

Equality Commission

FOR NORTHERN IRELAND

SCHOOL TEACHERS

A Guide on Recruitment
& Selection after the
commencement of the
Fair Employment (School
Teachers) Act (NI) 2022



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SECTION 1:

INTRODUCTION

1. This guide provides advice on the **recruitment and selection** of teachers in schools with particular reference to the **Fair Employment & Treatment (NI) Order 1998** (FETO), the equality law that prohibits discrimination on the grounds of religious or philosophical belief and political opinion.
2. The immediate context for the guide is the **Fair Employment (School Teachers) Act (NI) 2022**, which was enacted by the Northern Ireland Assembly in 2022 and which comes into effect on **12 May 2024**. It will revoke the remaining part of the FETO's **teachers' exception**.
3. This means that from that date it will be unlawful to discriminate on the grounds of **religious or philosophical belief or political opinion** in respect to **all aspects** of the employment of teachers in schools in Northern Ireland, including recruitment and selection and for promotion.
4. The guide is **not** a statutory code of practice and it does not impose legal obligations on the employers of school teachers. It is an advisory guide that outlines advice that the Equality Commission recommends that the employers of school teachers should follow when setting up their arrangements to recruit and select teaching staff, including arrangements for promotion; e.g. job descriptions, personnel specifications, selection methods such as shortlisting criteria and interview questions.
5. The guide is intended to complement other good practice guidance on fair recruitment and selection that is available from the Commission's website at [Hiring new staff](#) and in associated publications: [The Fair Employment Code of Practice](#) (pdf) and [The Unified Guide to Promoting Equal Opportunities in Employment](#) (pdf).

Note: In this guide, any reference to **schools** means schools as defined in *article 2(2) of the Education and Libraries (Northern Ireland) Order 1986*; i.e. an institution for providing primary or secondary education or both primary and secondary education, being a grant-aided school or an independent school. Thus, **the guide is for all schools, regardless of their size and the numbers of employees or the sectors in which they operate.**

Note - monitoring community background: The revocation of the teachers' exception will also bring the recruitment and employment of school teachers within the scope of the duties on employers under Part VII of FETO: i.e. monitoring the community background of job applicants and employees and associated duties. Further guidance on those duties is available at: www.equalityni.org/a55

SECTION 2:**THE EQUALITY LAWS****Religious belief, philosophical belief and political opinion**

6. The **Fair Employment and Treatment (NI) Order 1998** (FETO) prohibits discrimination and harassment in employment on the grounds of-
- **religious belief**
 - **philosophical belief**
 - **political opinion**

The meanings of those terms are outlined in the [Annex](#).

Non-teaching staff in schools

7. FETO, and its statutory predecessors, have prohibited discrimination on these grounds in relation to all aspects of the recruitment and employment of non-teaching staff in schools since 1976.
8. To that end, employers in the school sector have, for many years, applied policies and practices designed to help them to meet their legal responsibilities and to promote equality of opportunity in respect of this.

Teaching staff in schools – the teacher’s exception

9. Prior to 2003, FETO, and its predecessors, did not prohibit discrimination on the grounds of religious or philosophical belief or political opinion in relation to any aspect of the employment of school teachers. That was due to the effects of article 71 of FETO, commonly known as the *teachers’ exception*.
10. This situation changed through a process that began in 2003 when an EU equality law, *Council Directive 2000/78/EC*, required the exception to be modified and narrowed. As a result, and since then, FETO has prohibited discrimination on its equality grounds in relation to most aspects of the employment of teachers in schools; e.g. in relation to pay, training, absence and performance management, dismissal, harassment.
11. Despite that change, FETO’s prohibition of discrimination did not apply to the recruitment or promotion of teachers in schools due to the continuing effects of one part of the article 71 exception that remained.

