



Religious Freedom in the UK workplace: Promoting Diversity at Work

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1. Introduction

In the UK the Equality Act 2010 provides protection against discrimination on grounds of religion or belief at work.¹ This meets the state's obligation to protect freedom of religion under international human rights laws as well as meeting the UK's obligations under the Equality Directive 2000/78. In what follows, I will consider the ways in which freedom of religion and belief is protected in the workplace in the UK. First, I consider the protection available to individuals with a religion or belief, who find themselves disadvantaged when working in organisations which are secular or neutral in terms of religion or belief. Examples of disadvantage experienced at work include where religious individuals are unable to wear religious symbols at work, or are required to work hours which are incompatible with their religious obligations. I then consider the extent to which religion or belief based organisations are governed by equality laws in their employment practices; for example, to what extent, if at all, are such organisations allowed to discriminate against those who do not share their religion or belief? Before discussing how the law in the UK governs these issues some background information about religion and belief in the UK will be provided, together with a brief review of how religion and belief are defined in UK law.

2. UK National context

The UK does not have a written constitution and so there are no formal constitutional guarantees of religious freedom nor formal separation of the church from the state. However, there are a number

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¹ The focus is on the Equality Act 2010 (the 'Equality Act'), which does not apply in Northern Ireland. However the protection in Northern Ireland (provided in the Fair Employment and Treatment (Northern Ireland) Order 1998) is very similar and where differences occur these will be indicated.

of ‘constitutional conventions’ which provide for the protection of religious freedom. For example, a general principle exists that legislation may not create ‘partial and unequal treatment as between different classes’.² In addition, the Human Rights Act 1998, partially incorporates the European Convention on Human Rights (ECHR) into domestic law, and by so doing gives Articles 9 (freedom of religion and belief) and 14 (non-discrimination on grounds including religion and belief) *quasi*-constitutional force.

The Church of England is the established church in England but not in the whole of the UK.³ However, despite formal links between the Crown and the Anglican Church, the country is multi-cultural and secular in most of its day to day practices. For example, public and private sector workplaces take a flexible approach to religion in the workplace. In addition to its prohibition on discrimination, the Equality Act 2010 imposes on all public bodies a duty to promote equality on grounds of religion and belief,⁴ and to foster good relations between those with different religions or beliefs, or none. The Duty has led to the promotion of equality throughout the public sector, at work as well as in the provision of their services.⁵ In effect, public sector organisations are required to demonstrate a commitment to promoting and encouraging religious diversity at work, for example by ensuring that recruitment processes do not discriminate; by embedding equality training into staff development frameworks; and by collecting and analysing data on the religion and belief of staff so that employers can ensure that progress is made towards achieving equality.

The ways in which good relations are fostered between those of different beliefs (or none) can be seen in the way that a wide range of religious festivals are recognised and celebrated in the public sector. For example, cities, towns, schools and colleges will hold events to celebrate Diwali or Eid as well as Christmas.⁶ A second example of the UK’s flexible approach to religious diversity is seen in the approach to the wearing of the religious symbols at work. Throughout the public and private sector headscarves and turbans can be worn, including teachers, judges and the police. In this regard, it is notable that following the CJEU decisions in *Achbita* and *Bouagnaoui*⁷ the Parliamentary Under-Secretary of State for Women and Equalities made a statement on the decisions, in which she confirmed that the law would not change in the UK, despite the *Achbita* ruling being reported as confirming that employers can prohibit the wearing of the headscarf. The statement was made that it is “the right of all women to choose how they dress, and we do not believe that the judgments change

² *Kruse v Johnson* [1898] 2 QB 91.

³ The Church in Wales, the Church of Ireland and the Church of Scotland are not established churches.

⁴ S 149 Equality Act 2010. The Public Sector Equality Duty applies to all protected grounds.

⁵ Government Equalities Office – Independent Steering Committee (2013). *Review of the Public Sector Equality Duty: Report of the Independent Steering Group*. www.gov.uk/government/uploads/system/uploads/attachment_data/file/237194/Review_of_the_Public_Sector_Equality_Duty_by_the_Independent_Steering_Group.pdf

⁶ See for example, celebrations for Diwali held by the Mayor of London <https://www.london.gov.uk/events/2018-10-28/diwali-festival-2018>

⁷ *Achbita v G4S* C-157/15, *Bouagnaoui and ADDH* C-188/15 Judgments of 14 March 2017.

that. Exactly the same legal protections apply today as applied before the rulings.” This confirmed that the UK government was not expecting the UK to allow for broader restrictions on the wearing of religious symbols at work, but were committed to continuing a policy of tolerance for religious difference at work.

2.1. Religious discrimination in the UK

The religious make-up of the UK is fairly diverse, and is subject to fairly rapid change. In the 2011 census, 59.3 per cent of the UK population reported as Christian,⁸ and 25.1% of the population in England and Wales reported that they had no religion. However, despite the 59.3 per cent figure, a much smaller percentage of the population appear to be regular church goers,⁹ and by 2017 the British Social Attitudes Survey showed 53% of adults identifying as having no religion. In the 2011 census, Muslims were the second largest religious group (4.8% of the population), followed by Hindus (1.5%) Sikhs (0.8%) Jews (0.5%), Buddhists (0.4%) and other religions.

There exists some evidence of discrimination in employment on grounds of religion and belief, although the data does not present a particularly clear picture. In the 2011 census,¹⁰ economic activity varied by religion, with those of no religion having the greatest economic activity, and Muslims having the lowest rates. According to the 2018 EHRC Is Britain Fairer Report¹¹ those reporting no religion had a higher employment rate (69.1%) than those with a religion in 2016/17; the lowest employment rates were for Muslims (50.9%) and Christians (55.4%). Of those with a religion, between 2010/11 and 2016/17, employment rates rose for Jewish people and Muslims and declined for Christians. However, Muslims (20.2%) were around twice as likely to be in insecure employment as Christians and those of no religion in 2016/17, and Muslims also had the lowest pay rates.¹²

This data presents a mixed picture. It may reflect a level of religious discrimination in the workplace, although it could also be accounted for by other variables such as differences in the age profile (and consequent differentials in work participation) of different religious groups. However additional evidence can be found of workplace discrimination based on religion or belief. For example, research conducted for the Equality and Human Rights Commission in 2015¹³ showed that, despite many positive experiences, such as workplaces where employers were described as being supportive of the

⁸ www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html

⁹ In a poll published in *The Guardian* (London, 12 April 2015) only 30% of those questioned described themselves as ‘religious’.

