

Discriminatory choice of arbitrators

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The Court of Appeal has decided that an arbitration agreement requiring an arbitrator to be a member of a particular religious group is void.

That may appear to be of little consequence to many commercial arbitrations but as the wording of the regulations in issue, the Employment Equality (Religion and Belief) Regulations 2003, are materially the same as other anti-discrimination laws the ruling could also apply to nationality and age discrimination.

The matter came before the Court as *Jivraj v Hashwani* [2010]. The arbitration clause provided that "all [three] arbitrators shall be respected members of the Ismaili community and holders of high office within the community."

The Employment Equality Regulations prohibit an employer discriminating on grounds of religion in relation to employment. Employment is widely defined and as the appointment of an arbitrator invariably involves the personal performance of work that was within the definition of employment and hence covered by the Regulation. By requiring the arbitrators to have a particular religious belief the clause offended against the

Regulation and any term unlawful under the Regulations is void. That applied to the entire clause as criteria for the arbitrators could not be severed.

The Court held that the exemption of justification (the employer having a religious ethos and being of a particular religion was a genuine occupational requirement) did not apply, as the arbitrators were to apply English law. Membership of the Ismaili community was not necessary to apply English law – the position might have been different had the arbitrators been obliged to apply the principles of good faith within the community.

Having a chairman from a different country (e.g. ICC Article 9(5) provides "... the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties.") would be, prima facie, discriminatory (as nationals from the countries of the parties could not comply) but it might be a legitimate requirement in having a fair resolution by an impartial tribunal. Having a particular legal qualification may be indirectly discriminatory (as more

English can comply with a requirement to be an English lawyer then, say, French) but that too may be justified if the arbitrators must apply English law. Similarly being a lawyer of a number of years standing would discriminate on the grounds of age but might be justified on the grounds of relevant legal experience.

This decision will only directly apply if the seat of the arbitration is in the UK but as much of our discrimination law originates from EU law the position may well be the same in other EU states.

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