12. The remaining gap in coverage will be filled on **12 May 2024** when the **Fair Employment (School Teachers) Act (NI) 2022** comes into effect to revoke the article 71 exception entirely.
13. Consequently, **from 12 May 2024 it will also be unlawful to discriminate on the grounds of religious or philosophical belief or political opinion in respect of the recruitment or promotion of teachers in schools in Northern Ireland.**

Other protected equality grounds

14. FETO is not the only equality law in Northern Ireland that prohibits discrimination and harassment in employment. The other laws prohibit discrimination and harassment in respect to **all** aspects of the recruitment and employment of **all** employees, **including school teachers.**
15. The other laws are:
 - **Equal Pay Act (NI) 1970**
This law promotes the principle of equal pay for equal work for men and women.
 - **Sex Discrimination (NI) Order 1976**
This law prohibits discrimination on the grounds of sex, pregnancy and maternity, married and civil partnership status, gender reassignment.
 - **Disability Discrimination Act 1995**
This law prohibits disability discrimination against disabled people and imposes a duty to make reasonable adjustments.
 - **Race Relations (NI) Order 1997**
This law prohibits discrimination on racial grounds; i.e. the grounds of race, colour, ethnic or national origins, nationality.
 - **Employment Equality (Sexual Orientation) Regulations (NI) 2003**
This law prohibits discrimination on the grounds of sexual orientation.
 - **Employment Equality (Age) Regulations (NI) 2006**
This law prohibits discrimination on the grounds of age.

SECTION 3:**RECRUITMENT AND SELECTION –
GENERAL PRINCIPLES**

16. Equality law applies to all employers. Some principles of good practice have been developed to complement this. Of relevance to recruitment and selection are the following principles.

Be an equal opportunities employer

17. To promote equality of opportunity in employment and to eliminate or reduce the possibilities that unlawful discrimination **on any protected ground** may occur, employers should take a number of practical steps, such as adopting equal opportunities policies and providing training to staff on how to implement them. **Training is especially important.** Further information on the general principles is available from the Commission's website at [Promoting equality of opportunity](#).

Recruit fairly – review existing recruitment and selection procedures

18. It is important to **recruit fairly** and to avoid unlawful discrimination **on any protected ground** when doing so. Review current recruitment and selection procedures, or develop new ones, ensuring that they address the implications of **all** of the equality laws, including FETO; i.e. aim to remove the potential that the procedures may cause unlawful discrimination on any of the protected equality characteristics, including religious or philosophical belief and political opinion.
19. The recruitment and selection procedures followed by many grant-aided schools are likely to be those set out in the **teaching appointments schemes** that have been issued by the Education Authority, in the case of controlled schools, or by the Council for Catholic Maintained Schools (CCMS), in the case of Catholic maintained schools.
20. For schools that do not follow those teaching appointments schemes, they should also review, or draw up, their own recruitment and selection procedures.

Sources of help and advice

21. Information on the general principles of fair recruitment is available from the Commission's website at [Hiring new staff](#) and in associated publications: [The Unified Guide to Promoting Equal Opportunities in Employment](#) (pdf). The Commission has also published a [model recruitment and selection policy and procedure](#) that may be used as a guide for reviewing existing, or for developing new, procedures.

22. The Commission is also available to provide general advice and guidance on request – contact our [Employer Helpline](#).

Note – Section 75 of the Northern Ireland Act 1998: As public bodies that are designated for the purposes of [section 75](#), the Department of Education, the Education Authority and CCMS, when carrying-out their functions in relation to the employment of teachers in schools (such as, where appropriate, reviewing and monitoring the operation of the Northern Ireland Supply Teacher Register or their teaching appointments schemes), must comply with their duties under section 75 and their equality scheme arrangements.

SECTION 4:**RECRUITMENT & SELECTION – SCHOOL TEACHERS**

23. In addition to the general principles noted above, there are also some specific considerations that may be relevant:

A. Northern Ireland Supply Teacher Register

24. Recruiting or deploying teachers from the [Northern Ireland Supply Teacher Register](#) (NISTR) to teach in schools is subject to the equality laws, meaning that it is unlawful to discriminate on any of the protected grounds when doing so.

25. The review, or development, of recruitment and selection procedures should include the registration to and recruitment or deployment of individuals from NISTR. This is to ensure that fair practices are in place and are followed in line with the aims of NISTR.

B. Recruitment documents and selection criteria

26. When recruiting staff, employers should normally aim to attract the widest pool of suitable applicants, to recruit the best person for the job and to do so in a way that avoids [unlawful discrimination](#) on any of the equality grounds. This is not a new principle and employers in the school sector will be familiar with it.

27. As a matter of good practice, the recruitment and selection process should begin with the development of new, or the review of existing, job descriptions and personnel specifications. These are the source material for job advertisements and are a medium for attracting job applicants and for informing them about the duties of the job and of what they will be expected to do, if appointed. They are also the source of job selection criteria and assessment methods, such as interview questions.

