EMPLOYMENT

A Practical Guide for Employers and Jewish Employees

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INTRODUCTION

This pamphlet was originally produced to give information to employers and employees about the requirements of practising Jews in the workplace. It has been revised to take account of various changes in the law relating to England, Scotland and Wales. We explain the nature of those requirements in the light of the changes in the law and offer advice as to how they can best be accommodated by all involved parties.

The level of religious observance varies amongst Jews of different affiliations and the requirements of Jewish employees differ. In this pamphlet we deal principally with observant Jews whose requirements are greater.

SABBATH AND FESTIVAL OBSERVANCES

Jewish law requires Jews to refrain from various acts of "work" on the Sabbath, in commemoration of God's cessation of creativity on the seventh day of creation The prohibited acts of "work" include travelling (other than by foot), writing, carrying, switching on and off electricity, using a telephone, and any transactions of a commercial nature including buying and selling. Festival laws are for these purposes almost indistinguishable from Sabbath laws. Where we talk only about Sabbath observance that should be read to include Festivals.

The Sabbath starts on Friday about one hour before dusk. Thus, a practising Jew must leave work in sufficient time to arrive home by the onset of Sabbath, which at its earliest at midwinter is approximately 3.25 pm throughout the UK, but which is after 5.30 pm for most of the year. The Sabbath lasts for approximately 25 hours.

Like Sabbath, Festivals also commence immediately before dusk on the previous day, requiring people to leave work on the day before a Festival in time to reach home (comfortably) before dusk. Festivals can fall on any day of the week, but it is extremely unusual for all 13 to fall on weekdays. Every year the dates will be different as they fall in accordance with a lunar calendar. Passover and Pentecost often coincide with bank holidays.

In addition to Sabbath, there are in total 13 holy days ("Festivals") in the Jewish calendar, comprising:

Passover	(March/April)	2 sets of two days separated by 4 semi-festive days
Pentecost	(May/June)	2 days
New Year	(September/October)	2 days
Day of Atonement	(September/October)	Fast Day
Tabernacles (Sukkot)	(September/October)	2 sets of two days separated by 3 semi-festive days

The Workplace

Practising Jews work in every area of industry, trades and professions, at all levels and have found it possible to operate perfectly well within the normal work environment whilst still observing Judaism.

There are legitimate concerns, and to an employer with no experience of working with practising Jews, there may appear to be obstacles to employing them. In practice, difficulties can often be diminished or even eliminated. Many employers, especially in the public sector, have for some time adopted codes of practice providing that no employee can be refused leave on religious grounds. Since December 2003 and the introduction of the Employment Equality (Religion or Belief) Regulations, all employers will have to review their policies and procedures in this area.

Most jobs require a working day of 9.30 to 5.30, yet, as explained above, Jewish law involves leaving work early for several Fridays during the winter months. Normally holidays are booked to fit in with requirements of the workload, and of other colleagues. Yet Jewish law requires up to thirteen holiday dates each year (occasionally fewer, since some Festivals will fall on weekends and bank holidays) regardless of such considerations.

The Importance

It is difficult adequately to stress the centrality and inflexibility of the Sabbath and Festivals laws for the observant Jew. Sabbath observance in many ways is the central rock on which the rest of Judaism is founded. For an observant Jew there can be no compromise.

However, it should be noted that where life is at risk, Jewish law provides that the Sabbath and Festival laws must be disregarded. That, however, is the only exception, and Judaism has no mechanism for granting dispensations. Those working in the health and emergency services will therefore often be allowed to work on Sabbath and Festivals, but they may wish to consult a Rabbi to confirm this, and they may ask for assistance with tasks not directly contributing to saving life, such as taking notes. For anyone else no such dispensation is available.

The Law

The law affords various types of aid to Jews who wish to adhere to their beliefs without suffering

discrimination because of their ethnicity or religion. The starting point is the Race Relations Act 1976 and its consequent case law. Next is the Human Rights Act 1998 and added protection is to be found in the Employment Equality (Religion or Belief) Regulations 2003.

The Race Relations Act 1976 prohibits discrimination on racial grounds, and race is defined as "colour, race, nationality, ethnic or national origins". Case law arising from the Race Relations Act has decided that Jews are an ethnic group. Gaps in protection occur where particular instances of discrimination do not fall within the statutory ambit – the wording of the statute is very technical.

