

## Offering Sharia-compliant occupational pensions

By Lydia Seymour

The question of whether there is an obligation to offer Sharia-compliant pension schemes has arisen recently in relation to both statutory and private trust schemes. It is a complex issue, raising a number of difficult factual and legal questions.

### *What is a Sharia-compliant Scheme?*

Even the starting point isn't clear, in that the question of what is a Sharia-compliant scheme is subject to differing views among Islamic scholars<sup>1</sup>. In particular, whilst the majority of DC schemes will not be Sharia-compliant unless specifically designed to be so, there are different opinions as to the Sharia-compliance of DB Schemes. Taking the LGPS as an example, the Islamic Finance Guru website contains a discussion of the issue which concludes, in part on the basis of the opinion of Mufti Zubair Butt, that the LGPS is Sharia compliant<sup>2</sup>. Nonetheless, the Local Government Association recently sought counsel's opinion on the question of whether a Sharia-compliant alternative should be offered, as local authorities were reporting that Muslim employees were opting out of the LGPS on the basis that they considered that it was not Sharia-compliant. So in relation to any particular scheme, we start from the position that there may not be consensus among Muslim members (or potential members) as to whether or not it is Sharia-compliant.

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<sup>1</sup> See Determination of the Pensions Ombudsman PO-10901 (25 November 2016) at paragraph 9.

<sup>2</sup> <https://www.islamicfinanceguru.com/articles/personal-finance/are-pensions-halal>

*Is there a legal obligation to offer a Sharia-compliant Scheme?*

Looking at the legal position, the most obvious way in which an individual could claim that they are entitled to a Sharia-compliant scheme would be a claim for indirect discrimination on the grounds of religion or belief if no such scheme is on offer.

The basis of the claim would be that if the only pension scheme which is offered is not Sharia-compliant, this places Muslim employees as a group (as well as the individual bringing the complaint specifically) at a particular disadvantage when compared to other employees, in that they would be unable to access the benefit whilst others could<sup>3</sup>.

The 'group disadvantage' issue isn't as simple a question as it may sound. Muslim employees are a large and diverse group of people, with different views in relation to Sharia law and financial products generally. An idea of the range of views on financial products generally (including pensions) was set out in the report by the Nest Corporation who undertook research into attitudes of Muslim employees to Sharia obligations and finance prior to the introduction of auto-enrolment in 2011.

This point arises quite frequently in the context of religious belief discrimination. Even where a particular matter is clearly associated with a religious group – for example wearing a cross for Christians – it will generally not be universal within the group. A number of cases have recognised that the inevitable individual variations within religious groups and the importance of guaranteeing freedom of religion mean that a generous approach needs to be adopted to identifying whether a particular practice causes group disadvantage in the context of religion<sup>4</sup>. The effect is that it is not necessary to show that all Muslim employees are affected by the failure to offer a Sharia-compliant scheme, nor even that a significant number are affected. It is enough to show simply that there is a

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<sup>3</sup> Equality Act 2010 s19(2)

<sup>4</sup> For example *Eweida v British Airways* [2013] 1 WLUK 142

proper basis for the assertion that some Muslim employees are particularly disadvantaged as a result of their religious beliefs<sup>5</sup>.

Assuming that a claimant can get over the relatively low hurdle of showing that failing to offer a Sharia-compliant scheme puts Muslim employees at a particular disadvantage, the focus will switch to the scheme provider, who will have a defence to any claim for discrimination if they can justify their position. That is, if they can establish that their non-Sharia compliant pension arrangements are a proportionate means of achieving a legitimate aim.

The scheme provider's reasons need to be balanced against the discriminatory effect on the complainant – here, the risk that in the absence of a Sharia-compliant scheme some Muslim employees may opt out of occupational pension provision.

#### *Difficult questions*

A number of quite complex issues arise when carrying out that balancing act:

1. First, particularly in relation to statutory schemes which have adopted an auto-enrolment structure (such as the Teachers' Pension Scheme and the LGPS), there are issues as to the legal power of the scheme provider to offer alternative provision;
2. Secondly, there are practical issues resulting from the lack of consensus that I have discussed above as to whether any particular scheme (or type of scheme) is Sharia compliant. When a court or tribunal is deciding whether it is proportionate to require a Sharia-compliant scheme it will need to identify whether any particular scheme would avoid the disadvantage being suffered. If the reality is that the employer could offer a scheme which it believed to be Sharia-compliant, but which would not be accepted as compliant by some Muslim

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<sup>5</sup> *Trayhorn v Secretary of State for Justice* [2018] IRLR 502.

employees, then this will impact upon the question of whether it is proportionate to expect the alternative scheme to be provided;

3. Thirdly, what might the impact of offering a Sharia-compliant scheme be for non-Muslim employees? If a different scheme is to be offered then it should be offered to all, as otherwise non-Muslim staff could argue that they were being discriminated against on the basis of religion. This may not matter hugely in the context of a DC scheme, but could be highly significant in relation to statutory schemes, as any Sharia-compliant alternative could be fundamentally different to the current provision;
4. Fourthly, if a scheme provider offers the alternative of a Sharia-compliant scheme, what exactly are they obliged to provide? Again, the answer may be simple in the context of a DC scheme – the employer can simply replicate the employer contribution from its existing provision. But in relation to a DB scheme the position is far more complicated. At least arguably, DB benefits cannot be precisely replicated in a DC form, so what level of contribution or benefit structure would the employer be obliged to provide in a Sharia-compliant DC scheme which was offered as an alternative to a current DB scheme?
5. Finally, and perhaps most interestingly, if a scheme provider agreed to provide a Sharia-compliant scheme other groups that share a religious or philosophical belief might also seek an alternative scheme. We know that in the context of private trust schemes it is becoming more and more common for members to seek to restrict their own investments to ethical, or 'green' schemes, and it is not difficult to imagine other beliefs that could lead employees to wish to specify the type of pension scheme or investment strategy offered - a philosophical belief in pacifism, for example, could be advanced as a reason for wishing to avoid certain pension scheme investment choices.

## *Published Opinions*

If you are interested in reading more, there are two published opinions on the issue:

- The question of whether defined contribution occupational pension schemes are obliged to offer Sharia-compliant investment funds has been considered in an Opinion by Paul Newman KC, which is available at the Islamic Finance Guru website at:

<https://islamicfinanceguru.com/wp-content/uploads/2021/05/Sharia-op-v2.pdf>

- In a statutory scheme context, the question of whether local authorities are obliged to offer a Sharia-compliant alternative to the LGPS has been considered in an Opinion by me, which is available at the LGPS Scheme Advisory Board Website at:

<https://lgpsboard.org/images/PDF/BoardMar2022/Sharia07032022.pdf>

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