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## **Abstract**

*Legal responses to the individual manifestation and expression of religion in the workplace in England and Wales: a conceptual framework*

Andrew Hambler

The purpose of this thesis is to analyse legal approaches in England and Wales towards the manifestation and expression of religion by individuals in the workplace.

It begins by considering the nature of ‘religion’ and then seeks to understand and categorise the ways in which it is held by individuals at work through: inner belief, identity, association with others and, most significantly, outward manifestation or expression. Forms of manifestation which are potentially contentious are identified and classified, for analytical purposes, into three categories: negative, passive and active manifestation. These categories are utilised as headings in the later chapters of the thesis to provide a logical structure for analysing the relevant case law, as it is argued that there are legal issues which specifically apply to each.

The thesis continues to discuss theoretical positions which might be adopted in a liberal state towards workplace religious expression and considers and critiques the possible rationale underlying each. It is proposed that there are six possible models:

- (I) the exclusion model which aims to suppress religious expression;
- (II) support for a preferred historic (‘majority’) religion only;
- (III) laissez-faire (leaving the matter to the employer’s discretion alone);
- (IV) protection, but only within ‘islands of exclusivity’ (religious organisations);
- (V) protection; and
- (VI) protection for minority religions only.

These models are used as reference points in discussing statute law applying in the legal jurisdiction of England and Wales and, in subsequent chapters, case law. Although features of each model are discerned, particularly ‘protection’, ‘exclusion’ is identified as the dominant legal model in respect of many of the most contested forms of manifestation of religion in the workplace. It is submitted that, given the primary significance of religious expression to many individuals, the law should move further in the direction of the protection model.

**Legal responses to the individual manifestation  
and expression of religion in the workplace in  
England and Wales: a conceptual framework**

*Andrew G Hambler*

Thesis presented in accordance with the requirements of the degree of  
Doctor of Philosophy

Department of Law

Durham University

**2013**

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## **Statement of Copyright**

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## Chapter 1: Introduction

### *The Issue*

In March 2010, six bishops and former bishops of the Church of England wrote to the Sunday Telegraph as follows:

We are deeply concerned at the apparent discrimination shown against Christians and we call on the Government to remedy this serious development. In a number of cases, Christian beliefs on marriage, conscience and worship are simply not being upheld. There have been numerous dismissals of practising Christians from employment for reasons that are unacceptable in a civilised country.<sup>1</sup>

These comments are reflective of a growing perception that the expression of Christian beliefs, in the workplace and elsewhere, is becoming increasingly difficult due to the hostility of others.<sup>2</sup> An interim report from the longitudinal survey of religious discrimination in Britain 2000-10 also tentatively concluded that discrimination (or at least perceptions of discrimination) against Christians had increased over the period.<sup>3</sup> A Parliamentary report in 2012 found evidence that ‘Christians in the UK face problems in living out their faith and these problems have been mostly caused and exacerbated by social, cultural and legal

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<sup>1</sup> Letter to the Editor, *The Sunday Telegraph* (London, 28 Mar 2010) 1; signed by: Most Rev Lord Carey of Clifton, Former Archbishop of Canterbury; Rt Rev Michael Scott-Joynt, Bishop of Winchester; Rt Rev Michael Nazir-Ali, Former Bishop of Rochester; Rt Rev Peter Forster, Bishop of Chester; Rt Rev Anthony Priddis, Bishop of Hereford; Rt Revd Nicholas Reade, Bishop of Blackburn.

<sup>2</sup> This is also the view taken by the Archbishop of York, see: J Sentamu, ‘The intolerance towards Christians in the public sector is an affront’ *Daily Mail* (London, 13 February 2009) 17.

<sup>3</sup> P Weller, *Religious discrimination in Britain: A review of research evidence, 2000-10* (EHRC Research Report 73, 2011) 32-36.

changes over the past decade.’<sup>4</sup> There is also evidence that some Christians in general agree with this perception. For example, in a ComRes survey, conducted in May 2009 for the Sunday Telegraph, 19% of 496 Christian respondents agreed with the statement ‘I have faced opposition at work because I am a Christian’; 44% of 512 Christian respondents agreed with the statement ‘I have been mocked by friends, neighbours or colleagues for being a Christian’; 5% agreed with the statement ‘I have missed out on promotion at work because I am a Christian; and 6% agreed with the statement, ‘I have been reprimanded or cautioned at work for sharing my faith.’<sup>5</sup>

However, the perception of Christians, and perhaps other faith groups, that they face hostility in the workplace is not met with universal sympathy. For example, Terry Sanderson, President of the National Secular Society, adopts a rather different perspective, identifying religious expression, rather than discrimination against the religious, as the core problem:

The never-ending religious demands are now beginning to permeate the workplace. ... When the religious agitators realise that they have a new legal weapon at their disposal [discrimination law]... [t]hen will come the demand for prayer rooms and the conflict that they bring in their wake, then special holidays and after that uniform exemptions to be followed by dietary restrictions that will have to be imposed on everyone else. The work place should be a secular space. People should leave their religion at the door because once it’s over the threshold, it will cause mayhem as it does everywhere else.<sup>6</sup>

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<sup>4</sup> Christians in Parliament, *Clearing the Ground inquiry: Preliminary report into the freedom of Christians in the UK* (February 2012) 5; copy at: << <http://www.eauk.org/current-affairs/publications/upload/Clearing-the-ground.pdf>>>, accessed 30 April 2012.

<sup>5</sup> Copy at: <<<http://www.comres.co.uk/poll/70/the-sunday-telegraph-cpanel-poll-june-2009.htm>>>, accessed 30 April 2012.

<sup>6</sup> Anon, *Religion In The Workplace Becomes An Issue* (National Secular Society, 23 February 2007); copy at: << <http://www.secularism.org.uk/religionintheworkplacebecomesani.html>>>, accessed 16 May 2012.

There are thus different perceptions of freedom of religious expression in the employment sphere. There is the view that Christians, and perhaps members of other religions, face an increasingly hostile climate in the workplace, some of which has been caused by political and legislative change. There is a second view that, facing hostility or not, it is the religious employees who are the primary problem, with their disruptive and divisive desire to express their religious convictions in the workplace – a secular forum in which religion has no place.

A number of questions arise from these two perceptions. These concern the nature of religious expression and why religious people might consider it important to express their religious beliefs in the workplace; is it true that employees face hostility and what is the exact cause of this hostility? They also concern the rationale for trying to keep religion out of the workplace; how convincing is it, and what alternative positions are there on the issue? This in turn provokes the question, who are the actors involved? Clearly the religious employees are affected, and by extension the employer but who else has an interest? Given the ‘legal’ developments referred to, the Government, Parliament and the courts are surely also significant actors, given their respective roles in determining and adjudicating on the parameters of religious freedom in the workplace, once the decision has been taken to regulate it by means of law-making.