¹⁰ See Office of National Statistics, Full story: What does the Census tell us about religion in 2011? available at www.ons.gov.uk/ons/dcp171776_310454.pdf

¹¹ Available at <https://www.equalityhumanrights.com/sites/default/files/is-britain-fairer-2018-pre-lay.pdf>

¹² See EHRC Is Britain Fairer report (2018).

¹³ M. MITCHELL – K. BENINGER (with E. Howard and A. Donald): *Religion or belief in the workplace and service delivery*. Manchester, Equality and Human Rights Commission, 2015.

needs of religious staff, nonetheless, discriminatory practices could be found. Examples included difficulties in taking time off for religious observance such as prayer times; and difficulties faced by religious individuals in reconciling work dress codes with religious dress codes, such as refusal by employers to allow staff to wear religious symbols.

3. Legal framework in the UK

Religion and belief are protected in the workplace in the UK under the provisions of the Equality Act 2010, which in turn is interpreted to comply with the provisions of the parent EU Directive 2000/78. In addition, under the Human Rights Act 1998, the UK legislation is interpreted to accord the provisions of the ECHR, in particular Article 9 which protects freedom of religion or belief.

The Equality Act 2010 prohibits direct and indirect discrimination as well as harassment and victimisation because of religion and belief. Direct discrimination occurs where a person is treated less favourably on grounds of religion and belief and covers where employers refuse to employ religious staff altogether, or employ those of one religion on more favourable terms than those of a different religion. Direct discrimination cannot be justified, however 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.¹⁴

In addition to the general genuine occupational requirement exception that exists for all grounds of equality, a wider exception is provided in respect of religion or belief discrimination. The exception applies where employers are organisations with a religious ethos, such as religious hospitals, charities or business which operate with a religious ethos. In these cases the ethos of the employer can be taken into account in assessing the proportionality of any religion or belief based work requirement.¹⁵ This exception applies where sharing a religious belief is not an essential requirement for carrying out the specific duties of the job, but the employer nonetheless wishes all staff to share the beliefs, in order to maintain its ethos. Employers with an ethos based on religion or belief are also able to require loyalty from their staff towards the religion or belief, and so may be able to justify any adverse treatment based on an employee's disloyalty (such as ignoring certain aspects of religious teaching). Moreover, special rules apply to the employment of clergy or equivalent positions for organised religions, as well as for teachers in faith based schools. These special exceptions are discussed further below.

Indirect discrimination occurs where a provision, requirement or practice puts a person with a religion or belief at a particular disadvantage compared with others. It can be justified where there is a

¹⁴ Equality Act 2010 Schedule 9 (1) discussed below.

¹⁵ Equality Act 2010 Schedule 9 (3) discussed below.

legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary.¹⁶ 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.

UK case law suggests that under the Equality Act a group must have been disadvantaged before indirect discrimination can be found: less favourable treatment of one person may not suffice. Thus, in *Eweida v British Airways*,¹⁷ where a member of British Airways check-in staff wished to wear a cross at work, the Court of Appeal held that indirect discrimination requires a particular disadvantage to a group. Eweida's claim was therefore unsuccessful in the domestic court because she did not identify a group of people who shared her belief in the need to wear a cross visibly at work. She was successful in her Article 9 claim before the ECtHR,¹⁸ and moreover the EU Directive does not specify the need for group disadvantage in indirect discrimination cases.¹⁹ This suggests that the UK law is not in compliance with EU law on this issue. However, the position on group disadvantage has not yet been changed in domestic law.²⁰

The Equality Act also prohibits victimisation and harassment because of religion and belief. Harassment occurs where the religious employee engages in unwanted conduct with the effect of creating an intimidating or offensive environment for the other person.²¹

Most of the cases in the UK brought under the Equality Act 2010 have involved indirect discrimination. This is because in many cases individuals are not treated badly because of religion or belief *per se*, but because of something associated with the religion, or because of their desire to manifest their religion, for example by wearing religious dress at work. These cases are dealt with as indirect discrimination: if an employer refuses an employee's request to manifest religion through a dress code, the employer is effectively imposing a requirement on the employee not to manifest the religion or belief, and the employee is thereby put at a disadvantage compared to others. Such treatment amounts to indirect discrimination unless it can be justified by the employer. Examples of case law on indirect religion or belief discrimination are discussed below. First, however, two preliminary points are considered: whether all workers are covered by the protection; and how are the terms religion and belief defined legally.

¹⁶ Equality Act 2010 s 19.

¹⁷ *Eweida v British Airways* [2010] EWCA Civ 80.

¹⁸ *Eweida (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* Judgment 15 January 2013.

¹⁹ See N. BAMFORTH – M. MALIK – C. O'CONNOR (eds.): *Discrimination Law, Theory and Context*. London, Sweet and Maxwell, 2008. 307–308.

²⁰ See *Mba v London Borough of Merton* [2013] EWCA Civ 1562 the point was discussed and it was suggested that group disadvantage would still be needed, although the point was not fully argued.

²¹ Equality Act 2010, Section 26.

3.1. *Who is protected?*

The Equality Act applies to all employers, religious or secular, and to the public as well as the private sector. It protects employees, and all those who contract personally to do work, so it applies more widely than other employment-related legislation, and for example, applies to workers as well as to members of the clergy.²² Despite the wide coverage of the Equality Act, volunteers and those engaged under a contract for the provision of services are not protected.²³ As a result, some independent contractors are not covered by the legislation, a matter which has led to significant academic debate.²⁴ The case which decided that the equality provisions did not apply to independent contractors involved the appointment of an arbitrator from a particular religious group. For the arbitrator, it was argued that the appointment of arbitrators is covered by equality laws because the arbitrators were persons contracted personally to carry out the work. However the Supreme Court held that arbitrators are self-employed and so their selection, engagement or appointment is outside the scope of the non-discrimination laws. The Supreme Court focussed on the fact that the equality provisions applied to ‘employment under’ a contract to work personally and so the term should be interpreted in the light of the underlying understanding of the employment relationship. Given that the arbitrator was independent and not in a relationship of subordination to the user of the service, the Court ruled that there was no employment relationship in the case. In the opinion of the UK Supreme Court this kept the law within the parameters of envisaged by the drafters of the EU non-discrimination law, where the concern is with employment-focussed protection, in the context of employment, access to work, training etc. In the context of arbitration, the case may be helpful: had the Court decided that arbitrators were covered by the equality provisions, arbitration agreements in which the nationality of arbitrators are commonly included would have been rendered invalid. However, given the uncertainty on the boundaries of when a person is employed or self-employed,²⁵ individuals who are in practice in a subordinate relationship with a provider of work, may lack the protection they need against religious discrimination, if their contract is created as one of self-employment.

