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Religion and the Workplace

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Introduction

Whilst freedom of religion is well established as a fundamental right internationally and within Europe, the extent to which it should be enjoyed in the workplace is still the subject of some debate. There are two main areas of contention: one involves religious workers in secular organisations and the extent to which religious individuals can expect an organisation to accommodate their religious needs; the other concerns the interests of religious organisations and the extent to which they should be governed by equality laws. Questions which arise include: can religious employees expect to be allowed time off work for prayer or other religious observance; and can religious organisations require that staff hold particular religious beliefs in order to work for the organisation? A particular area of concern is how to deal with the tension that can arise between equality grounds, such as where religious equality and sexual orientation equality seem mutually irreconcilable. Although legal protection for religion at work can be seen in many states, the UK example is used below, to illustrate the areas of tension which arise surrounding religion and belief at work.

1. Religion at work

Debates concerning the issue of religion and the workplace have been fairly prominent in recent years with a number of high profile cases receiving significant media attention, including the cases of Ms Eweida,² who was refused permission to wear a cross at work by her employer, British Airways; and Ms Ladele,³ who was dismissed from her role as a registrar for refusing, for religious reasons, to conduct civil partnerships.

In the summer of 2014, in response to increasing debate regarding religion and belief, the UK's Equality and Human Rights Commission (EHRC) launched a call for evidence from individuals and organisations about how religion or belief has affected experiences in the workplace as well as the provision of goods and services. This call for evidence forms part of the EHRC's three year programme of work, *Shared understandings: a new EHRC strategy to strengthen understanding of religion or belief in public life*.⁴ The EHRC is interested in how religion or belief has affected the experiences of job applicants, employees or customers, whether people are aware of their legal rights, whether they feel the current law is effective and whether they have direct experience of discrimination on grounds of religion or belief.

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² *Eweida and Others v the United Kingdom*, Application No. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

³ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

⁴ *Shared understandings: a new EHRC strategy to strengthen understanding of religion or belief in public life*, Equality and Human Rights Commission (EHRC), 2013.

The findings from the call for evidence were published in March 2015.⁵ They present a very mixed picture, although there is certainly evidence of some contention. In some respects, the evidence suggests little cause for concern: a recurring theme from the respondents is that the law is clear and effective, with many examples of religious issues being dealt with respectfully and appropriately within workplaces. However, at the same time, many respondents report examples of perceived discrimination on grounds of religion in terms of recruitment, work conditions and harassment. This somewhat mixed picture is corroborated by the findings of a study by Weller et al.,⁶ reporting in 2013, showing that despite a decade of legal protection in the UK, employment remained an area in which unfair treatment on grounds of religion or belief was experienced. Nonetheless, the Weller study, as with the report on the EHRC's call for evidence, also shows that over the last decade, many workplaces have developed policies and practices in which the needs of an increasingly diverse work force are being met.

Both sets of research findings share common threads; first religion and belief are seen to create few problems in the workplace, with many respondents feeling either that work places are and should be neutral places in which religion is viewed as a private matter, or feeling that religion was dealt with respectfully at work. Equally, both sets of research findings have demonstrated areas of concern, with the matters of dress codes, working time, accommodating objections to certain work tasks and balancing freedom of religion with other equality rights identified as issues which require guidance. Moreover, the EHRC call for evidence revealed significant levels of concern from religious organisations in their capacity as employers, relating to the extent to which they can themselves discriminate when recruiting in favour of staff who share their religion.

While these areas of difficulty may be experienced by a minority of employees and employers within the overall economy, nonetheless they represent some strongly held views. This is perhaps unsurprising. Of course, for many believers, as well those with no belief, the issues are not particularly fundamental: conflicts between religious belief and the needs of the workplace may be minor or non-existent. Yet for others, belief or non-belief is more central to their sense of identity, will determine many aspects of their lives, and will not yield to other interests.⁷ Clearly this latter group of believers are likely to have more difficulty in reconciling religion and work, and those with strong non-religious views are unlikely to be content with significant levels of religious accommodation at work. Thus, although the numbers involved may be small, it remains important to assess whether the current legal framework can meet the concerns identified. In what follows, the legal framework is outlined, and some analysis is offered regarding the potential for the current law to achieve this.

