

## Sharia Law Considerations for Pension Trustees

Article By:

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Each year, I have a profound respect and admiration for colleagues and friends who have fasted during Ramadan. It is a very public demonstration of their faith, which clearly also has tremendous personal significance. I was particularly struck this year how LinkedIn was full of supportive comments and suggestions how employers might support those fasting.

Are there steps that employers – and trustees – can take to support Muslim employees and members from a pensions perspective? Indeed, is there a positive obligation to do so?

As a non-Muslim I am not expert in Sharia law, but as a pensions professional I am conscious that Islam places obligations on followers that extend to financial matters including their pensions. As a lawyer, I counsel my clients against the risk of unlawful discrimination – and religion is one of the “protected characteristics” that can give rise to discrimination claims.

Trustees are facing increased scrutiny and obligations on investment matters, whether from TCFD reporting requirements, cost and value for money disclosures or even complaints from members about how the scheme’s assets are invested. Must trustees also take members’ religious views into account? Could employers face a discrimination claim if the pension arrangement offered to staff is not Sharia compliant, so that Muslim employees feel compelled to opt out?

The position for DC arrangements seems more straightforward. As members have a positive choice about how their own pot is invested, including Sharia compliant options will allow Muslim members to satisfy their religious obligations. There are complexities – such as differing views of what is required for a fund to be Sharia compliant – and trustees will need to take professional advice in the usual way, but options are available. What is proportionate will vary from scheme to scheme depending on the membership – there have been recent press reports questioning why some large providers of pensions used as automatic enrolment schemes do not offer members any Sharia compliant investment choices.

The arguments for DB (and, in future, CDC) schemes are more complex. Members are entitled to a given benefit amount on retirement and do not control how any scheme assets are invested. There are differing opinions in the Muslim world about how Sharia law applies to DB schemes. However, if the view is taken that in order to be Sharia compliant the entire scheme assets must be invested in line with Sharia law, from a pure legal standpoint trustees would have to give very careful consideration to how such a non-financial factor was reflected in their investment strategy. Employers

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might consider trustees had unduly restricted their strategy in a way that increased contributions required or led to inappropriate levels of investment risk. Whilst trustees must only consult employers on their strategy, employers are often the ultimate residual beneficiary of the scheme (being entitled to any surplus on winding-up) and the trustees should take their views into consideration.

A number of employers within the Local Government Pension Scheme (a funded DB arrangement) are sufficiently concerned about opt-out rates among Muslim employees and the risk of discrimination claims for the LGPS Scheme Advisory Board to have sought a Counsel's opinion – not on whether the LGPS is Sharia compliant, but whether employers have an obligation to offer a Sharia compliant alternative if it is not, or might face successful discrimination complaints if they do not do so.

Whilst the opinion was provided specifically in relation to the LGPS, private sector employers with an open DB scheme should also take note. Briefly, Counsel concluded:

- Discrimination claims are by their very nature extremely sensitive to the individual facts and circumstances. In principle, however, if a Muslim employee demonstrated they considered the available pension arrangement was not Sharia compliant and opted-out, putting them at a financial disadvantage, then a discrimination claim might succeed. To defend such a claim, the employer would have to establish that only offering a non-Sharia compliant scheme was a proportionate means of achieving a legitimate aim.
- There may be issues for some public sector employers in having a legal power to offer an alternative to the LGPS. However, if an employer decided to offer a Sharia compliant alternative, it would need to be available to all employees. Comparing the outcome of a DB and a DC scheme is not straightforward and could lead to further claims. Paying the same level of employer contributions into a DC scheme is unlikely to provide the same level of emerging pension.
- It is possible that other groups of employees might seek equivalent accommodation for their own religious or other strongly held beliefs. Trustees and employers of schemes have in recent years had to defend member complaints about fossil fuel investments and by vegans.
- The wider impact on the scheme is a legitimate consideration for employers to take into account. The rate of opt-outs in some LGPS funds with a high proportion of Muslim members may be a particular concern and even impact the fund's liquidity and cash flows to the extent that contributions no longer meet monthly pension payments.

Counsel could not provide a definitive view in the absence of a specific claim, so this question remains unresolved. In the meantime, employers and trustees would be wise to consider their membership and be alive to the possibility of discrimination complaints if Muslim members (or indeed any group with strongly held religious or philosophic beliefs) consider those beliefs are not being met by the scheme and they must therefore opt out.

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