28. When reviewing job descriptions for each teaching post, employers should consider whether any of the job duties or working arrangements (e.g. a requirement to work full-time or anti-social hours) or criteria pertaining to them might directly or indirectly exclude disproportionately more people who have certain characteristics compared to others (e.g. women compared to men, or disabled people compared to non-disabled people), or might discourage such people from applying for work that they are suitably qualified to do.

Employers **should** think carefully about such arrangements and associated job criteria that may have these outcomes. It will amount to unlawful discrimination, particularly [indirect discrimination](#), if applying them to the particular job in question cannot be lawfully justified. For further advice on justification, refer to the [Annex](#).

29. That same approach **should** be taken in respect of considering duties or working arrangements or corresponding selection criteria that might have similar differential impacts on people of different religious or philosophical beliefs or political opinions. Again, employers in the school sector will be familiar with this approach as regard their non-teaching staff. If they have not already done so, they should consider these same factors when recruiting their teaching staff; i.e. if applying the arrangements or criteria to a particular job, consider whether there are likely to be disparate impacts on different groups and whether their application to that job can be lawfully justified.
30. There is not an exhaustive list of provisions, criteria or practices to consider and not all examples may be relevant to every school, but, depending on each school's circumstances, some examples of the kinds of issues that **should** be considered and, where necessary, lawfully justified include -
- (a) **Qualifications and other competencies:** As might be expected, the duties of a particular teacher's job may genuinely require that the job-holder must have certain levels of knowledge in a particular academic subject or that they must have certain abilities (e.g. an ability to use various software tools, or an ability to speak, read and write in certain languages). To test whether the candidates have the necessary knowledge or abilities, the selectors may seek evidence in the form of academic qualifications (e.g. a degree or post-graduate certificate in certain subjects), or by meeting certain standards in aptitude or other selection tests.

While such qualifications and abilities may be gained by people who hold a wide range of religious or philosophical beliefs or political opinions, or none, it seems reasonable to assume that in some cases; e.g. a requirement for a [Certificate in Religious Education](#) or an ability to communicate in the Irish language fluently, are more likely to be held by members of one community compared to others; that is the Roman Catholic community compared to the Protestant community or to other non-Christian faith groups.

Given that, the setting of such selection criterion in relation to a particular teaching post could be challenged as being discriminatory, most likely on the ground that it is potentially [indirectly discrimination](#), in which case the application of the criterion to the post in question **must** be lawfully [justified](#).

Such considerations could include answering questions like:

- Is the level of knowledge or ability in question genuinely needed to perform the duties of the post?
- Is it needed of all teachers in a given school, or in a given department within a school?
- Can exceptions be made without causing undue difficulties for the school?
- If an academic qualification is sought or if a selection test is set, how closely do the qualifications or standards correspond to the required level of knowledge or ability? A qualification or standard is likely to be easier to justify the closer the degree of correspondence.

(b) **Dress codes:** In the information that is provided to job applicants (e.g. job descriptions, personnel specifications, advertisements), employers **should** consider whether it indicates any requirements, express or implied, for teachers to dress in a particular way (e.g. no headwear or face coverings).

Such requirements might effectively dissuade applicants who hold certain religious beliefs (e.g. Islam) from applying or might exclude them from being appointed because they cannot as a matter of conscience comply.

Depending on their rationale, rules like this could amount to unlawful **direct discrimination** (e.g. where the rule was adopted deliberately to exclude job applicants from specific religious communities), or to potential unlawful **indirect discrimination** (e.g. where it was adopted for some legitimate and genuine educational purpose) in which case it would still need to be **justified** by reference to the genuine needs of the job and the school.

Such considerations could include answering questions like:

- What is the underlying rationale for the rule? If adopting it would amount to direct discrimination, it must not be adopted.
- If it has been adopted for some legitimate and genuine educational purpose-
 - What is that purpose?
 - In what circumstances does the rule apply: e.g. generally and at all times and places during the school day, or only in particular settings (e.g. only when teaching young children and/or only at particular times).
 - Is there evidence to support its use and educational value? Does that evidence support the general application of the rule or only a limited use? A rule is likely to be easier to justify the closer the degree of correspondence its application has to the underlying aim or problem that it seeks to address and to the supporting evidence.
 - Can practical arrangements be made to allow the affected staff to wear the relevant items without causing undue difficulties for the school?