2. Legal Protection for Religion at Work

A preliminary question that arises when considering the interaction of religion and work is whether the workplace is a forum in which religion has any traction at all. As

⁵ Mitchell, M., and Beninger, K., with Donald, A., and Howard, E., *Religion or Belief in the Workplace and Service Delivery*, EHRC, 2015 at p. 6.

⁶ Weller, P., Purdam, K., Ghanea, N., and Cheruvallil-Contractor, S., *Religion or Belief, Discrimination and Equality*, Bloomsbury, 2013.

⁷ Bradney, A., "Faced by Faith" in Oliver, P., Douglas-Scott, S., and Tadros, V. (eds), *Faith in Law*, Hart Publishing, 2000.

suggested by some respondents to the EHRC call for evidence,⁸ it is arguable that religion should be regarded as a personal and private matter, with no special treatment at work. On this basis one might expect that the general protection for religious freedom would not apply in the workplace, but instead that religious freedom would be provided by the freedom of staff to resign from their jobs.

Indeed, this minimalist approach to religious protection at work was taken until recently, with negative conduct related to religion or belief given no special treatment, but dealt with as part of standard disciplinary processes. However, two changes in the legal framework have led to a significant shift in approach. First, the EU Directive 2000/78 introduced anti-discrimination protection on grounds of religion and belief in the context of employment and occupation, currently implemented in the UK by the Equality Act 2010. Secondly, in January 2013, the European Court of Human Rights (ECtHR) recognised in *Eweida and Others v UK* that rights to religious freedom in Article 9 of the European Convention on Human Rights (ECHR) can be exercised in the context of the workplace when it held that dismissal amounted to a *prima facie* infringement of the right.⁹

These legal developments show a greater recognition of the significance of the workplace as a setting in which religious freedom and equality should be enjoyed. This is, in part, due to the fact that for many workers it is not possible to separate religious practice from work, as religious practices such as dress codes or practices of prayer cannot simply be dropped during working hours; and due also to the fact that it is often minority religious practices which are less easily compatible with standard working rules, so that a refusal to accommodate religious practice at work can have very unequal impact as between different religious groups.¹⁰

Of course, other interests may well conflict with religion at work, such as the economic interests of the employer, the equality interests of service users, customers and other employees, and the rights of non-believers to be free from the influence of religion. Thus, any right to religious freedom at work will need to be held in balance with these other interests.

The legal frameworks that operate for the protection of religious rights at work are human rights provisions, which protect individual and group freedoms; and equality law, under which religion and belief is a protected characteristic. The complementary nature of these two forms of protection for religion and belief can be illustrated by the UK legal framework in which religion is protected under Article 9 ECHR via the Human Rights Act 1998; and in the Equality Act 2010, which implements the EU Equality Directive 2000/78. The Human Rights Act 1998 requires that domestic law be interpreted as far as possible to comply with the ECHR, and so it can be expected that the Equality Act 2010 should be interpreted to accord with the jurisprudence of the ECtHR.

Article 9 ECHR recognises that freedom of religion includes the right to manifest religion “either alone or in community with others”, so that the right applies to religious groups

⁸ See Mitchell, M. et al, above note 5.

⁹ *Eweida and Others v the United Kingdom*, Application No. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013, Para 83.

¹⁰. Those of minority religion report higher levels of religious discrimination in the workplace than majority faiths, see Weller, P. et al, above note 6.

when they act as employers, as well as to religious individuals. The right has tended to be engaged with regard to manifestations of belief; in particular, the wearing of religious symbols, time off work and conscientious objection to certain work tasks. At the same time, religion and belief is protected at work by the Equality Act 2010 which protects against direct and indirect discrimination, harassment and victimisation on grounds of religion or belief.