### ***Research aims***

The purpose of this thesis is to investigate these questions. In particular, it seeks to define what is meant by religious expression by individual employees, and the motive underlying it, and sets out the different ways it might have an impact on the workplace, in both uncontroversial and potentially controversial ways. The preferred term in European human rights jurisprudence is ‘manifestation’, although this term is more narrowly defined than expression (see Chapter 4). In practice, in this thesis, the two terms will be used interchangeably to a certain degree, although the term ‘expression’, because of its greater breadth of meaning, is generally preferred.

The thesis attempts to identify different principled responses to workplace religious expression within a liberal state. It also considers the extent to which the law in England and Wales reflects these differing responses, both at a legislative and policy level, and at a court and tribunal level. The ultimate aim of the thesis is to determine the extent to which freedom of religious expression for the individual enjoys legal protection in the workplace in England and Wales, and whether or not there is a case for changing the law to strengthen that protection.

In the context of its research aims, this thesis uses the terms ‘employee’ and ‘worker’ interchangeably. Although in employment law there is a distinction (employees work under ‘a contract of service,’ and workers do not necessarily do so),<sup>7</sup> in practice this distinction is of limited consequence when discussing religion and belief in the workplace, as the protections under discrimination law apply equally to workers and employees.<sup>8</sup> The only substantial area where the distinction is significant is in the discussion of the protections of unfair dismissal law – these apply only to the narrow category of employees. A more significant distinction overall may be between public servants and employees/workers more generally. Where this distinction is relevant it is highlighted in the text of the thesis.

## *Materials*

### **Legal materials**

This thesis is confined in scope to a discussion of religious expression in the workplace in England and Wales. It therefore draws most heavily on domestic law, in particular employment discrimination law: most significantly, the Equality Act 2010 and the Employment Equality (Religion and Belief)

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<sup>7</sup> Employment Rights Act 1996, s 230.

<sup>8</sup> Equality Act 2010, ss 39-52.

Regulations 2003.<sup>9</sup> The majority of the case law which is subjected to analysis consists of judgements brought under the ‘religion and belief discrimination’ head of claim. There are a growing number of relevant cases which have progressed to the Employment Appeals Tribunal (EAT) or beyond, but there remain important areas where the law has not been authoritatively clarified and there is a need to rely, albeit with caution, on any developing doctrines which can be inferred from first instance judgments, at an employment tribunal, albeit that these can only have persuasive effect on other employment tribunals.<sup>10</sup> Where employment tribunal decisions are considered in this thesis, these are based on case reports which have been made public by the one of the parties; these have been sourced initially through a link from summary case notes prepared for the *Equal Opportunities Review*.<sup>11</sup>

The legal materials used are not confined, however, to employment discrimination law. Article 9 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) concerning freedom of religion and belief is also considered in some depth, in particular its application to the workplace by the European Court of Human Rights (ECtHR) and, indeed, by British courts. The relevant cases, some of which go beyond the employment situation, are discussed.

There are a small number of occasions where this thesis will draw on case law relating to religious expression in some foreign jurisdictions. The purpose of referring to such case law is not to attempt a comparative analysis, rather it is restricted to identifying how another jurisdiction has treated a problem relevant to the discussion but which has not yet been fully considered by an employment tribunal or court in England and Wales. Particularly useful for this purpose are examples from the United States where ‘the Supreme Court has developed over

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<sup>9</sup> SI No.1660.

<sup>10</sup> *Secretary of State for Trade and Industry v Cook* [1997] ICR 288.

<sup>11</sup> See <<<http://www.eordirect.co.uk/>>>, accessed 20 March 2012.

time a sophisticated and useful jurisprudence on the free exercise of religion’;<sup>12</sup> however, examples from other jurisdictions with a history of litigation over religious rights are also useful, such as those of Canada and Australia.

### **Non legal materials**

In addition, this thesis considers a range of other published sources, including: codes of practice and published guidance on religion and belief in the workplace; professional codes of practice; parliamentary reports; and government-sponsored research reports. It also uses materials published by pressure groups which have a particular interest in religion and belief in the workplace (with a view either to promoting it or opposing it), such as the Muslim Council of Britain, the Christian Institute, the Christian Legal Centre, the National Secular Society and the British Humanist Association. This material will be used to supplement the legal materials either to fill gaps in those materials or to enrich and deepen the overall analysis by providing additional reference points.

### ***Literature***

This thesis also draws on a wide range of academic writing from various disciplines, principally law, political philosophy, ethics and sociology, in support of the theoretical constructs which will be presented in Chapters 2 and 3. Some of these constructs draw on well-established literature, particularly on the role of religion in public life and the nature of equality, dignity and autonomy. In the later chapters, particular use is made of a more recent and expanding literature which expressly engages with religious freedom in the workplace and often includes analysis of particular cases. Some of this literature is sourced from

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<sup>12</sup> C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2000), 5.

specialist religion and law journals, such as the *Ecclesiastical Law Journal*<sup>13</sup> and *Religion and Human Rights*.<sup>14</sup>

The most comprehensive published study of religious freedom in the workplace to date is the book by Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace*.<sup>15</sup> This book is referred to at intervals in this thesis. It deals with the interaction of discrimination law and human rights law to create a framework for freedom of religion and it identifies a number of issues which, at the date of publication, had yet to be fully addressed, including approaches to resolving various conflicts between the rights of ‘religious’ employees and organisations and the rights of other actors such as employers, non-religious employees and employees protected under other strands of discrimination law. Vickers’ book seeks to develop frameworks and approaches and is consequently, to a certain extent, speculative in character. It also tends to view the question using an entirely secular worldview and from a societal perspective rather than from the viewpoint of either employees or organisations.<sup>16</sup>

This thesis is concerned with the same questions of religious freedom in the workplace but is different from the Vickers study in two respects: firstly, it approaches the issue primarily from the perspective of the religious employee; and, secondly, it enjoys the benefit of the developments in jurisprudence since the publication of Vickers’ study and is able to draw stronger inferences based, *inter alia*, on rather more case law.

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<sup>13</sup> Published by Cambridge Law Journals; see << <http://journals.cambridge.org/action/displayJournal?jid=ELJ>>>, accessed 15 May 2012.

<sup>14</sup> Published by Martinus Nijhoff Publishers; see << <http://www.brill.nl/religion-human-rights>>>, accessed 15 May 2012.

<sup>15</sup> (Hart 2008).

<sup>16</sup> For a fuller critique of this book, see A Hambler, ‘Book Review: Religious Freedom, Religious Discrimination and the Workplace by Lucy Vickers’ (2009) 11 Ecc LJ 220.

## *Outline Structure*

The purpose of Chapter 2 is to arrive at a principled understanding of what constitutes legitimate ‘religious expression’ in the workplace. Three key areas will be explored – the meaning of religion, categorising religious expression, and how to determine the underlying authenticity of individuals making claims.