The decision that volunteers are not protected under the Equality Act may be of particular significance in the context of religion and belief as ethos based organisations are likely to have significant numbers of voluntary workers: for example, churches, gurdwaras, temples, mosques and ethos based charities

²² See ss. 39–60 for coverage of the Equality Act 2010. The question of whether ministers of religion are covered by other aspects of employment law is currently contested in the UK case law. See for example A. C. L. DAVIES: The Employment Status of Clergy Revisited: *Sharpe v Bishop of Worcester*. *Industrial Law Journal*, Vol. 44., Iss. 4. (2015) 551.

²³ *X v Mid Sussex Citizens Advice Bureau (CAB)* [2012] UKSC 59; *Jivraj v Hashwani* [2011] UKSC 40. See further L. VICKERS: *Religious Freedom, Religious Discrimination and the Workplace*. Oxford, Hart Publishing, 2nd Edition, 2016. chapter 5.

²⁴ For example, see C. MCCRUDDEN: Two Views of Subordination: The Personal Scope of Employment Discrimination Law *Jivraj v Hashwani*. *Industrial Law Journal*, Vol. 41., Iss. 1. (2012) 30.; and M. FREEDLAND – N. KOUNTOURIS: Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*. *Industrial Law Journal*, Vol. 41., Iss. 1. (2012) 56.

²⁵ See A BOGG: Sham self-employment in the Court of Appeal. *Law Quarterly Review*, 126. (2010) 166.; A. C. L. DAVIES: Sensible Thinking About Sham Transactions. *Industrial Law Journal*, Vol. 38. (2009) 318.; see also discussion in Chapter 3.

often rely on volunteers to run worship, youth work, food kitchens, study groups and volunteer programmes. Although in the UK such volunteers are not protected from discrimination, it should be noted that some volunteering is closely linked to paid employment (for example expenses are paid and hours of work fixed) and in such cases the position might be different.

3.2. *Defining religion or belief*

A preliminary point has been discussed in a number of cases, regarding the meaning of religion and belief. The Equality Act 2010 refers to religion as ‘any religion’, and belief as any ‘religious or philosophical belief’. The courts have interpreted religion to include Christianity, Islam, Judaism, Hinduism, Sikhism and Buddhism, as well as religions which have fewer adherents worldwide, such as Wicca.²⁶ In 2013 the Supreme Court found that Scientology was a religion.²⁷ Although the case did not involve the Equality Act 2010, its definition of religion is likely to be used when interpreting the Act in future. Religion was defined to include ‘a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system’.

There has been significant debate about the definition of belief, which has to be established by case law as there is no statutory definition. In *Grainger plc v Nicholson*²⁸ five criteria were identified to help define when beliefs are protected. These are that the belief must be genuinely held; it must be a belief, and not an opinion or viewpoint based on the present state of information available; it must be a belief as to a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and importance; and it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others. In the case of *Grainger* this resulted in a finding that beliefs about climate change as being man-made were capable of protection under the Equality Act 2010.

These criteria have been developed and applied in a number of later employment tribunal decisions, although it is not easy to find clarity and consistency in the decisions. Examples of cases where a belief system has been found to meet the definition include *Greater Manchester Police Authority v Power*²⁹ where it was held that a belief in spiritualism and the philosophical belief in life after death and psychic powers met the criteria to be counted as a belief; and *Maistry v BBC*,³⁰ where a belief that public service

²⁶ *Holland v Angel Supermarket Ltd and Another* [2013] ET 3301005-2003 (20 September 2013).

²⁷ *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77

²⁸ See *Grainger plc v Nicholson* [2010] IRLR 4.

²⁹ EAT 0434/09/DA.

³⁰ *Maistry v BBC*, ET Case No.1313142/10, 29 March 2011.

broadcasting has the higher purpose of promoting cultural interchange and social cohesion was found to meet the definitional criteria. Most recently, in *McEleny v MOD*³¹ an Employment Tribunal held that beliefs in Scottish independence were protected. The belief was deeply held; not based solely on the present state of knowledge; had a substantial effect on his life and how he behaves; it relates to a weighty and substantial aspect of human life and beliefs on how a country should be governed are serious and coherent and cogent; and worthy of respect in a democratic society.

In contrast, beliefs which have been found not to be protected include *McClintock v DCA*,³² where a belief that single-sex couples should not adopt children was not protected as it said to be an opinion or viewpoint based on current research into the effects on children of same-sex parenting, rather than a belief; and *Lisk v Shield Guardian Co*,³³ where a belief that one should wear a poppy to show respect to servicemen was said not to amount to a belief as it was not based on a weighty and substantial aspect of human life or behaviour.

A further example of a belief which failed to meet the definition, this time on the basis that it did not have sufficient cogency, seriousness, cohesion and importance was a belief about the existence of a New World Order, and its activities in *Farrell v South Yorkshire Police Authority*:³⁴ here the beliefs were said to be ‘wildly improbable’.

These cases show that although protection can be claimed for a wide range of beliefs, determining which beliefs are protected is a challenge, and decisions have not always been entirely consistent. Nonetheless, some general principals can be gleaned from the case law. Religion and belief can be taken to include beliefs which are necessary to the dignity and integrity of the individual. They should relate to mankind’s place in the world, be important in helping the believer make sense of the unknowable, and be a means through which the individual develops a sense of the good. Protection is only available to those beliefs which are sufficiently serious to the individual to affect his or her sense of identity and understanding of the world. Although there is some uncertainty in the definition, this also allows for some flexibility in approach.

4. Protection against discrimination because of religion or belief at work

The legal protection against religion or belief discrimination at work covers any conduct at work which causes disadvantage on the basis of religion or belief. A number of common conflicts that have arisen in the workplace can be identified and will be focus of what follows. First, cases involving religious clothing and symbols, where employer’s uniforms or dress codes conflict with right of employees to

³¹ ET case no S/4105347/2017, 25 July 2018.

³² [2008] IRLR 29.

³³ *Lisk v Shield Guardian Company Ltd* [2011] ET Case No. 3300873, 14 September 2011.

³⁴ *Farrell v South Yorkshire Police Authority*, ET 2803805/10, 16 June 2011.

manifest religion; second employees who require time off or adjustments to their work schedules for prayer or other religious observance; third, those who have a conscientious objection to performing specific tasks, or who wish to be excused from particular duties; and fourth, those who feel restricted in their freedom to share religious views at work.