Direct discrimination occurs where a person is treated less favourably on grounds of religion or belief and would include where employers refuse to employ religious staff altogether, or employ those of one religion on more favourable terms than those of a different religion. Although direct discrimination cannot be justified, an exception exists where, because of the nature of the occupation or the context in which the work is carried out, a religion or belief constitutes an occupational requirement for the job in question, and it is proportionate to impose that requirement, any resulting discrimination will be lawful.¹¹ An additional and rather wider exception exists where the employer is an organisation with a religious ethos, such as hospices, or charities with a religious ethos. In these cases the religious ethos of the employer can be taken into account in assessing the proportionality of any religious work requirement.¹² This is the case even though sharing a religious belief may not be an essential requirement for carrying out the core duties of the job, and the provision allows religious employers to require loyalty from their staff towards the religion.

Indirect discrimination occurs where a provision, requirement or practice puts persons of a particular religion or belief at a particular disadvantage compared with others. It can be justified where there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary.¹³ Examples include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. Any such requirements must be justified as a proportionate means to meet a legitimate aim.

Common conflicts in the workplace involve dress codes, which interfere with religious employees' right to manifest religion; employees who require time off for prayer or other religious observance; those who wish to be excused from particular duties; and those who feel restricted in their freedom to share religious views at work.¹⁴ Cases have arisen involving all these issues and the extent to which the competing interests at stake are adequately balanced is considered in turn below.

a. Dress codes

In the employment context, one of the most common tensions that can arise between the needs of a business and the religious requirements of staff relate to dress codes.¹⁵ For

¹¹ Equality Act 2010, Schedule 9(1).

¹² Equality Act 2010, Schedule 9(3).

¹³ Equality Act 2010, Section 19.

¹⁴ See findings of RELIGARE report discussed in Alidadi, K., "Reasonable accommodations for religion and belief: Adding value to Article 9 ECHR and the European Union's anti-discrimination approach to employment?" *European Law Review*, Vol. 37, No. 6, 2012, p.693. See also Weller, P., et al, above note 6 and Mitchell, M. et al, above note 5 at p. 6

¹⁵ For a general discussion of the law relating to the wearing of religious symbols at work in a number of EU states, see Ooijen, H., *Religious Symbols in Public Functions: Unveiling State*

example, some workplaces impose restrictions on the wearing of religious symbols such as headscarves or turbans, to accord with a workplace uniform; alternatively, dress codes may require female staff to wear skirts or otherwise breach religious dress codes. A uniform imposed by the employer can be treated as an example of neutral practice, which has an indirectly discriminatory effect, and which can only be lawful if justified as a proportionate means of achieving a legitimate aim. In determining its proportionality, the domestic court should consider whether a restriction on dress interferes with Article 9 ECHR rights.

The case of *Azmi v Kirklees Metropolitan Borough Council*¹⁶ may usefully illustrate how a dress code can be justified as a proportionate means to achieve a legitimate aim. Azmi was a teaching assistant who was dismissed for refusing her employer's instruction to remove her niqab when assisting in class. She was unsuccessful in her claim of direct and indirect discrimination.¹⁷ The Court accepted that the refusal to allow a face covering put Azmi at a particular disadvantage when compared with others. However the Court held that the *prima facie* indirect discrimination was justified. The restriction on wearing the niqab was proportionate given the need to uphold the interests of the children in having the best possible education. A similar approach, based on balancing competing interests can be seen in the case of *Eweida and others v UK*,¹⁸ where two of the cases involved dress codes. In the first case, the Court found in favour of the employee; in the second, the employer was able to justify the restriction. Eweida, a member of the check-in staff for British Airways was refused permission to wear a cross over her uniform. Here the chamber of the ECtHR held that the restriction was not proportionate. Factors which lead to this decision included the fact that other forms of religious dress such as headscarves and turbans were allowed; and the argument that the employer needed to maintain its corporate image was not very strong when weighed against Eweida's freedom of religion. In comparison, Chaplin, a nurse, was required to remove the cross that she wore on a chain around her neck, for reasons related to health and safety, and the Court held these reasons were sufficient to outweigh the employee's religious interests.