Chapter 3 will consider how a liberal state might respond to the challenge of religious expression by employees. It will set out six models representing approaches which might be taken, ranging from exclusion to full protection in law and the justification for these approaches. These models, and their attendant implications, will in turn be subjected to critique.

The purpose of Chapters 4 to 7 is to consider the application of both religious expression and of the models of response in the context of the United Kingdom. Chapter 4 considers the broad legislative and policy landscape. The following chapters examine the way in which employment tribunals and courts have responded when faced with claims concerned with religious expression. Such claims will be examined with reference to a categorisation of religious expression set out in Chapter 2. Chapter 5 will be concerned with an examination of tribunal responses to a claimant’s desire to absent himself from work either at certain times (for reasons of religious devotion) or in order to avoid certain tasks because they clash with his religious-based conscience. In Chapter 6 the legal issues surrounding employees’ desire to adopt particular styles of dress, jewellery or personal grooming will be considered. In Chapter 7, an assessment will be made of the employee’s freedom to witness or proselytise and to object to or challenge the behaviour of others.

In Chapter 8, overall conclusions will be developed and a final assessment of the role of law as a support for, or a constraint on, religious expression in the workplace will be made, followed by recommendations as to how, and in what ways, the law could better protect religious expression.

## **Chapter 2: Conceptualising ‘Religious Expression’ in the Workplace**

### ***Introduction***

Religious expression differs from self-expression. The former commands stronger loyalties and deeper feelings, perhaps the deepest feelings of all; at best, it is less a matter of an individual choice, but an inevitable and unavoidable response to divine obligation. Thus the individual with strong religious beliefs will have an over-riding interest in expressing these beliefs in some way. This is as likely to apply to the workplace as to other fora.

In expressing their religious beliefs, workers are responding to what they view as a divine imperative, which, if it conflicts with other actors, such as an employer or a co-employee, is likely to be afforded greater weight by the religious employee. Self-expression, on the other hand, although an important human freedom, cannot make claims of this nature – it cannot invoke divine command to support the choices it has elected and thus is more easily circumscribed with reference to the requirements of others. Some indeed have argued that self-expression is not a human right in the fullest sense as the nature of self-expression varies according to societal and other contextual factors.<sup>1</sup> Religion however is different and thus, in an important sense, ‘special’.<sup>2</sup> It is also, potentially, and most immediately for the employer, a ‘problem’.<sup>3</sup> Two examples may help to illustrate this latter point. First, a retail employer may engage in Sunday trading and may require that all employees are available to work, by rotation, that day. A Christian objects on the basis that Sunday is a day set apart and by divine command she cannot work on Sundays. Second, a supermarket

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<sup>1</sup> See, for example, L Alexander, *Is There a Right of Freedom of Expression?* (CUP 2005).

<sup>2</sup> A term helpfully explained in S Bedi, ‘Debate: What is so Special About Religion? The Dilemma of the Religious Exemption’ (2007) 15 *Journal of Political Philosophy* 235. How special is a matter of debate which will be considered in the next chapter.

<sup>3</sup> D Hicks, *Religion and the Workplace: Pluralism, spirituality, leadership* (CUP 2003), 71.

chain requires that checkout staff process all customer purchases. A Muslim store assistant objects that this will mean she must handle alcohol which she believes is contrary to Islamic teaching. How should the employer respond to such instances as these where its own (or other) interests conflict with the fundamental beliefs of his religious employees? This important dilemma, amongst others, will be debated in Chapter 3. What this chapter is concerned with, however, is a necessary precursor to that question: how can this special, but potentially problematic, religious expression be recognised?

It is submitted here that recognition is required on two levels. At the first level, there is a 'positive' recognition of forms of expression which stake a claim to be considered religious and therefore potentially fall into the 'special' category. Within this level, it will be possible to categorise such expression in various ways and, in so doing, to identify those which are also, potentially, a 'problem' to employers. For these types of expression, in particular, it may be thought desirable to consider a second level of recognition, which would consist of an attempt to determine the legitimacy of that form of expression on the assumption that not all claims to religious expression have a right necessarily to be recognised as such. This could be characterised a form of 'negative' recognition as it is designed to limit the number of claims to be admitted into the 'special' category.

This chapter is thus divided into two parts: the first is concerned with an attempt to identify and classify 'religious expression' in its broadest terms; the second is concerned with the identification of principled approaches to distinguish between what might be regarded as 'legitimate' forms religious expression and what might not be.

### ***Identifying Religious Expression: A typology***

The purpose of this section is to attempt to provide a broad classification of what is could be considered *prima facie* as 'religious expression'. As an initial reference point, the term will be used in its widest sense to encompass the ways in which an employee might wish to bring his or her religious beliefs into the

workplace. From the religious employee's perspective, this may be very wide indeed, encompassing all forms of human activity (internal and external). As Ahdar and Leigh perceptively note:

The most mundane of human behaviours can be 'spiritualised' and take on a religious connotation. One is practising one's religion when one eats, drinks, works, plays and gardens, as much as when one reads scripture, prays or meditates. ... On this view there is no activity which is not generated by one's obedience (or disobedience) to God.<sup>4</sup>

If all human activity is inherently religious, it would then follow that forms of classification are unlikely to be significantly meaningful to the religious employee. Nevertheless, from the perspective of an employer, forms of classification are likely to be very useful, not least in order to identify and cluster thematically examples of religious expression which are, respectively, least and most likely to pose a 'problem' to others. For this reason, the mapping out of a typology of religious expression will be attempted here.

The ECtHR has developed the notion of two fora in which religion and belief may be expressed – respectively, the *forum internum*<sup>5</sup> and the *forum externum*.<sup>6</sup> The *forum internum*, by strict definition, refers to that which is internal to the individual – a sphere of activity which is private in nature. Holding a religious belief is a function of this *forum internum*; it is entirely internal to the believer and therefore no one else need be aware of his religious convictions.<sup>7</sup> The *forum externum*, by contrast, involves those forms of religious expression which are overt and sometimes highly visible. This division is potentially helpful, as it allows courts to distinguish between the two categories, potentially giving an

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<sup>4</sup> R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (OUP 2005), 155.

<sup>5</sup> First used in ECHR jurisprudence by the Commission in *C v the United Kingdom* (1983) 37 DR 142.

<sup>6</sup> See also discussion of these two terms in Evans, *Freedom of Religion under the European Convention*, 72-73.