4.1. Dress codes

As a general rule, the position in the UK regarding dress codes and religious symbols has been fairly relaxed. Headscarves and turbans are commonly worn throughout the public and private sector, including in schools and hospitals. Safety rules have been adapted to allow for religious dress: for example section 11 Employment Act 1989 allowed an exemption from the requirement to wear a safety helmet on construction sites for Sikhs who wear a turban, and in 2015 this was extended to cover a right to wear a turban in all workplaces.³⁵ The police allow for hijabs and turbans as part of the official uniform, and religious dress is even allowed for the judiciary. In 2011 the first Sikh High Court judge was appointed, now sitting in the Court of Appeal (The Rt. Hon. Lord Justice Singh). He wears a turban instead of the judicial wig along with formal judicial robes.

Given that the wearing of religiously symbolic head coverings are fairly common in the UK, it is perhaps unsurprising that the case law on Islamic dress codes have more often involved the wearing of face coverings (the *niqab*) rather than the headscarf (*hijab*). Even here, the courts have taken a fairly generous approach, only finding a refusal by the employer of a request to wear a *niqab* to be unlawfully discriminatory where competing interests are strong.

Where employers do impose a uniform with which a person cannot comply due to reasons of religion or belief, this is treated legally as 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.

The case of *Azmi v Kirklees Metropolitan Borough Council*³⁶ illustrates how the UK courts have approached the justification of restrictions on religious dress. Azmi was a teaching assistant in a Church of England school, who was dismissed for refusing her employer's instruction to remove her *niqab* when assisting in class. The Court rejected the argument that this was direct discrimination. The less favourable treatment was not *because of* her religion, but because of her manifestation or practice of that religion. The Court accepted, however, that the case involved potential indirect discrimination. The school was imposing a neutral requirement (to have the face uncovered) and this rule put Azmi at a particular disadvantage when compared with others. However the Court held that any potential

³⁵ S 6 Deregulation Act 2015. There is an exception for emergency response services and the military in hazardous operational situations where a safety helmet is necessary.

³⁶ *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154.

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, and for this they needed to be able to see her face.³⁷

In reaching the conclusion that the restriction on her religious practice was justified, the court noted that the school had thoroughly investigated before reaching the conclusion that the restriction was necessary. It had monitored her teaching to see if the quality of teaching was reduced when she wore the face covering; and they had considered whether it was possible to rearrange her timetable to enable her to assist only in classes with a female teacher. On this point the case can be contrasted with the Employment Tribunal case of *Noah v Sarah Desrosiers (trading as Wedge)*.³⁸ Noah, a Muslim who was applying for a hairdressing position, succeeded in her indirect discrimination claim when the potential employer told her that she would have to remove her headscarf while at work if appointed. The employer sought to justify this requirement on the basis that hairdressers needed to have their own hair visible in order to promote the image of the hairdressers. In rejecting this justification, the Employment Tribunal drew attention to the fact that the employer had not brought any evidence of the business need.³⁹ Although there was no need to carry out a trial to test the impact of the headscarf on business, nonetheless there was an onus on the employer to at least bring evidence that the wearing of the headscarf would have an adverse effect on the business. In the absence of any such evidence, the requirement was found not to be justified.

Other cases regarding the wearing of religious symbols have taken a similar approach, with Tribunals more ready to accept as justified restrictions on religious symbols where employers have made some attempt to investigate the practical implications of allowing the religious symbol into the workplace. In *Dhinsa v SERCO*⁴⁰ a refusal to allow a Sikh trainee prison officer to wear a *kirpan* (a ceremonial dagger) while on duty was justified and so not indirectly discriminatory: SERCO had undertaken a careful investigation into the issue and concluded that the restriction was appropriate and necessary for the maintenance of prison security and the safety of staff, visitors and prisoners.

Religious symbols cases have also arisen related to the wearing of a cross visibly at work. Again the cases are treated as potentially indirectly discriminatory. In *Eweida and others v UK*,⁴¹ at the ECtHR, two of the cases involved dress codes. In Eweida's case, the ECtHR found in favour of the employee as there were no strong reasons justifying the restriction, just a rather weak claim based on corporate

³⁷ [2007] ICR 1154 para 74.

³⁸ ET 2201867/2007.

³⁹ R. CATTO – D. PERFECT: Religious literacies, equalities and human rights. In: A. DINHAM – M. FRANCIS (eds.): *Religious Literacy in Policy and Practice*. Bristol, The Policy Press, 2015. 135–163.; R. SANDBERG: *Noah v Desrosiers t/a Wedge*. *Law and Justice*, Vol. 163. (2009) 191–192.

⁴⁰ [2011] ET 1315002/2009 (18 May 2011) (unreported).

⁴¹ 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.

image, which in any event was somewhat inconsistent given that the employer allowed both turbans and hijabs to be worn. In *Chaplin*, the second case heard together with *Eweida* before the ECtHR the employer was able to justify the restriction as it relied on stronger claims based on health and safety requirements.

In the UK, diversity at work is promoted in part through flexibility around dress codes when it comes to accommodating those who wish to manifest religion through the wearing of religious symbols at work. Although business and other reasons can be provided by employers to justify restrictions, these are subject to a degree of scrutiny by courts and tribunals, who are likely to require evidence to be provided by the employer. The position can be contrasted with the balance struck in other European states.

The difference in approach accounts for the UK reaction to the decisions of the CJEU in *Achbita* and *Bouagnaoui*,⁴² where the government made a public response confirming the position in the UK would not change.⁴³ It is clear from the case law discussed above, that in a UK tribunal would be unlikely to accept as justified a restriction on a headscarf imposed by a private company such as Micropole or G4S unless stronger reasons could be provided. The willingness of the CJEU to limit religious dress to non-customer facing roles, for example, creates a significant level of restriction on religious employees.⁴⁴ In the UK cases such as *Azmi* and *Noah*, the fact that the wearer was ‘customer facing’ was by no means sufficient to justify the restriction on religious practice, even in the case of *Azmi* where the employer was a Church of England school.

4.2. Time off for religious observance

The usual working week in the UK (Monday to Friday) is based on the dominant Christian religion, allowing time off for religious observance on Sundays. Moreover, four of the eight public holidays⁴⁵ (Good Friday, Easter Monday, Christmas Day and Boxing Day) are also based around religious holidays. Although most businesses are closed on Sundays, retail businesses are increasingly open on Sundays. Special restrictions apply to trading on Christmas and Easter Day,⁴⁶ and special rules for working hours apply to shop workers in relation to work on Sundays.⁴⁷ As well as national rules governing working time, all employees, not just parents and carers can request to work flexibly,⁴⁸ and

⁴² *Achbita v G4S* C-157/15, *Bouagnaoui and ADDH* C-188/15 Judgments of 14 March 2017.