- (c) **Attendance or participation at religious worship:** For the same reasons, employers **should** consider, within the context of their school's ethos and/or any statutory duties that they may be under in respect of providing assemblies of collective worship and religious education (for example, the duties under [articles 21-22 of the Education and Libraries \(NI\) Order 1986](#), if applicable), whether the information for applicants sets out what the expectations are.

Such job duties, if imposed on individual teachers, might effectively dissuade applicants who hold certain religious beliefs, or none, from applying, or exclude them from being appointed because they cannot as a matter of conscience comply with the duty.

Again, employers **should** consider whether such job duties are [justified](#) by reference to the genuine needs of the job and the school and/or by any statutory duties that the school may be under.

Such considerations could include answering questions like:

- Is attendance or participation at the events required of all teachers on all occasions when they arise, or only for some teachers and/or only on some occasions when they arise?
- Can practical arrangements be made to allow some staff to opt-out without causing undue difficulties for the school?

(d) Criteria relating to a “commitment to” or “to support” aims, values or ethos’: Whilst the terminology may vary, all organisations have aims, values, goals, mission statements or ethos’ that they wish to achieve or that outline guiding principles for what they exist to do and how they will do it.

Furthermore, every organisation will aim to recruit and employ staff who will perform their job duties conscientiously and in ways that complement the employers’ aims, and certainly not in ways that undermine or denigrate those aims.

Note: As was noted above, the prohibition of discrimination by FETO is partially influenced by an EU equality law ([Council Directive 2000/78/EC](#)), which required FETO to be modified to prohibit religious and philosophical belief discrimination in relation to most aspects of the employment of teachers in schools in Northern Ireland. The Directive also noted, at article 4(2), that complying with its obligations did “*not prejudice the right of churches and other public or private organisations*” that had an ethos based on religion or belief, and so long as they otherwise comply with the law, “*to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos*”.

Recruitment documents - be clear about meaning

Employers frequently outline their expectations for what they will require their employees to do in respect of such aims, values or ethos' in their job descriptions, personnel specifications and job advertisements. This is usually seen in criteria such as: "*applicants must be committed to [or, must support] our [aims / values / ethos]*". Terminology may vary.

Employers **should** ensure that such criteria are clearly defined so that job applicants know what is required of them and that selection panel members understand what they are assessing. The job description **should outline what is required of the employee on a day-to-day basis in respect of such criteria and the personnel specification should set out how applicants can meet those criteria. These documents, in turn, should form the basis for developing other closely related aspects of the selection processes, such as interview questions, model answers and assessment sheets.**

Effects of the criteria and how they are assessed

Where such criteria invoke FETO's protected grounds expressly; i.e. where they are framed expressly with reference to a particular religious or philosophical belief, there is a risk that applicants who do not hold that particular belief, or who have had limited or no association with it, may be dissuaded from applying for the jobs in question. Conversely it may be easier for other people, because they share that belief or have had some association with it, to feel more comfortable with it.

Employers **should** consider how the criteria are to be assessed. How does a job applicant show during the job selection process that they have the desired level of "*commitment*" or that they can give the desired level of "*support*"? Will selectors look for evidence in the actions that the candidates have taken, or events that they have participated in, or groups that they are members of, or schools that they have attended or have worked in?

Again, there is a risk that applicants who do not hold that particular belief, or who have had no association with it, may be excluded from being appointed because they may find it difficult, or more difficult, to demonstrate that they have the desired level of "*commitment*" or where it may be doubted that they can give the desired level of "*support*". Conversely it may be easier for other people, because they share that belief or have had some association with it, to prove that they satisfy such criteria.

Employers **should** think carefully about such criteria, how they are to be assessed, whether they may have these outcomes and, where necessary, whether they are lawfully justified. If they do lead to such disparate outcomes, it will amount to unlawful discrimination, particularly **indirect discrimination**, if applying them to the particular job in question cannot be justified. For further advice on justification, refer to the **Annex**.

- (e) **Religion or belief-based occupational requirements:** In some situations, which the Equality Commission expects to be rare, it may occur that the duties of a teacher's job genuinely requires that they hold a particular religious or philosophical belief (e.g. the job criteria state expressly that the successful applicant must be a practicing Christian). A criterion like this would normally amount to **direct discrimination** but it may be permissible if certain conditions are met - **further guidance** is given below.