<sup>7</sup> As Trigg puts it, 'How does one know what someone believes if it is never manifested?', R Trigg, *Equality, Freedom and Religion* (OUP 2012), 99.

absolute guarantee of freedom to the former, and a more qualified approach to the latter.<sup>8</sup> The problem with the *forum internum/externum* dichotomy<sup>9</sup> does become apparent, however, when considering the concept of belief in slightly wider terms. If an individual has publicly identified himself as holding religious beliefs, for example by attending church or placing a religious symbol on his car which he uses to travel to work, then, strictly speaking, he has stepped outside of the *forum internum* as he has acted on his beliefs.<sup>10</sup> However, because this activity has taken place, in private (i.e., in this case, outside of work)<sup>11</sup>, including it as part of the *forum externum* would seem to stretch that term as to render it less helpful analytically, particularly if the term is also used to describe much stronger forms of overt religious expression such as proselytism of co-workers.

An alternative form of classification therefore may be a simple private/public divide where ‘religious activities’ in private are potentially viewed differently from religious activities in public. However, identifying where to draw the line between the two may also be problematic. Assuming the terms are employed in the popular sense of distinguishing between a ‘private life’ and a ‘public life’, then private religious activities are likely to be inclusive of attending, for example, mosque or gurdwara. However, what exactly constitutes ‘public’ may be less straightforward. The workplace, for example, may be generally described as a public space but it does not necessarily follow that all activities which take place in it can be labelled ‘public’.

Both the *forum internum/externum* and the public/private distinctions are arguably of limited analytical use due to the limitations imposed by a simple bifurcation on what is actually rather more nuanced an issue and a more

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<sup>8</sup> See also discussion of this distinction within the text of Article 9 ECHR in Chapter 4.

<sup>9</sup> Or using different terminology, the belief/action distinction; see G Moens, ‘The Action-Belief dichotomy and freedom of religion’ (1989) 12 *Sydney Law Review* 195.

<sup>10</sup> See the discussion in M Evans, *Religious Liberty and International Law in Europe*, (CUP 1997). In Chapter 1 he shows how the European Court of Human Rights has developed a broader view of the *forum internum* (which enjoys absolute protection), whilst leaving room for ambiguity at the margins.

<sup>11</sup> But see discussion later in this chapter.

sophisticated framework would be advantageous. Such a framework is provided by Edge who proposes a fourfold typology of individual religious rights.<sup>12</sup> These are: the right to hold a religious belief; the right to a religious identity; the right to be a member of a religious community; and the right to act on such belief, identity or membership of a community. Edge's framework was not specifically designed for application to the workplace; however it will be employed here in order to categorise the different means by which individuals may wish to bring their religious beliefs into the workplace but in a slightly adapted form. The fourth category of the typology – the right to act on belief, identity or membership of a community – will be subdivided in order to create two categories, the right to act on belief, etc, *outside* of the workplace; and the right to so act *within* the workplace.

## **Belief**

Drawing on Edge's first category, employees who hold religious convictions will, by definition, bring these into the workplace at the most fundamental level of holding a belief. If this is a form of expression, it is entirely an internal one and thus corresponds to a narrow definition of the *forum internum*. In its own terms, it has no impact on others and so cannot be a problem. Belief, or internal religious expression, is the most basic and least intrusive form of religious expression, occupying, as it were, the bottom rung on any hierarchy of expression.

Although such an internal form of expression cannot pose a problem to others, it nevertheless remains 'special' and it is possible that its exercise could be subjected to interference by an employer. This scenario might arise if an employer sought to foster a particular set of organisational values which might run counter to the religious beliefs of some employees, and did so, for example, through intensive briefing and training, perhaps reinforced through the appraisal system or through other organisational policies and practices. If such values were

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<sup>12</sup> P Edge, 'Religious rights and choice under the European Convention on Human Rights' (2000) 3 Web JCLI.

promulgated with sufficient force, then this might put irresistible pressure on the integrity of the inner religious belief.<sup>13</sup> Within a modern workplace context, values associated with ‘diversity’ might, in some circumstances, fulfil these criteria.<sup>14</sup>

Employing a slightly wider understanding of the *forum internum*, there may be further instances where pressure might be placed on internal beliefs through the imposition of oaths of office for certain public sector roles and in certain professions. Whereas it is possible that such oaths might have a religious content or a holy book might be the vehicle by which such oaths were authenticated (and thus highly problematic to those of a different, or without, religious faith),<sup>15</sup> it is equally possible that an oath, or a proxy for an oath such as a signed commitment to certain professional standards of an entirely secular nature, might have the effect of requiring public commitment to values which would not be in keeping with an individual’s inner beliefs. Although some individuals may be willing to accommodate the resulting tension, others might be extremely uncomfortable about such a compromise.<sup>16</sup> An example might be a magistrate, sitting on a children’s bench, who by oath is forced to adjudicate in all cases even in

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<sup>13</sup> There is a parallel here under ECHR jurisprudence where indoctrination of school pupils (through, for example, compulsory sex education) has been regarded in the past as potentially an interference with religious belief; see, for example, *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979) 1 EHRR 71; and discussion in S Langlaude, ‘Indoctrination, secularism, religious liberty and the ECHR’ (2006) 55 *International and Comparative Law Quarterly* 929. (It should, however, be noted that, in other more recent cases, the Court appears to have been less persuaded of the potential for interference: see, for example, *Alonso and Merino v Spain*, Appl no. 51188/99 (25 May 2000)).

<sup>14</sup> See for example, the concerns expressed by Lord Waddington and David Taylor MP about ‘Police officers, pressurised by diversity training ...’ in a letter to the Times during a debate on the incitement to homophobic hatred provisions of the Coroners and Justice Bill 2009; see ‘Letters’, *The Times*, 9 November 2009.

<sup>15</sup> As in *Buscarini v San Marino* (2000) 30 EHRR 208 and also in *Alexandridis v Greece* Appl No. 19516/06 (21 February 2008), where the ECHR found that a lawyer, in violation of Article 9 ECHR, was obliged to reveal that he was not an Orthodox Christian and, as a result, to partially reveal his religious beliefs so as to make a solemn declaration in lieu of a religious oath.

<sup>16</sup> See A Hambler, ‘A No-Win Situation for Public Officials with Faith Convictions’ (2010) 12 *Ecc LJ* 3, for a slightly different manifestation of essentially the same dilemma.

circumstances where the law is fundamentally opposed to his religious beliefs, such as requiring him to issue an adoption order in favour of a same-sex couple.<sup>17</sup> Another example might be a Christian school teacher who, as a requirement of registering with the appropriate professional body, is forced to accept a code of conduct requiring her to ‘promote equality and value diversity in all [her] professional relationships and interactions’; allowing ‘equality’ and ‘diversity’ to be defined by the employer and potentially in a way which might force her to promote homosexual lifestyles in the classroom.<sup>18</sup>

## Identity

Edge’s second category is that of religious identity. An individual may be known to identify with a particular religion through observable external evidence; for example, church attendance or subscription to a religious interest journal. It is submitted that this is unlikely to cause any form of workplace conflict and, in general, the ‘special’ status will be of limited importance. There are perhaps two exceptions. Firstly, some religious beliefs may be considered so offensive to others that merely to identify with them (particularly if there is some kind of formal or official connection) might be sufficient to cause conflict in the workplace. As an indirect example, involving political rather than religious identity, the offence given by BNP membership alone in the UK has been sufficient to lead the Home Office to ban officers in the police and prison services from joining up.<sup>19</sup> Secondly, some organisations either religious in

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<sup>17</sup> Per the facts, as they eventually emerged, of *McClintock v Department of Constitutional Affairs* (2007) EAT 0223/07.