⁴³ This stance is consistent with the CJEU decision as it took into account national context in reaching its decision on proportionality.

⁴⁴ See further L. VICKERS, *Achbita and Bouagnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace*, *European Labour Law Journal*, Vol 8., Issue 3. (2017) 232–257.

⁴⁵ Technically made up of public holidays and bank holidays.

⁴⁶ And New Year’s day in Scotland.

⁴⁷ See further VICKERS (2016) op. cit. chapter 5.

⁴⁸ Section 47 of the Employment Act 2002. The right was extended to all employees by the Children and Families Act 2014.

these rules may allow religious staff to request to work around religious obligations. However, the right is only to make the request: there is no obligation on the employer to grant it, only to deal with it in a reasonable manner.

Clearly the Christian history of the UK informs the regulation of working time, and this leads to a level of disadvantage for those of other faiths who do not have their major religious festivals recognised in this way. As a result, refusal of time off for religious observance is treated as indirect discrimination unless justified; the refusal puts religious individuals at a disadvantage compared both to those who do not need time off, and to those whose religious observance is linked to standard working time.

Although justifications can be fairly readily identified, not least the needs of the business or the needs of service users and customers, the case law in the UK has had varied outcomes, leaving the position rather uncertain. For example, in *Thompson v Luke Delaney George Stobbart Ltd*⁴⁹ a Jehovah's Witness was refused permission for time off work on Sundays. Her discrimination claim was upheld because it was not proportionate to refuse her request as other employees could have covered the Sunday shift without difficulty. In contrast, in *Cherfi v G4S Security Services Ltd*⁵⁰ it was held to be justified to refuse a request by security guard to adapt his working hours to facilitate attendance at a mosque for prayer on Fridays, as the employer required a certain number of security staff to be on site during operating hours. Similarly, in *Mba v London Borough of Merton*⁵¹ the refusal of a request not to work on Sundays was found to be proportionate. The employer had previously managed to arrange the rota to accommodate her request, but this was no longer possible, and there was no viable or practical alternative but to require her to be available to work on Sundays. The fact that the manager had tried for some time to accommodate *Mba* will have been of significance in holding that the refusal to accommodate any longer was proportionate on the facts.

In effect, the approach of the UK courts has been to take a balancing approach in assessing the proportionality of restrictions on religious practise imposed by the regulation of working time. The courts consider factors such as whether other staff can swap shifts and whether the needs of the business can be met. The result is that the outcomes of the cases tend to turn on their specific facts.

4.3. *Conscientious objection to work tasks*

A third area in which cases have arisen in the UK regarding religious discrimination and work relates to conscientious objection to work tasks. Special provisions apply in some particular contexts. With

⁴⁹ [2011] NIFET 00007 11FET (15 December 2011).

⁵⁰ [2011] UKEAT 0379_10_2405 (24 May 2011).

⁵¹ [2013] EWCA Civ 1562.

regard to abortion, section 4(1) of the Abortion Act 1967 states: ‘no person shall be under any duty [...] to participate in treatment authorised by this Act to which he has a conscientious objection.’ Similar terms can be found in Section 38 (1) Human Fertilisation and Embryology Act 1990. The scope of the Abortion Act exemption was tested in *Greater Glasgow Health Board v Doogan*,⁵² where it was confirmed that it is limited to the medical process of abortion only. Broader activity such as providing ordinary nursing and pastoral care of a patient who has just given birth was not covered by the provisions, and there was no obligation to allow nursing staff to opt out of such work.

Other requests may be made to be excused from performing work duties based on religion or belief, beyond the special circumstances of abortion and work with embryos. For example, staff in a supermarket could ask to be excused from selling alcohol or handling meat products. Such requests would be covered by the general non-discrimination rules discussed above: a refusal may be indirectly discriminatory unless it can be justified by the employer. 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. Although there have been occasional press reports of cases involving such requests,⁵³ there are no higher level court decisions,⁵³ which suggests that these situations are usually resolved at local level.

In contrast, some high profile cases have been brought where the request to be excused from performing work tasks has been on grounds which are discriminatory, such as those refusing to offer services based on the service user’s sexual orientation: for example, a marriage registrar refusing to perform civil partnership ceremonies; and a sex and relationships counsellor refusing services to same sex couples. These cases too are treated as cases of indirect discrimination; the requirement to carry out the civil partnership or counselling is a neutral requirement which causes disadvantage to the particular religious employee because he or she cannot comply for religious reasons.

The UK courts have found that the refusal of a request for exemption to carrying out civil partnerships or relationship counselling for religious reasons was a proportionate means to achieve the legitimate aim of equal treatment on grounds of sexual orientation. For example, in *Ladele v Islington Borough Council*,⁵⁴ Ladele was refused permission to be excused from carrying out civil partnerships on the basis of her religious beliefs. The Court of Appeal held that the refusal to accommodate Ladele’s request 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. Similarly, in *McFarlane v Relate Avon*

⁵² [2014] UKSC 68.

⁵³ <https://www.theguardian.com/money/work-blog/2013/dec/23/religious-freedom-marks-spencer-employers>

⁵⁴ *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.

*Ltd*⁵⁵ the employer was found to be justified in refusing to accommodate McFarlane's wish not to offer therapy to same sex couples.

The outcome in these cases was upheld by the ECtHR on a similar basis: the restriction on religious freedom represented by the failure to accommodate their requests was justified as proportionate means to protect the equality rights of others. Although the cases were more complex as involving a potential clash of competing equality rights, the outcome is fairly straightforward in terms of equality law. As with the other indirect discrimination cases, the decisions are based on the balancing of different interests to achieve a proportionate outcome. The religious interest of the employee has to be balanced against the interests of others, in this case the equality and dignity rights of the service users who would be affected by any denial of service.

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

Another area of religious practice which has given rise to case law in the UK has involved employees who have promoted their religious beliefs, for example through distribution of literature or the offering of prayers, in a manner which has led to disciplinary action at work. As with the other manifestations of religion, any restrictions imposed by employers on such behaviour are likely to be found to be indirectly discriminatory unless they are justified. The consideration of justification in such cases requires a balance between, on the one hand protection for the exercise of religious freedom which is implicit in the religious employee's activity, and, on the other hand the protection of other staff from what they may experience as harassment.