Before seeking to apply a GOR (of any kind), the Equality Commission recommends that, as a matter of good practice, an employer should consult it for advice.

ANNEX

1. PROTECTED BELIEFS AND OPINIONS

Protected religious beliefs

The term *religious belief* is not defined in FETO, but it is reasonably clear that it encompasses the general dictionary meaning of the term and that a protected religious belief will include a belief (or non-belief) in a religious faith defined broadly, such as Christianity, Islam, Judaism, Hinduism, Buddhism, Sikhism. That is not an exhaustive list. It will also include a belief (or non-belief) in a specific religious community within any of those broader categories, such as Roman Catholicism and the various forms of Protestantism. Again, it is not an exhaustive list.

Protected philosophical beliefs

The term *philosophical belief* is not defined in FETO but, for the purposes of determining whether one is a protected belief, some guidelines have been set down by case law (i.e. the *Grainger criteria*). To be deemed to be a protected philosophical belief, the belief must be a genuinely held viewpoint about a weighty and substantial aspect of human life and behaviour; for example, a philosophy that is a matter of conscience or morality. It is not enough if it is merely an opinion based on some real or perceived logic or based on information or lack of information available. It must be a viewpoint that has sufficient cogency, seriousness, cohesion and importance and that is worthy of respect in a democratic society. It has been held in case law to include a very wide range of beliefs, such as, but not limited to:

- ethical veganism,
- a belief that climate change imposes a duty to live one's life in a way that limits one's impact on the environment, and
- a belief that the cause of racial equality is best advanced not through separatism and segregation but by valuing people based on the content of their character rather than on their race or the colour of their skin and by emphasising what people of all races have in common.

Might a belief that the aims or values of integrated education are beneficial or desirable be deemed to be a protected philosophical belief? Possibly, but an answer to this question must await its consideration by the Fair Employment Tribunal. In considering that question, the Tribunal will likely have regard to the statutory meaning and purpose of integrated education as outlined in [sections 1 and 2 of the Integrated Education Act \(NI\) 2022](#).

Protected political opinions

The term *political opinion* is not defined in FETO, but case law has clarified that the term includes any opinion “*relating to the conduct of the government of the state or matters of public policy*”. That is wide enough to include any lawful political opinion, such as Unionism, Nationalism, Conservatism, Liberalism, Socialism. It also includes political opinions about narrower issues, such as opinions supporting (or, opposing) a government’s policy on a wide variety of matters, such as foreign or defence policy, immigration, taxation or law reform on any other matter. The term also refers to the *absence* of a political opinion.

The protection of the law does not extend, though, to any political opinion that consists of, or includes approval or acceptance of, the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.

2. DEFINITIONS OF DISCRIMINATION

Direct discrimination

This occurs where an employer treats a job applicant or employee less favourably than they treat (or, would treat) another person, in the same or similar circumstances, on one or more of the protected grounds.

For example, it is direct discrimination to refuse to employ a job applicant because she is a woman, or pregnant; or, because they are a Roman Catholic or a Protestant; or, because they are an Irish Traveller; or, because they are gay or lesbian; or, because they are undergoing or have undergone gender reassignment, or because they are disabled; or, because they are of a certain age (e.g. over 60, or under 20).

A decision that is directly discriminatory will be unlawful unless:

- (a) in an age discrimination case, the decision can be objectively justified, or
- (b) in any other case, an employer can rely on a statutory exception, such as a *genuine occupational requirement exception* where the job needs to be done by a person who has a particular characteristic (e.g. the job holder needs to be a woman in order to preserve the decency and privacy of women service-users who may be undressed).

Indirect discrimination

This occurs where an employer applies to all job applicants or employees a particular provision, criterion or practice, being one that has the effect of placing people who share a particular equality characteristic (e.g. the same sex, or religious belief, or race) at a particular disadvantage compared to other people (i.e. people of a different sex, religious belief, or race).