<sup>18</sup> The wording of the controversial draft Code of Conduct produced by the General Teaching Council in the UK in 2008 and amended after religious objections were raised; see P Curtis, ‘Teachers’ anti-discrimination code reworded after faith groups object’ *Guardian* (London, 2 July 2009); copy at: <<<http://www.guardian.co.uk/education/2009/jul/02/teachers-discrimination-diversity-code-reworded-gtce>>>, accessed 20 March 2011; and, for a critique of the code by the Christian Institute, <<<http://www.christian.org.uk/news/20090625/draft-code-of-conduct-may-make-teachers-hide-faith>>>, accessed 20 March 2011.

<sup>19</sup> For the police, see: <<<http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2005/012-2005/>>>, accessed 20 March 2011; for the prison service, see: eligibility criteria, at:

character or with quasi-religious overtones may fall under suspicion due to secrecy rules, and solemn oaths of fraternity, and the resulting concerns that members may have divided loyalties which might compromise their operational roles. A good example in the UK is public concern (including two parliamentary enquiries) about police officers and members of the judiciary who are also members of secret societies, and who are sometimes suspected of feeling that they owe a greater loyalty to their fellows than to the general public.<sup>20</sup> Such secret societies include the freemasons and the Opus Dei.<sup>21</sup>

### **Membership of a Religious Community**

As with religious identity, it seems unlikely that mere membership of a religious community, such as a church, would create a workplace ‘problem’ unless, as before, it was the particular religious community, or the activities of some members of that community, which are considered offensive to others or dangerous in some other way. For example, some individuals may be excluded by the state from some areas of employment, not on the basis of overt expression of religious beliefs but by association with other individuals or groups suspected of subversive activity which may be motivated by their religious convictions. Such individuals are likely to be identified through some form of security vetting process either before or during employment.<sup>22</sup>

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<<<http://www.hmprisonservice.gov.uk/careersandjobs/becomingaprisoonofficer/prisonofficereligibility/>>>, accessed 20 March 2011.

<sup>20</sup> See the Parliamentary report, Home Affairs Committee, *Freemasonry in public life* (HC, 1998-99, 467), which recommended the creation of a voluntary register for freemasons working in legal services in the UK.

<sup>21</sup> J Bennetto, ‘New rules will force policemen to quit freemasons’ *The Independent* (London, 25 October 1996) 1.

<sup>22</sup> See, for a discussion of security vetting in employment, L Lustgarten and I Leigh, *In From the Cold: National Security and Parliamentary Democracy* (Clarendon Press 1994), 127-163.

## **Acting on Belief, Identity or Community outside of the Workplace**

When an individual chooses to act on (or ‘manifest’ or ‘practise’)<sup>23</sup> her beliefs, or identity, alone or in community of others outside of the workplace, there might reasonably be a general assumption that this is unlikely to pose ‘a problem’ to employers. This is based on the view that an individual should be free to express himself as he sees fit outside of the workplace (including participation in any religious activities) and that freedom should not generally be fettered by the employer. Nevertheless, there may be exceptions to this general rule for specific reasons. A senior civil servant, for example, might be required to avoid political activity in order to preserve the perceived political impartiality of the role.<sup>24</sup> Where the employer does seek either to prevent employees from particular activities outside of the workplace, or to discipline them for non-work behaviour, this is most likely to be considered fair in circumstances when the nature of such expression can be shown to potentially compromise an employer or otherwise to bring the employer into disrepute. Employers may consider themselves potentially compromised if employees are seen to act, albeit outside of the workplace, in ways that are contrary to the core values of that organisation, or the role which they occupy.<sup>25</sup> Although not strictly a workplace example, it is nevertheless instructive to note that this was the argument voiced by members of the European Parliament in 2004 when they rejected the appointment of Rocco Buttiglione as European Commissioner for justice and security, a portfolio carrying responsibility for the implementation of EU anti-discrimination and human rights law.<sup>26</sup> Buttiglione was a committed Roman Catholic who had, in

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<sup>23</sup> The preferred ECHR terminology, see discussion in Chapter 4.

<sup>24</sup> See *Civil Service Management Code* (June 2011), s 4.4 (Annex A); copy at: <<  
<http://www.civilservice.gov.uk/about/resources/civil-service-management-code>>>, accessed 1  
March 2012.

<sup>25</sup> In some occupations there may be clear guidance on what constitutes conduct incompatible with the ethos of the employer; in the UK, for example, this is spelt out for school teachers in the School Standards and Frameworks Act 1998, s 60(5)(b).

<sup>26</sup> D Gow, ‘MEPs reject anti-gay commission candidate’ *Guardian* (London, 12 October 2004) 15.

the past, publicly endorsed official Roman Catholic teaching that homosexuality is a sin and expressed traditional views on gender roles and the family.<sup>27</sup> MEPs argued that his expressed views made him unsuitable for the portfolio he was to receive, and could not accept Buttiglione's own argument that he would separate his own private convictions from his public actions.

Equally, a religious organisation, espousing, for example, Christian values, might decide to dismiss an employee known to have engaged in extra-marital sex and thus compromised the aims and religious integrity of the organisation.<sup>28</sup> Employers may also take the view that their businesses have been brought into disrepute by employees who have committed a criminal act; or who have publicly criticised their employer online; or who have worn the company uniform (in full or in part) whilst engaging publicly in behaviour which might offend others; or who have caused (potentially) great offence to other employees or clients by their published opinions. An example of the latter, concerning offence on religious lines, involved the senior press officer of the British Council who was exposed as the author of a series of articles in the Daily Telegraph attacking 'the black heart of Islam.'<sup>29</sup> An investigation was carried out and the British Council dismissed him for writing articles 'offensive to Islam' and, presumably, thereby bringing the British Council itself into disrepute.<sup>30</sup> A relevant second example might be the dismissal of Glenn Hoddle as the England football team coach in 1999. Hoddle, who held a religious belief in reincarnation, was dismissed following a public outcry over the 'offence' given by his public remark that 'disabled people were paying for sins committed in previous lives'.<sup>31</sup>

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<sup>27</sup> Anon, 'EU panel opposes justice nominee' *BBC News* (London, 11 October 2004); copy at: <<<http://news.bbc.co.uk/1/hi/world/europe/3734572.stm>>>, accessed 10 March 2011.