The Commission for Racial Equality (CRE) was set up pursuant to the Race Relations Act 1976 and works towards the elimination of racial discrimination and the harmonisation of race relations in Britain. In 1984 it published a document entitled *"The Code of Practice for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment". The code is designed to assist employers. It is not legally binding, but is admissible in evidence in relevant proceedings before an Employment Tribunal. Paragraph 1.24 of the code provides:

> *"Where employees have particular cultural or religious needs which conflict with existing work requirements it is recommended that employers should consider whether it is reasonably practicable to vary or adapt these requirements to enable such needs to be met."*

It is not clear whether Sabbath and Jewish Festival observance would be covered by the Race Relations Act 1976 at all, since that Act specifically relates to discrimination on racial, not religious grounds. The question has been examined in relation to Muslim Festivals, where, in 1996 unusually, an Employment Tribunal held that preventing adherents from attending Mosque on a special Festival did amount to indirect racial discrimination. The question in relation to Jews has not yet been tested in the English or Scottish courts.

However, a case has been brought before the European Court of Human Rights. In 1976, a practising Jewish woman brought proceedings after she was prevented from sitting a public examination a day late, on the grounds that it had been held on a Jewish Festival. The Court held that the requirements of a practising Jew:

"may not be deliberately or wantonly ignored" and that they "should be accommodated unless there are overriding reasons to the contrary."

That ruling appears very similar to the guidance set out by the CRE. The issue of Sabbath and Festival observance does, however, fall within the ambit of the Employment Equality (Religion or Belief) Regulations 2003 and these are considered below. ACAS have produced a very detailed guide to the application of the Regulations. We suggest that the CRE code and the ACAS guide should be followed in all cases.

The Human Rights Act 1998 is also important. It is unlawful for public authorities to act in a way that is incompatible with the European Convention on Human Rights. All legislation must be interpreted in a way that is compatible with the Convention, and the Convention, together with decisions of the European Court of Human Rights, must be taken into account by the English courts. In this way it may assist employees not employed by public authorities, but no cases have yet been reported on this. In Scotland the Scotland Act 1998 which established the Parliament in Edinburgh had the effect of directly incorporating the Convention into the law of Scotland.

Article 9 of the Convention, which is incorporated into the Human Rights Act provides:

"9(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching or practice or observance.

9(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others."

In October 2000 a Framework Discrimination Directive was agreed by the EU Council of Ministers to combat discrimination on grounds of sex, racial or ethnic origin, religious belief, age or sexual orientation. Since 2nd December 2003 the Employment Equality (Religion or Belief) Regulations 2003 have made it unlawful to discriminate on grounds of religion or belief in employment and vocational training. The Regulations prohibit direct and indirect discrimination,

victimisation and harassment in the employment field by reason of any religion, religious belief or similar philosophical belief.

Direct discrimination occurs if an employer treats one employee less favourably than another because of their religion or belief. This is only justifiable if a "genuine occupational requirement" (which is explained below) applies. Indirect discrimination occurs where an employer has a generally applied provision, criteria or practice within the business that puts persons of a particular religion or belief at a disadvantage. Even if there is no intention to discriminate, this is unlawful except if such provision, criteria or practice is a proportionate way to achieve a legitimate aim, i.e. where there is a real business need for the provision and there is no alternative means available to achieve that aim. An example of this would be if an employer had a rule that no head coverings may be worn by anyone. Unless there was a legitimate business reason for this rule, it could amount to indirect discrimination.

Victimisation occurs where a person has been treated less favourably than others because he or she has made or is going to make a complaint that someone else has been discriminated against on the grounds of religion.

Harassment is when one person subjects another to conduct on grounds of religion or belief that violates the other person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment in the workplace.

If a person thinks he or she is being discriminated against, or being harassed or victimised by his or her employer or fellow employees because of being Jewish, the employer has a duty to do something about it. An employer is responsible generally for the actions of his or her employees whilst at work. All employers should have a grievance procedure, which should be used in the first instance.

In the regulations there are two exceptional situations where an employer may choose to offer or refuse employment to a person of a particular religion: these are where being of a particular religion or belief is a genuine and determining occupational requirement for the job and it is proportionate to apply that requirement in the particular case; or where the organisation has a religious ethos. There has to be a genuine occupational requirement for the job and it must be proportionate to apply that requirement in the particular case.

Resolution

Over a year, Sabbath observance requires one to leave work early on a Friday afternoon, only for a few weeks of the year, and then by a maximum of about 2-3 hours. The period rapidly reduces (by an hour a month) as the days get longer. For employees needing to complete a set number of hours, this is easy to make up.

