

Re: ISLAMIC FINANCE GURU

OPINION

Introduction

1. I am asked to advise Islamic Finance Guru as to whether the trustees of workplace pension schemes are required to offer halal investment funds to employees who are eligible to join such schemes.¹
2. In summary, my opinion is that a failure to offer such an option in the circumstances more particularly described below is likely to constitute discrimination for the purposes of the Equalities Act 2010, and that the trustees of the scheme concerned will be obliged by that legislation to rectify the discriminatory conduct by offering such an option to scheme members.
3. My advice is provided solely for the benefit of Islamic Finance Guru. It should not be relied upon by any third party and any such party should seek and rely on their own specialist legal advice.

Factual background

4. My advice relates solely to occupational pension schemes which offer benefits to members on a defined contribution or “money purchase” basis, i.e. benefits which are calculated by reference to the contributions paid into the scheme by and in respect of each member, increased by the investment return achieved.
5. Typically, such schemes offer members a range of funds in which contributions can be invested, usually based on different levels of risk: members are given an option to choose a particular fund, and regularly to review their choice of fund, with a default option in which members’ contributions will be invested if they do not choose any particular fund.

¹ I am instructed by Mr Ibrahim Khan, who holds an individual practising certificate issued by the Solicitors Regulation Authority.

6. Such schemes have been given an increased prominence by the introduction in 2012 of a duty on certain employers to make arrangements automatically to enrol prescribed employees into a pension scheme which meets prescribed requirements.²
7. Trustees of defined contribution schemes are under a number of legal obligations with regard to the investment of assets, deriving from the trust document pursuant to which the scheme is governed as well as general pensions law: as to the latter, the standards of conduct and practice which trustees of such schemes are expected to achieve are set out in a code issued by the Pensions Regulator.³
8. In addition to these obligations, all occupational pension schemes are required to include a rule which requires the trustees and the employer of the scheme not to discriminate against another person in carrying out any of their functions under the scheme. This non-discrimination rule is read into the rules of all such schemes, even if it has not been expressly included in those rules.⁴ Any failure to comply with the non-discrimination rule is a contravention of the 2010 Act, which gives rise to the enforcement procedures set out in Part 9 of the 2010 Act.

Analysis

9. The vast majority of investment funds used by defined contribution pension schemes will not be compliant with sharia, because they invest in assets which generate interest or involve industries considered haram. It is therefore not possible for Muslim employees to become members of their employer's scheme if it does not offer the option of halal investment funds.
10. Amongst the acts prohibited by the 2010 Act is indirect discrimination, which is concerned with acts, decisions or policies which are not intended to treat anyone less favourably but

² Part 1 of the Pensions Act 2008 (as amended by the Pensions Act 2011 and the Pensions Act 2014). This "auto-enrolment" requirement was extended to all employers from 1 February 2018.

³ Code of Practice no.13: Governance and administration of occupational trust-based schemes providing money purchase benefits (July 2016).

⁴ *London Fire Commissioner v Sargeant* (UKEAT/0137/17/LA (V)) at [112] and [124] per Sir Alan Wilkie.

which, in practice, have the effect of disadvantaging a group of people with a particular protected characteristic.

11. Indirect discrimination is defined in s.19 of the 2010 Act, which provides that a person (“*A*”) discriminates against another person (“*B*”), where:
 - (i) *A* applies to *B* a *provision, criterion or practice* (“*PCP*”).
 - (ii) *B* has a protected characteristic.
 - (iii) *A* also applies (or would apply) that *PCP* to persons who do not share *B*'s protected characteristic.
 - (iv) The *PCP* puts or would put persons with whom *B* shares the protected characteristic at a particular disadvantage compared to others.
 - (v) The *PCP* puts or would put *B* to that disadvantage.
 - (vi) *A* cannot show the *PCP* to be a proportionate means of achieving a legitimate aim.

12. As to these:
 - (i) *PCP* is construed broadly, having regard to the statute's purpose of eliminating discrimination, and includes formal and informal practices, policies and arrangements.⁵ I have no doubt that the provision by the trustees of a particular range of investment funds to pension scheme members constitutes a *PCP*, as well as the carrying out of a trustee function for the purposes of s.61 of the 2010 Act.
 - (ii) The protected characteristic in this case is the Muslim religion of the employee in question.

⁵ *Lamb v The Business Academy Bexley* (UKEAT/0226/15/JOJ) at [26] per Simler J.

- (iii) The provision of the range of investment funds is made available to employees who do not share the protected characteristic, i.e. non-Muslim employees.
 - (iv) The provision of a range of investment funds which does not include halal options puts Muslim employees at a particular disadvantage compared to non-Muslim employees, given that that non-availability discourages or prevents Muslim employees from joining the pension scheme.
 - (v) In the case of a Muslim employee who is unable to join the scheme because of the non-availability of halal investment options, the PCP has put that employee at a disadvantage compared to non-Muslim employees, as the employee is effectively deprived of workplace pension benefits which are available to other employees.
13. Accordingly, in my opinion, the provision of investment options without including halal funds is discriminatory, unless the trustees can demonstrate that this is objectively justified, i.e. that the PCP is a proportionate means of achieving a legitimate aim. The burden of proving this is on the trustees, who will not be permitted the kind of “margin of discretion” that they are usually given when the exercise of their powers are challenged on other legal bases.⁶
14. In my opinion, the only plausibly-arguable justification for not offering members the option of halal investment funds is likely to be where it is not practically possible for the trustees to locate such funds which would also comply with the legal and regulatory requirements of pension scheme investments, including the maintenance of the security, quality, reasonable liquidity and profitability of the portfolio as a whole.⁷
15. Where such funds are available, should the trustees seek to defend their conduct on the basis of the high cost to the scheme of providing such funds, in my opinion it will be very

⁶ *Hardy & Hansons Plc v Lax* [2005] ICR 1565.

⁷ Reg.4(3) of the Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378) (“*the Investment Regulations*”).

difficult for them successfully to do so, given that the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim.⁸

16. Although the availability of halal investment funds will be a question for each individual scheme, my understanding is that such funds are generally available in the investment market.
17. Where it is open to trustees to offer investment choices which meet the relevant religious requirements, I consider that they will have great difficulty in justifying any failure to do so. Accordingly, in my opinion, such a failure is likely to constitute discrimination for the purposes of the 2010 Act, which gives rise to a duty on the part of the trustees pursuant to s.61 of the 2010 Act to put an end to the discrimination by including halal funds amongst the investment options for scheme members.
18. Finally, when considering halal investment choices it is important for scheme trustees to offer more than one such fund, so as to enable members to diversify their investments. Trustees who offer only one such fund, and who thereby limit Muslim members to investing in that fund, may expose themselves to claims for maladministration or breach of trust for failing to offer the requisite diversity in the investment options under their scheme.⁹



PAUL NEWMAN QC

Wilberforce Chambers
24 May 2021

⁸ *Woodcock v Cumbria Primary Care Trust* [2012] ICR 1126 at [66] per Rimer LJ.

⁹ For workplace pension scheme trustees' investment diversity obligations, see reg.4(7) of the Investment Regulations.

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**Mr Ibrahim Khan
Islamic Finance Guru**