<sup>28</sup> Per the facts of *O'Neill v Governors of St Thomas More RCVA Upper School* [1996] IRLR 372.

<sup>29</sup> For example, W Cummins, 'The Tories must confront Islam instead of kowtowing to it' *The Daily Telegraph* (London, 18 July 2004) 21

<sup>30</sup> H Muir, 'British Council official sacked over anti-Islam articles' *Guardian* (London, 2 September 2004) 1.

<sup>31</sup> J Davison and L Gregoriadis, 'Hoddle 0, Disabled 1(Hoddle o.g.)' *The Independent* (London, 3 February 1999) 1.

Discipline, and particularly dismissal, for conduct outside of the workplace is highly contested and rights arguments are advanced to limit as far as possible employers' freedom of action in this regard. Mantouvalou observes that employer action in respect of conduct outside of work is usually justified on the basis of the public nature of that conduct (what she terms *spatial* criteria).<sup>32</sup> Most human rights instruments (including Article 8 of the ECHR, which she quotes) are concerned with the right to a private life. Thus rights arguments can be circumvented by courts in dealing with behaviour, including of course religious expression, outside of the domestic sphere.<sup>33</sup> In seeking to overcome this, Mantouvalou argues that a spatial understanding of the private/public dichotomy is inadequate:

Private life is not to be restrictively interpreted as encompassing one's home and family circle only; the right to privacy does not merely encapsulate activities that take place in a secluded inaccessible location.<sup>34</sup>

Mantouvalou prefers to view privacy as 'contextually-dependent', a theme she goes on to develop. Certainly this involves the extension of privacy to encompass activities which might otherwise be regarded as taking place in public, but outside of work. If it were not so, then:

The imposition of a duty to act in a certain way or to refrain from engaging in certain conduct in a person's private time can be detrimental to ... freedom of expression, the right to private life, and freedom of religion ... In the context of employment, being watchful and alert when engaging in leisure activities, and being fearful that they may impact on the retention of employment, may be damaging ...<sup>35</sup>

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<sup>32</sup> V Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces', (2008) 71 MLR 912, 919.

<sup>33</sup> Although in *Niemietz v Germany* (1992) 16 EHRR 7, the ECtHR noted that a simple binary divide between work and (private) non-work life may not always be necessary or desirable when it observed that 'it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not' [29].

<sup>34</sup> *ibid.*, 921.

<sup>35</sup> *ibid.*, 927.

Mantouvalou does concede, however, that there may be occasions when employers will be entitled to dismiss employees for conduct outside of work, but she requires a test of proportionality (which is not particularly clearly set out in her article) before this is allowed. Overall, the conclusion is that an employee's time after work 'is covered by a strong claim to privacy against employer interference.'<sup>36</sup>

When applied to freedom of religious expression outside of the workplace, Mantouvalou's conclusions do not provide the basis of any more concrete protections for religious employees. However, the analysis does imply the possibility of a greater extension of the right to privacy. Quite how far this might extend is open to question. Should, for example, a non-work conversation about religion between two work colleagues, where one is offended by what she hears, be regarded as a purely private matter, or public and of interest to the employer?<sup>37</sup>

### **Acting on Belief within the Workplace**

Thus far, religious belief, identity and expression outside of the workplace have been considered and the relatively rare, and often hypothetical, examples of occasions when that expression might pose a 'problem' to employers (and thus require a response) have been explored. The discussion will now turn to forms of religious expression which occur within the workplace and initially the first of Edge's categories – acting on belief. There is clearly potential for this category to merge into the one which follows it – acting on religious identity in the workplace. For analytical purposes, however, the definition of belief used earlier, as something potentially unknown to others, will be employed here, thus creating a distinctive category.

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<sup>36</sup> *ibid.*, 931-932.

<sup>37</sup> See discussion in Chapter 7.

Actions of course cannot remain private – but the source, in terms of the underlying motivations, of those actions might remain unknown to others. One of the areas in which examples are most likely to be found is in relation to workplace ethics. Amongst the effects of Christian belief, for instance, might be fidelity to an employer, maintaining the ‘highest moral and ethical standards of behaviour and attitudes’<sup>38</sup> and a concern for the health and well-being of co-workers. These are legitimate expressions of the Christian belief in the workplace and yet do not require any overt public identification with Christianity – Jesus Christ need not be mentioned by an employee who helps his co-worker, or who adheres strictly to the time limits during ‘breaks’. For Muslims, similarly, a strong workplace ethic is a requirement of Islam. This need not require the invocation of religious beliefs but simply that ‘the good Muslim businessman should be guided by his conscience – and by God’s written instructions – to do the right thing by other people.’<sup>39</sup>

Another important example of acting on religious belief lies in commitment to career and workplace. Within Christianity, for example, work in all its forms is highly esteemed. Martin Luther regarded human work as a direct extension of God’s ongoing creative work on earth and made the colourful claim that God even milks the cows through those he calls to work.<sup>40</sup> This view of work, charges it with spiritual significance – by working, men and women fulfil a specific calling to be ‘cultivators and stewards of all the good gifts of his creation’ in whatever work role or position they hold.<sup>41</sup> Calvin added to this sense of work, however humble, as divine vocation, a particular stress on its role in allowing the Christian to serve others and society.<sup>42</sup> This reformation view of work is now a mainstream Christian position,<sup>43</sup> although now liberated from its least attractive

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<sup>38</sup> W Backus, *How to be a Christian in the Workplace*, Decision Magazine (July 1998).

<sup>39</sup> M Tayeb, ‘Islamic revival in Asia and human resource management’ (1997) 19 *Employee Relations* 352, 356.

<sup>40</sup> L Hardy, *The Fabric of This World* (William B Eardmans 1990), 48.

<sup>41</sup> *ibid.* It should be noted that Luther did exclude certain occupations as unsuitable for Christians (those of monk, prostitute and usurer).

<sup>42</sup> *ibid.*, 58-59.

<sup>43</sup> *ibid.*, 76.

feature – the concept of ‘one’s place’ in an inflexible social order.<sup>44</sup> This high view of work, essentially as a divine calling, should translate in practical terms in the workplace to a discerning choice of job role and then a strong commitment to that job role, the worker diligently seeking to carry out its demands to the best of his ability in order to serve others and, in so doing, to serve and please God.<sup>45</sup>

As these examples in the realm of ethics and workplace commitment are normally aligned to organisational interests, they also lie within a wider category of religious responses in society identified by Robert Audi as ‘secularly-aligned religious obligations’.<sup>46</sup> In other words, the religious beliefs produce actions and attitudes which would gain approval by the non-religious, regardless of the initial motivation which may therefore remain undisclosed.<sup>47</sup> In terms of the original proposition, such religious expression will not normally be expected to constitute a ‘problem’.