The issue of an urgent piece of work on Fridays can for the most part be avoided by careful planning. When deadlines are set they are often created by the very people negotiating a deal. It is common to set deadlines for Fridays, but usually there is no reason why they could not be set for another day of the week. Provided this is agreed when timetables are first set, the problem of a Friday afternoon crisis is almost entirely avoided. Even if some unexpected matter were to arise requiring urgent attention on a winter Friday afternoon, which cannot be resolved on the following Sunday or Monday it should be possible to have such matters handled by a colleague, unless the business is too small to permit other colleagues to cover for this absence. Although there is nothing in the Employment Equality (Religion or Belief) Regulations 2003 that specifically requires an employer to provide time off on a Friday, the employer does have to be careful in case a policy to refuse the time off might amount to unjustified discrimination.

The prospective employer and employee should both try to establish the extent to which it is reasonably practicable to vary existing working practices to cater for Sabbath and Festival observance. In some instances it will be totally impractical. In most others it will cause little or no disruption. Often the position would be no different if an employee was occupied with a more important matter, or was absent sick, or on holiday, or for some other reason was unavailable. People normally understand that others cannot always be available at a moment's notice. The experience of other people can be invaluable in making this assessment. Where it would be helpful to draw on the considerable body of experience of the Board of Deputies, we invite you to contact us to see if we can assist.

Jewish Festivals can be accommodated even more easily. Festivals can be taken as annual or unpaid leave. As such they actually cause very little disruption, since they are taken in one and two day bursts, rather than solid blocks of one or two weeks. The Working Time Regulations 1998 have now

made it mandatory for all workers to have 20 days paid holiday per year, although the 20 days may include bank and statutory holidays. Employees should try to give as much notice as possible of when holiday leave is required to coincide with Festivals.

In some kinds of employment, a Jewish employee may be able to make up hours on Sundays or may be prepared to be available during colleagues' holiday periods, e.g. over Xmas. Employers who have to cover a seven day week may therefore find this a positive advantage.

Some employees may wish to attend afternoon prayers which are recited during daylight hours, particularly if they are in mourning (see section on Bereavement below). Afternoon prayers commonly take place at lunchtime during the winter months. Legislation does not specifically require the provision of a quiet room by employers, but if an employee requests access to a quiet place for prayer in the working day, an employer may be acting in a discriminatory way if such a request is refused if a room is available and the request does not cause disruption to other employees. Most people are contractually entitled to a one hour lunch break, and in any event the Working Time Regulations provide for a rest period of twenty minutes for all staff who are required to work six hours or more. There is however no obligation for employers to release staff for prayers outside normal rest breaks.

Considering applicants for a post

The question of Sabbath and Festival observance will usually arise at the interview stage when the prospective employer is considering an application from an observant Jew. Note that interviews, appraisals and disciplinary meetings should not be scheduled on Friday afternoon, Saturdays, on Festivals or the afternoon before Festivals.

Employers should make clear to all applicants and applicants must make it their business to find out what a job entails, what duties are expected to be performed and what hours and days are required. This will enable the applicant to assess if the job conflicts in any way with his/her religious requirements. An employer is not obliged to employ people whose religious requirements make it impossible for them to undertake essential parts of the job. If the needs of the business require that work is to be done on a Saturday, then this must be

explained at the interview stage. Employers should not ask personal questions, including those relating to religious affiliation unless these are relevant to the duties of the job, to enable the employer to establish whether the applicant is suitable for the job. It is however permissible and advisable for both parties to ascertain if the applicant is able to do the job in accordance with the needs of the employer's business. The applicant should raise all relevant matters at the interview stage so that there is no misunderstanding later. Thus the issues arising out of Sabbath and Festival observance can be discussed in a constructive way.

Under no circumstances should an employee be expected to enter into a contract of employment, containing terms which are inconsistent with her/his religious observance, nor should an employee sign such a contract. Prior to signing any terms of employment, or commencing work under such terms, the contractual terms should be tailored to take into account the employee's special requirements. Failure to do so will result in either breach of contract, or a breach of Sabbath/Festival laws. Clearly neither option is acceptable.

There are occasionally instances where someone who has not been offered a job, or where someone in employment has perhaps been refused promotion, feels that he or she has been treated unfairly because of their religious requirements and beliefs and have suffered discrimination. If such a person thinks he or she has been discriminated against when applying for a job, or in the course of employment, specialist advice should be sought promptly.