A number of the high profile cases relating to religion and belief have involved dress codes, and dress codes are a common way for religion and belief to be manifested in the wider environment. Nonetheless, it seems from the EHRC call for evidence and other research that the law in this regard is reasonably well understood.¹⁹ Although cases still arise at times, in the main, few major issues arise for religious employees or employers with regard to uniforms. Elsewhere in Europe, restrictions on religious dress at work

Neutrality. A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols, Intersentia, 2012.

¹⁶ *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154.

¹⁷ She also claimed victimisation and was successful due to inadequacies on the part of the employer in dealing with her case.

¹⁸ The case was brought in the UK as *Eweida v British Airways* [2010] EWCA Civ 80. It was then joined with others in an appeal to the European Court of Human Rights and heard as *Eweida and Others v the United Kingdom*, Application No. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

¹⁹ See Mitchell, M. et al, above note 5.

are widely imposed, particularly in the public sector.²⁰ However, in the UK religious requirements are routinely accommodated in terms of uniforms and dress codes at work, and it would seem that a reasonable balance has been struck between the interests of staff who wish to manifest religion at work, and the business needs of the employer. Where there is no good reason to the contrary, staff may wear religious symbols: where employers can provide good reasons, such as health and safety requirements or the requirements of effective service delivery, for restrictions on religious symbols at work, such restrictions are likely to be proportionate.

b. Time off for religious observance

The refusal by an employer of a request for time off for religious observance will put religious individuals at a disadvantage compared to those who do not need time off, and so any such refusal will need to be justified, by taking the balancing approach discussed above. The balancing approach can be seen in the following two cases, where different outcomes were reached, despite the initial similarities of the cases, illustrating how fine a balance is sometimes required. The first case²¹ involved a Jehovah's Witness, who was refused permission for time off work on Sundays, making it impossible for her to attend worship. Her claim of discrimination on grounds of religion and belief was upheld, the tribunal deciding that the requirement to work on Sundays was not justified because there were other employees who could have covered the Sunday shift without difficulty. In contrast, in *Mba v London Borough of Merton*²² a care worker who was also obliged by her employer to work on Sundays was unsuccessful in claiming religious discrimination. The Court was unanimous in deciding that the refusal to allow Mba time off on the Sunday was, on its facts, a proportionate response by the employer. The employer had endeavoured to arrange the rosters so as to allow her not to work on Sundays while it was possible to do so, and this had been achieved in for nearly two years. However, the management needed workers available every day, and ultimately there was no viable or practical alternative but to require her to be available to work on Sundays.

The difference in outcome of these two cases demonstrates that an approach based on proportional balancing of interests leads to reasoning which is highly sensitive to the facts of each case. This can mean that results are difficult to predict, leaving staff and employers unclear about how to deal with requests for time off for religious observance. However, although more clarity would almost certainly be welcomed, it is hard to see how that might be achieved. Clarity in terms of a set number of days for religious observance still may not satisfy all religious demands unless the number of days were to be set very high, in which case the needs of businesses may well suffer. Instead, a proportionate response which can allow for flexibility by staff and employers probably remains the most satisfactory legal response.

c. Conscientious objection to work tasks

A third area of contention in the law on religious discrimination and work relates to conscientious objection to work tasks. Relatively simple examples of tasks from which

²⁰ Van Ooijen, H., *Religious Symbols in Public Functions: Unveiling State Neutrality. A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols*, Intersentia: 2012.

²¹ *Thompson v Luke Delaney George Stobbart Ltd* [2011] NIFET 00007_11FET (15 December 2011).