There are, however, two qualifications to add to this analysis. Firstly, it assumes that the organisation is itself practising organisational virtue (akin to civic virtue in Audi’s wider application to society). If this is not the case, then a dilemma may arise for those acting on religious belief. This dilemma is not of course necessarily exclusive to the religious employee but is likely to be particularly acute for him. A good illustration of this is the position of the ‘whistleblower’ who may feel obliged to act on his beliefs and report abuse of power, corruption or unlawful activities within the workplace. Secondly, it assumes that organisational virtue will generally travel in the same direction as religious virtue such that, at this level, there is unlikely to be a conflict. However, it remains possible that such a conflict may arise if the organisation conceptualises virtue in a very different way to the religious individual. The virtues of ‘respect’ and

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<sup>44</sup> D Jensen, *Responsive Labor: A theology of work* (Westminster John Knox Press 2006), 34 – 35.

<sup>45</sup> This is set out in some detail in Hardy, *The Fabric of This World*, 79 – 122.

<sup>46</sup> R Audi, *Religious Commitment and Secular Reason* (CUP 2000), 118.

<sup>47</sup> The potential synergies between corporate and religious values is discussed in M Bandsuch and G Cavanagh, ‘Integrating Spirituality into the Workplace: Theory and Practice’ (2005) 2 *Journal of Management, Spirituality and Religion* 221.

‘tolerance’ which might form part of a dignity at work policy or a wider ‘diversity’ approach have potential to create conflict for some religious employees who may be discouraged under this policy from speaking openly with others about their Christian faith, or offering advice on lifestyles, etc. This conflict is, however, most likely to emerge at a more overt level of religious expression, of the kind to be discussed in the next section. At the level discussed here it is difficult to envisage a conflict.

Thus, religious expression can be uncontroversial, where it is aligned with organisational virtues and where the specifically religious motivation remains internalised. Controversy is only likely to arise if the behaviour of managers or colleagues is contrary to the principles of organisational virtue – the resulting conflict is unlikely to be perceived as a specifically religious problem, however.<sup>48</sup> Religious expression is most likely to be potentially ‘a problem’ when it is both externalised and is identifiably religious in character.<sup>49</sup> Inevitably, given its potentially controversial nature, it is this aspect of religious expression which is of most interest in this chapter.

### **Acting on Religious Identity within the Workplace**

Actions within the workplace which are identifiably and overtly religious in character are potentially many and varied. Such actions, or forms of expression, will differ in the level of challenge that they pose to the employer, but all are potentially problematic. One way of categorising these overt forms of religious

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<sup>48</sup> See, for example, *Moore v Hartlepool B C* (2009) ET Case No. 2501537/09, where a tribunal found that ‘honesty’ had an ‘ethical’ rather than a specifically religious foundation in an unsuccessful claim by a Christian employee who argued that he had suffered religious discrimination because he had been asked to behave in a manner which he considered to be dishonest.

<sup>49</sup> Vickers identifies examples of explicitly religious expression which, because they are internalised do not cause any conflict; see Vickers, *Religious Freedom Religious Discrimination and the Workplace*, 98. Praying for co-workers (without their knowledge) would fall into this category.

expression is in terms of their effect on aspects of the employment contract.<sup>50</sup> Thus, religious expression can be identified in terms of requests for time off for religious devotions; implications for the company dress code; the effect of conscience in terms of a desire not to engage in a particular aspect of the job or workplace regime because it is considered distasteful, or even sinful; the desire to ‘witness’ to, or seek to convert co-workers; or to challenge their behaviour. Hambler uses a different approach to categorisation which focuses on the character of the form of expression. Thus identifiably ‘religious’ expression is manifest either ‘passively’, ‘negatively’, or ‘actively’, with the latter representing potentially the greatest challenge to the organisation.<sup>51</sup> Examples of ‘passive’ manifestation include the wearing of an Islamic headscarf, or a Christian cross or the decoration of workstations to form so-called ‘employee-created sacred space or altars’.<sup>52</sup> ‘Negative’ manifestation involves either, seeking to be absent from work at specified times (such as Sundays for mainstream Christian groups, and Saturdays for Jews and Seventh Day Adventists) in order to engage in collective religious devotion outside of the workplace, or seeking exemption from some aspects of a work role due to a conflict with religiously-inspired conscience. An example of ‘active’ manifestation would be proselytism, with a view to gaining converts, in the workplace.

An adapted version of this method of categorisation will be utilised in the analysis presented in the later chapters of this thesis.

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<sup>50</sup> For example, Vickers, *ibid.*

<sup>51</sup> A Hambler, ‘A Private Matter? Evolving approaches to the freedom to manifest religious convictions in the workplace’ (2008) 3 *Religion and Human Rights* 111. This framework was cited as a useful categorisation for understanding the manifestation of religion in a report for the Equality and Human Rights Commission (EHRC); see A Donald, *Religion or belief, equality and human rights in England and Wales* (EHRC Research Report no. 84, 2012), 60.

<sup>52</sup> J Montgomery, ‘A most delicate matter: religious issues and conflict in the US library workplace’ (2003) 23 *Library Management* 442, 427.

## **Acting on Religious Community within the Workplace**

The final element of Edge's typology to be applied to the workplace is the desire to act on membership of a religious community. This could manifest itself in terms of a wish for people with the same religious convictions to meet together on the workplace premises, perhaps at lunchtimes or after work, in order to engage in collective religious devotion or prayer, or to meet for mutual encouragement or outreach to others. In the United Kingdom, there is an organisation known as 'Christians at Work', which exists to support individuals and 'Christian fellowships' meeting in the UK workplaces. According to its website, 'there are over 100 workplace Christian Fellowship groups affiliated to [Christians at Work].'<sup>53</sup> On the basis that there are other non-affiliated groups, then it may be assumed that a number of Christians, at least, actively engage in a form of collective religious expression in the workplace. Similarly, Muslims, who are required individually by Islam to engage in short periods of daily prayer, may wish to do so 'in congregation'.<sup>54</sup> In these cases, there may be a consequent desire for the employer to provide some appropriate facilities to enable the collective religious activities to take place.<sup>55</sup>

### ***Religious Expression – a test of legitimacy***

Thus far, an initial attempt to categorise, in various ways, expression which might stake a claim to be considered 'religious' has been made. It is now necessary to consider the extent to which such claims should be accepted. The reason why this is necessary is because, as argued earlier, religious expression is both 'special', and therefore likely to claim privileges for itself, and potentially, at least in some forms, a problem (e.g. to employers). As a result, there is a strong case for seeking to draw the boundary lines as narrowly as possible as to what actually represents religious expression without becoming overly-

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<sup>53</sup> See <<<http://www.caw.uk.net/index.php>>>, accessed 1 June 2012.

<sup>54</sup> Muslim Council of Britain (MCB), *Muslims in the Workplace: A Good Practice Guide for Employers and Employees* (MCB/DTI 2005), 15.