Simple conversations about religion or belief are unlikely to amount to harassment, but if they persist once it has been made clear that they are unwelcome, it is possible that they could come within the definition: the religious employee will have engaged in unwanted conduct with the effect of creating an intimidating or offensive environment for the other person. Although the right to manifest religion can cover proselytising, any such right is not absolute, and is limited where it is improper.⁵⁶ Thus in *Grace v Places for Children*⁵⁷ a nursery manager was dismissed for reasons which were linked to her religious beliefs, but it was found that the dismissal was not based on the beliefs but on the manner in which they were manifested. In particular, her communication of the beliefs had left her staff upset and distressed: one pregnant staff member had left a meeting with the manager extremely scared, believing she would suffer a miscarriage; and the claimant had told another member of staff that something was going to happen in the nursery which left staff members uneasy and scared. The

⁵⁵ [2010] EWCA Civ 880.

⁵⁶ *Kokkinakis v Greece* [1993] 17 EHRR 397. Proselytising will be improper if it interferes with the rights of others to be free from harassment at work.

⁵⁷ [2013] UKEAT/0217/13/GE.

Employment Appeal Tribunal took the view that it was the manner in which these views had been shared, rather than the holding of the views themselves, which had led to the dismissal. Whilst this could still be potentially indirectly discriminatory, it could also be justified as the behaviour had an adverse effect on the wellbeing of staff. Similarly, in *Chondol v Liverpool CC*⁵⁸, a Christian social worker was dismissed because he had improperly shared his Christian beliefs with service users. The Employment Tribunal found that his treatment was not directly discriminatory because it was not based on his religion but on the manifestation of his beliefs. The case did not consider whether there was a potential indirect discrimination claim, but even had it done so, any indirect discrimination would likely be held to be justified, given the competing interests of a social worker's clients to a religiously neutral service.

Chondol and *Grace* involved sharing of religious views in contexts where there was an imbalance of power between the parties (manager and staff; social worker and client). A further set of cases has raised the question of whether religious staff can share their religious views with colleagues and peers. Particular concern has been raised when the religious views are hostile to homosexuality. These cases have been treated as indirect discrimination cases, and any restriction on speech has to be justified. In considering justification, freedom to debate religious doctrine needs to be balanced against the need to protect the dignity of other workers, in this context the interests of gay colleagues whose dignity may be undermined by such speech. As a result, it has usually been proportionate to place limits on speech which is offensive to others on grounds of sexual orientation.

For example, in *Apelogun Gabriels v London Borough of Lambeth*⁵⁹ a worker claimed that he had been dismissed for distributing "homophobic material" to co-workers. He had distributed some verses from the Bible which were critical of homosexual activity to members of a workplace prayer group, and some other co-workers. Members of staff found them offensive and complained. He claimed that his resulting dismissal was discriminatory on grounds of religion. The Tribunal found the dismissal lawful; the material was offensive to gay and lesbian people and so any indirect discrimination involved in his dismissal was justified. Similarly, in *Haye v London Borough of Lewisham*,⁶⁰ a Christian administrative assistant was dismissed after posting her beliefs about homosexuality on the Lesbian and Gay Christian Movement's website, using her work computer. The tribunal dismissed the claim of religious discrimination: any indirect discrimination was justified.

One potential claim that has been tried in cases where staff have been disciplined for sharing religious views at work is a claim that the disciplinary action amounts to harassment of the employee. However, such claims have so far been unsuccessful. In two Employment Tribunal cases, *Mbuyi v*

⁵⁸ [2009] UKEAT 0298/08/1102.

⁵⁹ *Apelogun Gabriels v London Borough of Lambeth* (2006) ET Case No. 2301976/05.

⁶⁰ (2010) ET Case No. 2301852/09.

*Newpark Childcare*⁶¹ and *Wastenev v East London NHS Foundation Trust*,⁶² it was decided that that disciplinary action taken by an employer against an employee who expressed negative views about homosexuality in conversation with colleagues did not amount to harassment.⁶³

4.5. Summary

These cases involving religious employees working in religiously neutral or secular workplaces illustrate the flexible approach of UK domestic courts in addressing the needs of a diverse workforce. In most public and private sector workplaces religious practices are generally accommodated, as long as this does not interfere with the rights of others. Thus, the wearing of religious symbols is largely accommodated, as are requests for time off, or requests to be excused from non-core duties at work, where necessary to comply with religious requirements. However, there is no right to have requests granted, and they need to be balanced with any other competing interests, such the needs of other staff and the needs of employers. Thus where employers can identify a business-related need to limit the manifestation of religion or belief, such limits are likely to be proportionate. However, the needs do need to be linked to business or other significant need. Justification based on assertion,⁶⁴ or on weaker claims such as company image,⁶⁵ are unlikely to be justified in the UK even if this would be allowed under the current approach of the CJEU to the justification of indirect discrimination.⁶⁶

5. Employers with an ethos based on religion or belief

In this section I turn to a second set of concerns, those of religious organisations and the rights of those who work for them. The number of religious organisations providing services is large. One major sector in the UK in which the employer has a religious ethos is education (discussed further below). In addition, some care homes and hospices are run by religious bodies, as well as religious groups providing youth work, and homeless shelters etc. In some cases the employers is a religious body such as a church; in other cases small private businesses are run along religious lines.

The legal question that has arisen in this context has involved the extent to which religious employers can exercise their religious freedom by restricting employment to those who share their religion,

⁶¹ *Mbuyi v Newpark Childcare* [2015] Case Number: 3300656/2014.

⁶² *Wastenev v East London NHS Foundation Trust* [2015] Case Number 3200658/2014.

⁶³ Note that *Mbuyi* was successful in her direct discrimination claim. See above at p.000.

⁶⁴ See *Noah Noah v Sarah Desrosiers (trading as Wedge)* above.

⁶⁵ See *Eweida and others v UK* above.

⁶⁶ *Achbita and Bougnaoui*, above.

effectively discriminating against others. In some cases the resulting discrimination is against those of a different religion or none, and in some cases, the requirements will also result in discrimination on other grounds. For example compliance with religious teaching (such as celibacy for those who are not heterosexual) will discriminate on grounds of sexual orientation.