In a recruitment situation, indirect discrimination might arise where the employer sets and applies a particular job selection criterion to all job applicants; however, it has the effect of disproportionately excluding or disadvantaging people who are members of a particular group who share a particular equality characteristic. For example:

- (a) if a job applicant needs to have a degree and 5 years post-qualification experience then the criteria effectively exclude people aged under 26 or 27 years and, thus, the combined effect of the two criteria could be indirectly age discriminatory against people under that age;
- (b) if a job applicant needs to have relevant work experience gained within the past two years, then the criterion may effectively exclude many women who wish to return to the workplace after taking time-off for caring reasons and, thus, the criterion could be indirectly discriminatory against women on the grounds of sex;
- (c) requirements to have academic qualifications that can only be gained through the local education systems (i.e. UK or Ireland) may effectively exclude many migrant workers who are otherwise eligible and qualified to do the work in question and, thus, could give rise to indirect race discrimination.
- (d) in the context of the school teaching profession in Northern Ireland, a requirement for school teachers to hold the Certificate in Religious Education or to have an ability to speak, read and write in the Irish language may also be open to an allegation of indirect religious discrimination. This is because an inference may be drawn that those currently able to meet those requirements are more likely to be members of the Roman Catholic community than of the Protestant community or of members of other non-Christian faith groups.

A provision, criterion or practice that has a disparate impact like this will be unlawful unless it (e.g. the job criterion in question) can be objectively justified or is permitted by another statutory exception.

Objective justification for indirect discrimination:

The test of objective justification for indirect discrimination requires an employer to show that their discriminatory action or decision was *a proportionate means of achieving a legitimate aim*.

Legitimate aims:

The first part of the test requires the employer to have a *legitimate aim*. For example, what is their underlying reason for applying the job selection criteria in question? A wide range of business aims are likely to be deemed to be *legitimate* and could include the following:

- complying with statutory duties that the employer is under,
- ensuring employees are adequately qualified or skilled to perform the duties of their jobs,
- meeting the reasonable needs of customers (but not their unreasonable prejudices),
- avoiding redundancies,
- promoting health & safety,
- offering existing staff career development opportunities.

It is not an exhaustive list.

However, it is not sufficient for an employer to point to one of these aims and to merely assert that it applies to them. It must actually be relevant and applicable to their business or organisation and it must be an aim that they are genuinely trying to pursue. The employer would be helped by having evidence showing that there is an underlying problem that the criteria are designed to fix or that it is a solution to an aim they wish to achieve.

Proportionate means of achieving those legitimate aims:

The second part of the objective justification test requires the employer to show that setting the discriminatory criterion is a reasonably necessary step they have to take to achieve their legitimate aim(s). The employer must also show that there are no non-discriminatory, or less discriminatory, alternative courses of action open to them.

The case law on this topic is very fact specific. What is deemed to be lawful for one employer (e.g. a primary school) may not necessarily be lawful for another (e.g. a secondary school). Also, what may be lawful for one employer in relation to a particular job (e.g. a teacher who prepares children for the Sacraments) may not necessarily be lawful when applied to other jobs in the same workplace (e.g. a teacher who has no role in respect of preparing children for the Sacraments).

One important principle is clear: the employment tribunals tend to place justification arguments under intense scrutiny. This means that employers should not expect tribunals to readily accept mere assertions. Tribunals are likely to require evidence and logical arguments that are specific to an employer's particular circumstances, and which hold up under cross-examination.

Other forms of discrimination

Direct and indirect discrimination are not the only forms of discrimination that are prohibited by the equality laws. The other forms of prohibited conduct are-

Harassment:

That is: subjecting a person to unwanted offensive or intimidating behaviour that is related to a protected ground.

Victimisation:

That is: retaliating against a person for exercising their rights under the equality laws, or for helping others to do so.

Failure to comply with a duty to make reasonable adjustments:

This is the most frequent form of disability discrimination against disabled people.

These forms of discrimination are not directly relevant to the specific subject-matter of this guide. Nevertheless, they are very important and relevant more generally and should not be ignored. Further information may be obtained from the Equality Commission.

3. RELIGION OR BELIEF-BASED GENUINE OCCUPATIONAL REQUIREMENTS

One of the exceptions to the general anti-discrimination rule of the equality laws wherein employers may under certain circumstances be permitted to **directly discriminate** on the protected grounds is that known as *the exception for genuine occupational requirements [GOR]*. In other words, where having a particular characteristic, such as a sex or race or age, is an essential qualification for the job in question. These exceptions are not invoked often in practice and there are strict conditions to be followed when seeking to apply them.