²² *Mba v London Borough of Merton* [2013] EWCA Civ 1562.

staff may ask to be excused involve tasks such as selling alcohol or handling meat products. Such requests will be dealt with similarly to those relating to uniforms or time off work. Where proportionate, employers may refuse requests of this type, but a refusal when it would be easy to allow the request may be indirectly discriminatory. For example, it would be proportionate to refuse to accommodate a butcher who refused to handle meat; but a request from a butcher to be exempt from occasional requests to handle alcohol should probably be accommodated if other staff can cover the task.

More complex have been cases where the refusal of a task has been on grounds which themselves are discriminatory, and it is here that the concern was expressed the most strongly in the call for evidence.²³ Cases have arisen in several jurisdictions involving marriage registrars who wish to be exempted from carrying out civil partnerships. These cases too are treated as cases of indirect discrimination; the requirement to carry out the civil partnership is a neutral requirement which causes disadvantage to the particular religious employee because he or she cannot comply for religious reasons. However, the UK courts have found the refusal to accommodate a request for exemption to be a proportionate means to achieve the legitimate aim of equal treatment on grounds of sexual orientation. For example, one of the cases heard with *Eweida* before the ECtHR was *Ladele v Islington Borough Council*.²⁴ Ladele sought to be excused from carrying out civil partnerships on the basis of her religious beliefs, but permission was refused. The Court of Appeal held that the refusal to accommodate Ladele's request to be exempt from carrying out civil partnerships was justified as the employer was entitled to rely on its policy of requiring all staff to offer services to all service users regardless of sexual orientation.

This decision remains highly contentious, with many seeing it as emblematic of an embedded conflict between religion and sexual orientation equality. In effect, however, the case is no different from other indirect discrimination cases; the employer's requirement that Ladele perform civil partnerships was potentially indirectly discriminatory as it put her at a disadvantage, but it was justified as a proportionate means to achieve equality on other grounds. This outcome was upheld by the ECtHR on a similar basis: the restriction on her religious freedom was justified as proportionate means to protect the equality rights of others. Whilst it is possible to imagine a different outcome of that balancing exercise (and indeed the Court of Appeal was clear that it was not criticising the decision by other councils to accommodate similar requests to Ladele's) the legal approach to the question does seem to be the most appropriate. As with the other indirect discrimination cases, it is based on the balancing of competing interests to achieve a proportionate outcome, and has the potential to be sensitive to the individual facts of the case.

d. Promotion of religion or belief in the workplace and harassment

In some cases, staff have been involved in the promotion of religion or belief in the workplace, including through the distribution of literature and prayers. Such activity can be viewed by the religious staff member as the manifestation of religion, or the exercise of religious freedom. However, other members of staff may object, seeing such activity as breaching the neutrality of the workplace, or even as amounting to harassment. As

²³ See Mitchell, M. et al, above note 5 at p. 144 and 159.

²⁴ *Ladele v Islington Borough Council* [2009] EWCA Civ 1357; then heard with *Eweida and Others v the United Kingdom*, Application No. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

with the other manifestations of religions discussed above, any restrictions imposed by employers on such behaviour are likely to be found to be indirectly discriminatory unless they are justified; with the rights of others to a religiously neutral workplace often providing the justification. In terms of harassment, simple conversations about religion or belief are unlikely to be covered, but if they persist once it has been made clear that they are unwelcome, it is possible that they could come within the definition of harassment: the religious employee will have engaged in unwanted conduct with the effect of creating an intimidating or offensive environment for the other person.²⁵ Although the right to manifest religion does cover proselytising, any such right is not absolute, and is limited where it is improper.²⁶ Proselytising will be improper if it interferes with the rights of others to be free from harassment at work, and the fact that rights to religious freedom are engaged, need not prevent a finding of harassment.

The question of whether religious staff can share their religious views, particularly when those views involve negative views regarding homosexuality, is one that has concerned a number of religious groups.²⁷ In some cases, speech regarding religious attitudes to homosexuality may be viewed as harassment, and such speech may be restricted at work. In such cases, freedom to debate religious doctrine will need to be balanced against the need to protect the dignity of other workers.