The EU Directive allows for exceptions to the non-discrimination rules where there is a genuine occupational requirement which can be justified as proportionate. Article 4(2) provides for wider exceptions for religious ethos employers. The standard of review appears to be lower for Article 4(2) as the religion or belief requirement needs only to be a genuine, legitimate and justified occupational requirement, with no additional need for the requirement to be proportionate. However, in *Egenberger*⁶⁷ the CJEU confirmed that it is implicit that any requirement must be proportionate as the Directive is to be interpreted in the light of the general principles of Community law, one of which is the principle of proportionality.

The exceptions provided in Article 4(1) and 4(2) are implemented in the UK in Schedule 9 of the Equality Act 2010.

5.1. Religious ethos organisations

The Equality Act 2010 Schedule 9 (1) implements Article 4(1) and provides that discrimination will be lawful where, because of the nature of the occupation or the context in which the work is carried out, religion or belief constitutes an occupational requirement for the job in question, and it is proportionate to impose that requirement. The exception under Schedule 9(1) also applies to all other protected characteristics, and is narrowly interpreted to apply when it is essential to the job that it be carried out by a person with the particular characteristic. In the case of religion, it will cover the employment of religious leaders and teachers and will allow, for example, a church to require that its priest be Christian, and a mosque to require that an imam be Muslim.

Article 4(2) is implemented in the wider exception provided under Schedule 9(3). This applies where the employer is an organisation with an ethos based on religion or belief, such as hospices, or charities with an ethos based on religion or belief. In these cases the religious ethos of the employer can be taken into account in assessing the proportionality of any religious work requirement.⁶⁸

There have been few cases on this issue, with the case law at tribunal level only. In the Employment Tribunal case of *Muhammed v Leprosy Mission* a Muslim finance administrator claimed religious discrimination when he was unsuccessful in his application for work in a Christian charitable organisation. One of the criteria for the role was that the incumbent “be a practising Christian

⁶⁷ (C-414/16) at para 68.

⁶⁸ Equality Act 2010, Schedule 9 (3).

committed to the objectives and the values” of the organisation. The Tribunal held the requirement that all staff be Christian was a valid occupational requirement. Although religion was not necessary to the financial administration tasks themselves, the tribunal 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.⁶⁹ Thus, even though the work was not religious in nature, the court could find religious requirements were proportionate because of the highly religious ethos of the employer.

In contrast, in *Sheridan v Prospects for People with Learning Disabilities*⁷⁰ an employment tribunal did not allow the exception to allow a charity only to employ Christians and not promote its existing non-Christian employees. Although the charity had started out as a small Christian organisation it had evolved into a larger organisation supplying care services to local social services departments, only a minority of service users were Christian, and significant funding was received from public bodies. As the charity had not carried out an evaluation of each job, and because it employed non-Christians in many roles, it was therefore not proportionate to require all employees to be Christians.

Thus, although the ethos based exception in paragraph 3 is broader than the general exception in paragraph 1, it is not without limitations: any requirement must be occupational and thus linked to the job in question; and it will be difficult to argue that all staff must share the religion as each post should be carefully considered.

Although the occupational requirement exception allows the employer to discriminate on grounds of religion or belief (where proportionate etc.), it does not make discrimination on any 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 sex or sexual orientation. This could occur, for example, if the religious requirement was imposed by a group that was opposed to the employment of women.

5.2. Religious organisation exception

One further exception is created by the Equality Act 2010 Schedule 9(2), which does not have a direct equivalent in the EU Equality Directive. It is narrowly drawn and was designed to apply 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. For example, the Catholic Church can require that priests be male.⁷¹

⁶⁹ *Muhammed v The Leprosy Mission International* ET/2303459/09, 16 December 2009.

⁷⁰ *Sheridan (Mark) v Prospects* ET Case no. 2901366/2006, 13 May 2008.

⁷¹ 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.

When it was originally introduced, there was some concern that the provision could cover a wider range of workers employed by religious organisations, such as teachers or nurses in religious foundations. However, the decision of the English High Court in the *Amicus* case,⁷² confirmed that the words ‘for the purposes of a religion’ limited the provision to the appointment of religious leaders and teachers such as priests and imams. Discrimination on grounds of sexual orientation in any other context remains unlawful. Unlike the position in some other member states, those working for religious organisations as priests or imams are covered by the Equality Act 2010, and so this exception was seen to be necessary.

The provision does not include a proportionality test. On this basis, it is arguable that the ‘organised religion’ exception breaches Article 4 of the EU Directive, particularly following the decision in *Egenberger* which implies the concept of proportionality into Article 4(2). However, the rule as applied in practice would seem to accord with the ECHR case law on Article 9, which is clear that where an employee is playing a key role in the group’s manifestation of religion (for example, carrying out religious rites), the autonomy of the religious group should be respected. This suggests that a requirement relating to sex or sexual orientation which is applied by a religious group in order to comply with religious doctrine would probably be judged to be proportionate if the EU Directive is to be interpreted to accord with the provisions of the ECHR. Nonetheless, particularly in the light of the *Egenberger* case the lack of a proportionality requirement remains a cause of concern.

The ‘religious organisation’ exception has been tested in two cases. First, an Employment Tribunal case, *Reaney v Hereford*,⁷³ where a Christian youth worker was denied employment as a diocesan youth officer because the Bishop did not believe his lifestyle would remain compatible with the church’s teachings on homosexuality. The applicant’s work involved some ‘face-to-face’ youth work and leading of worship, and so the tribunal held that this role was covered by the exception.⁷⁴ The second case, *Pemberton v Inwood, Acting Bishop of Southwell and Nottingham*⁷⁵ involved the refusal to licence a hospital chaplain, after his marriage to his same sex partner, contrary to the current teaching of the Church of England. The court held that the employee was to work in the role of a Church of England priest, and was thus employed for the purposes of an organised religion. Of course it is arguable that, the employer, a public sector body, should not be able to use the exception that is provided for a church, however, the question of whether NHS hospital trusts should employ religious chaplains was not in issue in the case.

Although the limit in scope to clergy or closely related work means that any court is highly likely to find an exception to be proportionate in the light of the religious freedom issues at stake, nonetheless

⁷² *R (on the application of Amicus-MSF and others) v Secretary of State for Trade and Industry and others* [2004] IRLR 430.

⁷³ *Reaney v Hereford Diocesan Board of Finance*, ET 1602844/06, 17 April 2007.

⁷⁴ However, the church lost the case, because the tribunal held that the Bishop was unreasonable in his belief that the applicant would not meet the requirement to remain celibate whilst in the post.