FETO is no different in this respect in that it too has a clause that may permit an employer to set a job selection criterion that requires applicants or employees for a particular post to be of a particular religious or philosophical belief, subject to certain conditions.

The conditions are set out in article 70 of FETO and provide that it is not unlawful to require a job applicant or employee to hold a particular religious belief where-

Article 70(1): The job in question is that of a clergyman or a minister of a religious denomination, or

Article 70(3): The religious belief in question is an occupational requirement and applying it is a proportionate means of achieving a legitimate aim.

Following the revocation of the teachers' exception, this potential legal defence will be available to an employer of school teachers who can show that the conditions for applying it are satisfied.

Before seeking to apply a GOR (of any kind), the Equality Commission recommends that, as a matter of good practice, an employer should consult it for advice.

Article 70(3)

It is unlikely that many, if any, teaching jobs in schools require the job-holder to be a clergyman or a minister of a religious denomination. Where an employer of school teachers seeks to apply a religion-based GOR they will more likely seek to invoke the exception permitted by article 70(3).

As to whether this defence can validly be applied in any particular case, the Equality Commission considers that the general principles are as follows-

- Every post, teaching or otherwise, for which the exception is claimed to apply must be examined separately to determine if the exception may properly be applied to it. Such an examination would take account of the nature of the particular job in question that is being filled, such as the duties of post.
- Being of a particular religious belief must be a **requirement** of the post (i.e. it must be something which is **essential** for the person to be able to perform the duties of the job, and not merely be desirable).
- It must be **occupational** (i.e. it must be connected to the job duties in question).
- It must be a **genuine** requirement.
- The requirement must be **proportionate**. This means that it does not discriminate more than is necessary: for example, if an employer already has other employees of that religious belief who can carry out the religious-based duties of the relevant job, then the employer cannot rely on the exception to further discriminate against others, unless this would create excessive difficulties for the employer – in this regard a “minor inconvenience” is not the same as an “excessive difficulty”.

Note: Legal case on the use of religion or belief-based GORs: One case about the applicability of the GOR defence in a school teaching context is the case of [Glasgow City Council –v- McNab \[2007\] UKEAT](#) - a case from Great Britain under the equality laws that apply there; i.e. the Employment Equality (Religion or Belief) Regulations 2003, a predecessor to the Equality Act 2010.

Part of the context of the case was a provision of Scottish education law, [section 21\(2A\) of the Education \(Scotland\) Act 1980](#), as amended. This applies to denominational schools that have been transferred to the management and control of a local education authority; the latter thereby becoming the employer and having the primary duty to appoint teachers to those schools. That appointing power is subject to the approval of the representatives of the relevant church or denomination that previously controlled the school and in whose interests the school is now being run. Its history and relationship to equality law was examined in *McNab*.

Having encountered difficulties in filling school teaching vacancies in its transferred schools, the Catholic Church made an agreement with Strathclyde Regional Council in 1991 that gave advance blanket approval to local education authorities to appoint teachers of any religion or none to the relevant teaching vacancies apart from the following posts: head teacher, principal or assistant principal teacher of guidance or religious education, principal teacher of biology, teacher of religious education or senior teacher in a primary school.

In *McNab*, the claimant was an atheist who was employed as a computing and mathematics teacher in a Roman Catholic school and who had applied for promotion to the post of Acting Principal Teacher of Pastoral Care. He was not considered for an interview as he was not of the Roman Catholic faith and because the local education authority which maintained the school thought that the Catholic Church would have regarded being of their faith as a pre-requisite for the post. Thus, the local council was claiming that a religion-based GOR applied to the post. The Employment Tribunal and, on appeal the Employment Appeals Tribunal, rejected that defence. Section 21 did not displace the need to justify the appointment of a Catholic for any post (even one of the allegedly reserved posts of the 1991 agreement) in terms of the GOR defence that the law permitted.

In this particular case, a religion-based GOR for this post could not be justified. A number of reasons were given: The post was not one of the reserved posts listed in the 1991 agreement; a local council is not an employer who can claim to have an ethos based on religion or belief; and, although a small number of the duties of this post sometimes could have a religious element (i.e. giving sensitive instruction or advice to individuals in relation to the Roman Catholic religion), the practice was that those particular duties could be passed on to other teachers who were better qualified to perform them.

Equality Commission

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