Cases involving disciplinary action for speech related to sexuality have been treated as indirect discrimination. For example in *Apelogun Gabriels v London Borough of Lambeth*²⁸ a worker claimed that he had been dismissed for distributing “homophobic material” to co-workers. Gabriels had organised prayer meetings for Christian staff which were held (by permission) on council premises. He then distributed some verses from the Bible which were critical of homosexual activity to members of the prayer group, and some other co-workers. Other staff members found them offensive and complained. Gabriels was dismissed for reasons of gross misconduct and claimed that this was discriminatory on grounds of religion. The Tribunal hearing the case found that the dismissal was lawful; the material was offensive to gay and lesbian people and although it had not been targeted at these staff, this nonetheless meant that any indirect discrimination involved in his dismissal was justified. In a second case, a Christian worker was dismissed after posting her beliefs about homosexual practice on the Lesbian and Gay Christian Movement’s website, using her work computer outside working hours (a practice that was permitted by the employer). The Tribunal dismissed the claim of religious discrimination: any indirect discrimination was justified.²⁹ As with the harassment issue, these cases will largely be determined on the basis of a review of the proportionality of any restriction on speech, and will need to be considered in the light of the interests of gay colleagues whose dignity may be undermined by such speech.

e. Summary

²⁵ Equality Act 2010, Section 26.

²⁶ *Kokkinakis v Greece* [1993] 17 EHRR 397.

²⁷ The Christian Institute; EHRC call for evidence, see Mitchell, M. et al, above note 5 at p.55.

²⁸ *Apelogun Gabriels v London Borough of Lambeth* (2006) ET Case No. 2301976/05.

²⁹ *Haye v London Borough of Lewisham* (ET/2301852/09, 16 Jun 2010)

These cases illustrate the approach of UK domestic courts in addressing the tensions which can arise between competing equality interests. In summary, religious staff can expect that their religious practices or beliefs will be accommodated at work so long as there remains a reasonable balance between the needs of staff and the needs of their employers. Whilst there is no legal duty of accommodation for religion in the UK workplace, the way in which indirect discrimination works is broadly similar: a failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination, unless the refusal to accommodate can be justified. Such an approach to indirect discrimination has some judicial backing, with the acceptance that failure to make reasonable accommodation may be evidence that an employer's refusal to change its requirements are disproportionate.³⁰

Whether or not the creation of an explicit duty of accommodation would improve the protection of religion and belief at work remains the subject of much debate.³¹ What is clear however, is that the current legal framework effectively allows religious staff to reconcile their religious needs with the demands of the secular workplace, using a proportionality assessment to allow for the facts and context of the case to be taken into account. Although this can make the outcomes difficult to predict, this approach does allow for careful analysis of the different factors which can be at stake in any particular case, such as the operational requirements of the business, health and safety concerns, or the equality needs of staff and clients. Whilst there may be disagreement about the outcome of individual cases, it is difficult to find any other approach which could be more responsive to the variety of interests at stake apart from this balancing proportionality based approach.

3. Religious organisations as employers

A second area of concern identified in the EHRC call for evidence relates to religious organisations which act as employers. The number of organisations and range of activity is large, with religious organisations providing services including education, care homes, hospices, night shelters, adoption services, drop-in centres, youth work etc. In some cases the employers are religious organisations such as churches; in other cases they may be small private businesses which the business owner seeks to run along religious lines. The tension that can arise in this context with regard to religion and belief involves the extent to which religious employers can exercise their religious freedom via their employment practices. Issues which have arisen include whether they can impose religious requirements on staff such as requirements that staff be loyal to the religion's teaching. Such requirements will involve discrimination against those of a different religion or none, and in some cases, the requirements will also result in discrimination on other grounds, for example a requirement of celibacy imposed on any staff who are not heterosexual. These cases involve the religious interests of employers, often groups

³⁰ "I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases" per Lady Hale in *Bull v Hall* [2013] UKSC 73, Para 47.

