

How will religion and belief be protected under Guernsey's new discrimination law?

UPDATE

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The [Prevention of Discrimination \(Guernsey\) Ordinance, 2022](#) (the **Discrimination Law**) finally came into force on 1 October 2023. Despite important points of difference, the long-awaited new framework goes some way to bringing the island up to speed with Jersey, the UK and Europe, where similar legislation has been in place for many years. In some respects, the Discrimination Law goes further. One such area is discrimination connected to religion or belief, which is not currently a protected characteristic in Jersey. In this article, we look at how employers might expect this ground to be treated in Guernsey, particularly with reference to the UK position.

Scope of protection

Under the Discrimination Law, the scope of protection is deliberately wide. 'Religion' means any religion or lack of religion, and 'belief' means any religious or philosophical belief or lack of belief.

The protection of philosophical belief as well as religious belief mirrors the UK [Equality Act 2010](#) (the **Equality Act**). So, as in that jurisdiction, employers in Guernsey must anticipate the possibility of employees claiming protection with reference to a broader system of thought than organised religion necessarily.

Helpfully, Guernsey's new Employment and Equal Opportunities Service has published guidance that cites a five-stage test that emerged from some of the UK case law for determining whether a purported philosophical belief will be protected.

According to the guidance, the belief must:

- be genuinely held;
- be a belief and not an opinion or viewpoint based on the present state of information;
- be weighty and substantial;
- attain a certain level of cogency, seriousness, cohesion and importance; and
- be worthy of respect in a democratic society.

Over time, a range of beliefs have been protected under the Equality Act: ethical veganism, gender-critical beliefs, a belief in man-made climate change and stoicism, to name a few.

A number of beliefs have not been protected: disappointingly for sports fans everywhere, a Glasgow Rangers fan's claim in 2022 that support for a football club should be a protected philosophical belief was rejected.

A critical issue in the assessment of whether a belief should be protected arises from the wider protection of human rights.

Human rights analysis

Beliefs which are not compatible with human dignity and conflict with the fundamental rights of others will not meet the threshold for protection. The UK Equality and Human Rights Commission gives an example of a person who believes in a philosophy of racial superiority, which will not be treated as a belief to be protected in law.

But the case law is clear that the notion of a belief being worthy of respect in a democratic society crosses over into the protection of human rights under the [European Convention of Human Rights \(ECHR\)](#), specifically, rights to freedom of thought, conscience and religion ([Article 9](#)) and freedom of expression ([Article 10](#)), which are recognised in Guernsey and Jersey. Only beliefs which would constitute a grave violation of those principles will be excluded from protection.

As such, the mere fact that a belief is likely to cause offence does not mean it will be excluded from protection. This has the potential to cause uncertainty for employers, who must balance individual rights to thought and expression with conflicting views of colleagues or the employer's own stance.

Manifestation and expression of belief

A related theme is the nexus between a person's protected belief and their right to express (or *manifest*) that belief. Taking action against an employee *because of* their protected belief or the manifestation of that belief will be discriminatory. But where action is taken in respect of the *manner of* the manifestation, the position may be more nuanced.

For example, to what extent could an employer take action in respect of the way in which an employee chooses to express a certain belief on social media?

The UK Employment Appeal Tribunal ([EAT](#)) provided useful guidance on this question in [Higgs v Farmor's School](#)¹. The judgment follows a raft of recent cases concerning beliefs relating to gender and gender identity. A first-instance tribunal found that the reason for the employee's dismissal (relating to posts on social media about the teaching of LGBT topics in schools) was that she would be perceived to hold unacceptable views, not *because of* those views, so she had not been discriminated against.

On appeal, it was ruled that the first-instance tribunal had, among other things, failed to balance the employer's actions with the employee's protected belief, and consider whether the former constitute a proportionate interference with the employee's freedom of thought and expression. The appeal therefore succeeded and the case was remitted back to the first-instance tribunal. But the EAT went on to note that where such a proportionality assessment is required to be carried out, a number of core principles should be considered:

1. the foundational nature of the rights to manifest belief and express views relating to that belief.
2. the manifestation of belief and free expression may nonetheless be limited for the protection of the rights and freedoms of others.
3. whether a particular limitation is objectively justified is always context-specific.
4. matters relevant to that assessment will include–
 - the content, tone and extent of the manifestation;
 - the individual's understanding of the likely audience;
 - the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business;
 - whether the individual has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk;
 - whether there is a potential power imbalance given the nature of the individual's position/role and that of those whose rights are intruded upon;

¹ [2023] EAT 89

- the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients;
- whether the limitation imposed as a result is the least intrusive measure open to the employer.

Stepping back, in that case itself, the offending social media post (whilst using '*florid and provocative language*', according to the tribunal) was not malicious nor directed at any person or group of people. If that were the case, the employer's rationale for taking action in respect of such malicious or targeted comments might well be stronger.

Conclusion

UK case law may be treated as persuasive in the Channel Islands but it is not binding, so the Guernsey tribunal and Royal Court will determine any issues such as this afresh. However, the Discrimination Law adopts a similar approach to the Equality Act (as does Jersey's discrimination law framework, despite the lack of corresponding protection for religion or belief). As such, we would expect the guidance available from the UK to be considered a helpful source in approaching the questions outlined above, with a range of prior examples to draw upon. But as the UK guidance makes clear, the nature and context of a particular scenario must be assessed on its own merits. It remains to be seen how the balance will be struck if and when the first challenge is brought.

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