⁷⁵ [2018] EWCA Civ 564.

there remains a concern that the question is not subject to any scrutiny by the courts: there is no requirement for genuineness of the requirement to be assessed. As well as implying a requirement of proportionality, in *Egenberger* the court required that religion and belief requirements imposed by religious bodies be subject to some external scrutiny. The case involved the use of the Article 4(2) exception, in the context of a decision that a church could impose a limit on employment to those who shared the religion of the employer. The employer argued that it was for the employer itself to determine the necessity of the requirement, in the light of the churches' right to self-determination under German law. The CJEU ruled that the religious employer could not be the sole arbiter of whether the occupational activities justified the imposition of a religion or belief requirement. Applied to the UK context, it would seem, then, that the provisions of the Equality Act 2010 regarding employment for the purposes of a religious organisation do not accord with the Directive, as interpreted by the CJEU.

This reservation regarding the compatibility of the UK legal protection is even more marked in the case of schools, discussed below.

5.2.1. Schools

Schools with a religious ethos are common in Britain, even within the state sector, with over 30 per cent of state schools in England having a religious character. Although these are not all Christian in affiliation, the vast majority are. These schools are largely funded by the state, although they may also receive some additional funding from the Church. Thus although they have a religious input in terms of some funding and aspects of their governance, they are effectively public sector organisations.

Special rules relating to discrimination on grounds of religion or belief apply to teachers in schools in England and Wales, under the Schools Standards and Framework Act 1998 (SSFA). There are several categories of school⁷⁶ depending on questions of funding and the legal question of who employs staff. Some schools have a religious character, even though they are funded by the state. The categories are: voluntary aided, voluntary controlled or foundation schools (as a general rule these are faith based schools), community schools, (usually non faith based) and academies (may be faith based).

In summary, in community schools and other schools which do not have a religious character, teachers cannot be discriminated against on grounds of religion or belief, including for refusing to give religious education.⁷⁷ With regard to voluntary controlled or foundation schools with a religious character, religion can be taken into account in appointing the head teacher and up to a fifth of the

⁷⁶ Voluntary aided, voluntary controlled, community schools, foundation schools and academies.

⁷⁷ SSFA 1998 s59. The provision applies to working as a teacher, and being employed for the purposes of the school otherwise than as a teacher.

teaching staff.⁷⁸ In voluntary aided schools religious requirements can be imposed on all teaching staff.⁷⁹ The requirements only apply to religion and belief. There is no further exception on other grounds of discrimination such as sex or sexual orientation.

The special exceptions to the protection against religion and belief discrimination as applied by the SSFA (i.e. exceptions for heads and a fifth of teachers in voluntary controlled schools; and all teachers in voluntary aided schools), go beyond what would be allowed under the Equality Act 2010 as they do not contain a requirement of proportionality in their application.

Unlike the position regarding the employment of clergy, discussed above, it is quite probable that the rules as they apply to schools do allow religious requirements to be applied which might not be viewed as proportionate by a court. For example, in voluntary aided schools a school could apply faith and lifestyle requirements to all teachers (e.g. that they cannot remain in employment if they get divorced). Whilst such a requirement may possibly be proportionate in the context of teaching religion, it is hard to see that being of a particular religion or belief, or living in accordance with its teaching, would be an occupational requirement of the job when teaching subjects such as maths or modern languages. It might be proportionate in some limited contexts, for example if the school was very religious in its ethos such that religion permeated the organisation, and it was important to retain a religiously homogenous staff, but the exception applies to all schools in a particular legal category rather than on the social and religious context in which they currently exist.

Because of the lack of a proportionality review, it is arguable that the provisions of the SSFA go beyond what is allowed under the Directive, a position that is confirmed by the decision of the CJEU in *Egenberger* which confirmed the need not only for a proportionality review, but also for judicial scrutiny of any exceptions to the non-discrimination provisions.

5.2.2. Summary

Schedule 9 Equality Act 2010 which implements Article 4 of the EU Directive allows religious employers to create workplaces which share a religious ethos, even where the work is not directly religious in nature. However, if direct discrimination on other grounds such as sex or sexual orientation results, such a practice will be unlawful, except in the very limited context of religious practice. If indirect discrimination results, it would need to be justified. The effect is that religious groups are

⁷⁸ SSFA 1998 s58. After amendment by section 37 of the Education and Inspections Act 2006, if the head teacher is appointed to teach religious education, the headteacher counts as a reserved teacher. This means that the extra religious requirements can be imposed on the head teacher.

⁷⁹ With regard to non-teaching staff there is a small difference between England and Wales. See further SSFA s 60(6). In Scotland, the position is covered by the Education (Scotland) Act 1980.

given fairly significant freedom to create religiously homogenous workplaces, as is allowed by Article 4(2) of the directive.

In a number of respects the provisions go beyond what is allowed under the EU Directive, particularly in the light of the decision in *Egenberger*. Following *Egenberger*, and the later case of *IR v JQ*⁸⁰ it is clear that the CJEU will expect any reliance on the exceptions to the non-discrimination principle to be proportionate, and also that they will subject any claims to a significant level of scrutiny. It will not be sufficient for an employer to assert that a discriminatory practice is a requirement of the religion: the court will be willing to seek evidence to prove this, and will be willing to question whether the religious rule is applicable in the context.

6. Conclusion

Religious freedom enjoys significant protection in the workplace in the UK. The Equality Act 2010 provides protection against direct and indirect discrimination and it is the indirect discrimination provisions which have been used most in the UK courts. Protection against indirect discrimination has allowed religious staff to enjoy significant levels of accommodation of religious needs at work.⁸¹ This has resulted in maintaining diversity in the workplace, in particular allowing religious affiliation to be visible through the ready accommodation of religious dress codes at work.

However, despite the fairly flexible approach to religion in the UK workplace, an approach that provides a greater degree of protection for religious workers than is strictly required by the EU Directive, there remain some areas in which the protection falls short of what is required. In particular, the additional exceptions provided in the context of the employment of clergy and the employment of teachers in schools with a religious character, and their respective lack of a proportionality requirement, are incompatible with the requirements of EU law. It is arguable, following the decision in *Egenberger* that the notion of proportionality must be implied into the Directive in order to comply with general principles of EU law, that a proportionality requirement must therefore be read in to the Equality Act.⁸² With such an addition to the law, the protection against religion and belief discrimination in the UK would be more complete.

⁸⁰ *IR v JQ* Case C-68/17.

⁸¹ For a discussion of whether the law in the UK provides a right to reasonable accommodation see VICKERS (2016) op. cit. chapter 7.

⁸² This may remain the case even after the expected exit of the UK from the EU as the UK courts are likely to be expected to interpret UK law with due regard for the decisions of the CJEU.