³¹ For a discussion of the duty to accommodate religion at work, see Alidadi, K., "Reasonable accommodations for religion and belief: Adding value to Article 9 ECHR and the European Union's anti-discrimination approach to employment?" *European Law Review*, Vol. 37, No. 6, 2012, p. 693; Gibson, M., "The God 'Dilution'? Religion, Discrimination and the Case for Reasonable Accommodation", *Cambridge Law Journal* Vol. 72 (3) (2013), p. 578; and Loenen, T., "Accommodation of Religion and Sex Equality in the Workplace" in Alidadi, K., Foblets, M., and Vrielink, J. (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Ashgate, 2012.

of religious individuals, seeking to manifest their religion or belief in community with others through the medium of work, as set against the equality interests of staff.

Under the ECHR, Article 9 is reasonably clear that the autonomy of religious groups should be respected; they should be able to determine their own leadership, for example.³² This means that courts will be loath to restrict a religious organisation in its choice of clergy and so religious requirements imposed on priests or other religious leaders would be likely to be lawful. However, where the work is less directly involved in religious practice, religious requirements will be scrutinised more carefully. For example, in *Obst v Germany* and *Schüth v Germany*, the ECHR had to decide whether the dismissal of a broader category of church employee for breaching religious teaching was lawful.³³ In both cases staff had been involved in extra-marital relationships. In both cases, the ECtHR recognised the right of the employer to require loyalty to Church teaching from these staff. However, they held that the religious interests of staff needed to be balanced against the rights of the staff in question, in terms of their privacy rights and rights to family life, but also in terms of other factors of relevance to the case, such as the ease with which they might find other work.³⁴ Thus the rights to religious freedom of the employer were recognised, but needed to be balanced against other competing interests.

A similar process can be seen in the context of the exceptions to the Equality Act 2010 contained in Schedule 9. An exception exists where, because of the nature of the occupation or the context in which the work is carried out, a religion or belief constitutes an occupational requirement for the job in question, and it is proportionate to impose that requirement, any resulting discrimination will be lawful.³⁵ This will cover the employment of religious leaders and teachers and will allow, for example, a hospital to require that its chaplain be Christian. An additional and rather wider exception exists where the employer is an organisation with a religious ethos, such as hospices, or charities with a religious ethos. In these cases the religious ethos of the employer can be taken into account in assessing the proportionality of any religious work requirement.³⁶ Its application can be seen in the Employment Tribunal case *Muhammed v Leprosy Mission* where a Muslim finance administrator applied for work in a Christian charitable organisation. One of the criteria for the role was that the incumbent “be a practising Christian committed to the objectives and the values” of the organisation. Mr Muhammed’s application was unsuccessful, and he claimed discrimination on the ground of religion. The Tribunal held that being a Christian was an occupational requirement of the role. In particular it drew attention to the fact that Christian beliefs were at the core of the employer’s activities and that employing a non-Christian would have a very significant adverse effect on the maintenance of that ethos.³⁷ Thus, as long as

³² See for example, *Hasan and Chaush v Bulgaria*, Application No. 30985/96, 26 October 2000, Para 62; and *Serif v Greece*, Application No. 38178/97, 14 December 1999.

³³ *Obst v Germany*, Application No. 425/03, 23 September 2010; *Schüth v Germany*, Application No. 1620/03, 23 September 2010. The cases were brought under Article 8, but religion and belief pervade the reasoning of the Court, so they are discussed here.

³⁴ The Court reasoned that the organist would find it difficult to find other work; the PR Director less so.

³⁵ Equality Act 2010, Schedule 9 (1)

³⁶ Equality Act 2010, Schedule 9 (3)

³⁷ *Muhammed v The Leprosy Mission International* ET/2303459/09, 16 December 2009.

there is some religious element to the staff role, even where the work is not inherently religious in nature, the court may find religious requirements are proportionate.

