Northern Ireland Act 1998, places public authorities under a duty to have due regard to the need to promote equality between various groups including between persons of different religious belief and political opinion.

This means that service providers and public sector employers have to design employment and services with the different needs of people from different religious and political backgrounds.

This information sheet provides a summary of the rights of employees in relation to Religious and Political Discrimination. This information should not be taken as a comprehensive statement of the law in this area. You are advised to take advice from your union representative before taking any action based on this information.

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