The Employee already in Employment

An employee, previously not religiously observant, who decides to start keeping the Sabbath and Festival laws creates a host of interesting legal questions. It could be that the request for a change constitutes a breach of contract, and entitles the employer to terminate the employment. Alternatively, a refusal by the employer to take necessary measures to facilitate the employee's new religious requirements could amount to discrimination. The few cases on this question have been settled, before coming to a hearing, so the legal questions remain unresolved. We do not attempt to answer them here.

In such circumstances, we recommend that the employer and employee should consider together whether it is reasonably practical to vary or adapt the job requirements to enable the new needs of the employee to be met. We repeat our invitation to draw on the experience of the Board of Deputies, where this can be of assistance.

CLOTHING

It is the religious practice of some orthodox Jewish men to keep their head covered at all times generally by wearing a skull cap (known as a 'yarmulka' 'kappel' or 'kippah'). If an employer prevents a Jew from covering his head in accordance with this practice without good reason, that will amount to an act of racial discrimination and/or a breach of the Human Rights Act, and/or discrimination under the Employment Equality (Religion or Belief) Regulations 2003, for which the Jewish employee can obtain redress in an Employment Tribunal. The same is likely to apply to observant Jewish women who will wish to dress modestly, cover their hair and may not wish to wear trousers, short skirts or short sleeves. Among other things, the Human Rights Act protects freedom of expression. If an employer wanted to impose a restrictive dress code, he or she would have to justify his or her interference with this right of the employee and the new rights under the Employment Equality (Religion or Belief) Regulations 2003, as being necessary. This might be if there is a health and safety implication. An employer should look at ways of being sufficiently sensitive and flexible to accommodate the needs of the employee.

FOOD

Jews are required only to eat kosher food. This means that they can only eat certain kinds of meat and fish, and food which has been treated and prepared in a particular manner. Jews who observe the dietary laws may require all food to be prepared under supervision in order to be satisfied that no prohibited ingredients have been used, and consequently may also refuse even 'vegetarian' cooked food. They may also wish to store and heat food separately from food that is not kosher. None of this need conflict with any reasonable requirements of an employer. Indeed, it is difficult to envisage a situation in which a reasonable employer could not permit a Jewish employee to observe these requirements. A prudent Jewish employee will check in advance of any business lunches, dinners or other such occasions whether arrangements can be made in order to accommodate her/his religious needs.

BEREAVEMENT

When a Jew dies, the funeral must take place as soon as possible following the death, sometimes on the actual day of the death. Thus Jewish employees may need to attend a funeral at short notice.

After the funeral, the immediate family of the deceased (i.e. parents, children and siblings) mourn for 7 days. This is known as 'the Shiva'. During the Shiva the immediate family stay at home, saying prayers and receiving condolences. During the 30 days following a death, some men do not shave nor cut their hair, in accordance with Jewish law.

A reasonable employer will treat attendance at a funeral and the Shiva as compassionate leave. Employers are now obliged to permit employees to take unpaid reasonable time off to care for dependants. This covers taking time off to look after sick dependants as well as taking time off in consequence of the death of a dependant. "Dependant" means a child, parent, spouse, partner of the employee, or member of the employee's household, or a person for whom the employee has a primary care responsibility. There are no guidelines as to how much time may be taken off, other than that it should be a reasonable amount of time. The employee must

give the employer some idea of how long the absence is to be at or before the commencement of the absence.

CONCLUSION

In the vast majority of cases, Sabbath and Festival observance should not represent any significant inhibition to employees carrying out their jobs to their fullest potential.

In the event that the issue does arise during the process of negotiations for employment or for people already in employment, we recommend the following:

1. Clarify the nature of the issue prior to agreeing the terms of employment.
2. Discuss the manner in which the work to be carried out can be varied, if necessary to comply with the requirements of Sabbath and Festival observance.
3. If further information or advice is required, contact the Board of Deputies Trades Advisory Section, and/or a solicitor, and if an employee, your trade union official (if applicable).
4. There is an excellent booklet published by ACAS that gives a detailed explanation of the Employment Equality (Religion or Belief) Regulations 2003. This may be found on the ACAS website, www.acas.org.uk, or contact them by telephone on 08702 429090.

* The Commission for Racial Equality's Code of Practice can be obtained from
Central Books,
99 Wallis Road,
London E9 5LN
Telephone: 020 8986 4854
Fax: 020 8533 5821.

For advice from the Commission for Racial Equality, contact them at
Elliot House,
10-12 Allington Street,
London SW1E 5EH
Telephone: 020 7932 5240
Fax: 020 7630 7605.

We have set out in this pamphlet our view of the present law and good practice in relation to employment practices in the area of religious observance. The Board of Deputies cannot accept any liability for actions you take in reliance on this document.

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