However, the occupational requirement exception does not make discrimination on other grounds lawful. Thus, for example, a requirement to be Christian to work in a Christian bookshop may be lawful, but it will not be lawful if that requirement also discriminates, albeit indirectly, on grounds of gender or sexual orientation.³⁸ The only exception to this rule is in the narrowly drawn exception which applies to the appointment of clergy or their equivalent, allowing this to be limited in terms of gender and sexual orientation in order to comply with religious teaching.³⁹

The provisions which enable religious employers to create religiously homogeneous workplaces as long as there is no discrimination on other grounds, help to resolve the tension identified above between maintaining religious freedom and upholding equality interests. In effect religious employers are able to create workplaces which share a religious ethos, even where the work is not directly religious in nature. In this way, the freedom of religious groups is maintained. However, if direct discrimination on other grounds such as sex or sexual orientation results, such a practice will be unlawful. If indirect discrimination results, it would need to be justified.

Conclusion

Whilst it can be argued that religion is a private matter which has no place at work, such an approach relies on too functional a view of work and the work environment. Few see work as based purely on the economic transaction of the contract of employment. Instead, for most individuals, work is a forum in which a significant aspect of life is lived: it is where people meet others, engage with wider society, gain economic benefit, undertake personal and professional development, and to an extent where they express aspects of their personality. Viewed in this way, it seems clear that religion should not be excluded from the workplace. However, it has also to be recognised that protecting religious freedom at work can lead to tension; tension between equality rights and tension between religious and other interests such as the economic interests of employers. Moreover, the response to the EHRC call for evidence and Weller's research⁴⁰ demonstrate that, along with education where very significant tensions exist, the workplace is the forum in which many wider tensions between religion and secularism are played out.

The legal frameworks which engage these tensions have developed mechanisms to address them based on the concept of proportionality. This approach involves contextual analysis of the competing interests at stake in any case. It also involves engaging in a degree of metaphorical weighing and balancing of these interests, to ensure that any restrictions on religious freedom are imposed for a legitimate aim and are proportionate to that aim. Such an approach involves careful, fact sensitive decision

³⁸ This could occur, for example, if the religious requirement was imposed by a group that was opposed to the employment of women. Alternatively, a requirement to share the particular religious ethos of a group could discriminate against gay Christians if the group believes that homosexual sexual activity is wrong, and the gay Christian is in a (non-celibate) relationship.

³⁹ Equality Act 2010, Schedule 9(2). See *R (on the application of Amicus – MSF and others) v Secretary of State for Trade and Industry and others* [2004] IRLR 430.

⁴⁰ See Weller, P. et al, above note 6.

making by the courts, taking into account and being responsive to the circumstances and context of each case.

This approach is far from being perfect. It can lead to difficulties in predicting the outcome of cases, and certainly the outcome of decisions is unlikely to please everyone. Nonetheless, it is suggested that this approach remains the most effective way to uphold religious interests in the context of the workplace. If certainty were to be required, it would likely involve very little by way of protection; after all, the alternative, that is a rule that religion will be normally be protected at work, would never be granted because of the strength of the competing interests of employers to economic freedom, and to equality interests of staff and service users.

In particular, it would always be unlikely for religious rights to be granted much more by way of protection because of the fact that the right to manifest religion at work remains at all times a contingent right. This is both because the right to manifest is in any event a qualified right, liable to restriction in order to uphold the rights of others, and additionally because workplace rights are ultimately protected by the residual right to resign. As a result, it is submitted that the balancing approach provides the best solution to the tensions that inevitably arise in connection with the protection of religion in the workplace. Where proportionality is used thoughtfully, we should be able to reach some sort of equilibrium or balance in our application of the law, as a way to hold in balance the right to freedom of religion and belief, and the right to equality, autonomy and dignity at work for all.