<sup>55</sup> *ibid.*

exclusionary. This is clearly a delicate balance to be achieved and requires some tests to be formulated and applied to each instance of putative religious expression (and this will be particularly important for those forms of expression which are most likely to be controversial or problematic). The most significant of these tests is the widest of all – legitimacy. Legitimacy can of course be defined in various ways, but how it is formulated here is in terms of conveying a sense of validity. Can a particular form of expression make a valid claim to be considered ‘religious expression’? To make an assessment of validity, there is likely to be a requirement that there is some external standard for measurement.

The next stage of this analysis is thus devoted to exploring the legitimacy (with reference to external standards) with which an employee can in fact stake a claim that his particular form of expression is indeed ‘religious’ in nature.

### **‘Legitimate’ Religion**

A potential starting point is to consider the legitimacy of the particular religion itself which is being invoked as the basis of an act of expression. For example, the wearing of a headscarf-*hijab*<sup>56</sup> is a potential act of religious expression which invokes Islam. The initial question in determining legitimacy might therefore be to examine first the question, is Islam, upon which this act of putative religious expression relies, a legitimate religion? Here legitimacy is most likely to be defined in terms of ‘recognised’ or ‘worthy of recognition’ (by society). Having determined on this basis that, yes, Islam is in fact a legitimate religion, it would then be possible to progress to consider the particular form of religious expression which is associated by the employee with Islam to judge whether this form is indeed a valid (or legitimate) expression of Islam. In essence, this approach involves a two-stage test.<sup>57</sup> Most commentators do not follow a two-stage approach and go directly to the particular religious belief being expressed

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<sup>56</sup> Terminology used by D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart 2006).

<sup>57</sup> See for example, G Van Der Schyff, ‘The Legal Definition of Religion and It’s Application’ (2002) 119 S African LJ 228. The author envisages a two stage approach, in which establishing the presence of a religion is the first.

as their initial reference point.<sup>58</sup> This religious belief is then scrutinised in various ways to determine its legitimacy. This may indeed be the preferred approach in many legal jurisdictions. Nevertheless, it remains at least theoretically possible to seek an initial definition of religion as a first hurdle to be overcome prior to addressing the substantive issue of the particular way in which a consequent belief is being made manifest.

To identify whether this first hurdle has been crossed, requires therefore a consideration of how to recognise a legitimate religion. The attempt to define the essence of 'religion' has preoccupied academics from a number of fields and constructs have appeared from within a number of disciplines such as theology, philosophy, sociology, socio-economics and psychology.<sup>59</sup> Conceptualising religion itself therefore would be a complex and controversial enterprise and one beyond the scope of this dissertation. Fortunately, it is unnecessary for the purposes of the law and therefore this chapter. The need is not to define religion with a view to explaining it as a phenomenon but rather to define it descriptively for the purposes of being able to recognise it when it is engaged. This is potentially a more manageable exercise, though not without its difficulties.

For the purposes of seeking this kind of definition, it is submitted that there is, theoretically, an identifiable continuum. At one end, anything which a person sincerely believes and values, and claims this belief as a religion on whatever basis, could be regarded as such by society and, as a result, by the law.<sup>60</sup> This would be the most open and all-embracing definition. At the other end of the continuum, religion could be extremely tightly defined such that only certain (probably ancient) religions are recognised as legitimate (and in their orthodox forms).<sup>61</sup> Both of these approaches are problematic. The major problem with the

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<sup>58</sup> See, for example, Ahdar and Leigh, *Religious Freedom in the Liberal State*, 110 – 126.

<sup>59</sup> There is a chapter devoted to each of these disciplines in P Clarke and P Byrne, *Religion Defined and Explained* (MacMillan 1993).

<sup>60</sup> For example, in *United States v Kuch* 288 F Supp 439 (1968) an attempt was made to claim recognition for 'the Neo-American Church' (whose key 'sacramental' practice involved collective partaking of marijuana and LSD).

<sup>61</sup> This possibility is recognised by Ahdar and Leigh, *ibid.*, 111-112.

latter is its inflexibility. Inflexible fixed categories deny any protections to new (authentic) religions or, potentially, to new movements within religions. The major problem with the former is that it risks becoming so all inclusive that the term loses its significance. Clarke and Byrne highlight this with their modern American examples of devotion to baseball or playing the stock market.<sup>62</sup> If these are regarded as ‘religious’ then not only is the term trivialised but there can be no meaningful protections when all can claim religious rights on each and every pretext. An allied problem with the former is the possibility which is opened up for protection to be claimed for highly individualised forms of ‘spirituality’ (sometimes vaguely defined), again hugely widening the scope of protection.<sup>63</sup> A third problem is the difficulty which arises in attempting to gauge levels of sincerity.<sup>64</sup> Whilst this problem could arise in any event, it is particularly significant where sincerity is the only real test to be employed. Sincerity is an extremely important requirement and it will be considered in some detail later in this chapter.

Returning to the notional continuum, between the two polar opposites outlined above, there are a variety of ways of defining religion for descriptive purposes which seek in some way to limit the reach of the term whilst remaining generally inclusive. Clarke and Byrne provide a useful classification of the possible approaches to providing what they describe as an ‘operational’ definition of religion.<sup>65</sup> Firstly, they identify ‘experiential’ definitions which seek to identify some general type of experience which could be described as religious in nature, such as ‘a disposition which enables men to apprehend the infinite under

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<sup>62</sup> Clarke and Byrne, *Religion Defined and Explained*, 8.

<sup>63</sup> ‘Spirituality’ is an elastic concept which can encompass traditional religion (see the literature review in J Coyle, ‘Spirituality and health: towards a framework for exploring the relationship between spirituality and health’ (2002) 37 *Journal of Advanced Nursing* 589); but it can significantly depart from this as, for a ‘spiritual’ individual, ‘the God in whom his life revolves may be his work, physical activity or even himself’: see R Stroll, ‘Guidelines for Spiritual Assessment’, (1979) 79 *American Journal of Nursing* 1574, 1574.

<sup>64</sup> Van Der Schyff, ‘The Legal Definition of Religion and It’s Application’, 292.

<sup>65</sup> Clarke and Byrne, *Religion Defined and Explained*, 3-27.

different names and disguises.’<sup>66</sup> The experiential definition is perhaps worryingly close to the subjective approach already considered (as it relies to a large extent on individual perception) and, as such, is likely to be similarly flawed. Secondly, there is a substantive or content-based definition which considers the substance of the beliefs associated with a religion. Vickers considers that Tillich's famous definition of faith as ‘ultimate concern’ falls into this category,<sup>67</sup> although other content-based definitions are more explicit in making reference to man's awareness of a deity.<sup>68</sup> There is a third approach which looks at the function which ‘religion’ plays in people’s lives. Deep social or individual needs are identified and religion is the institutional medium by which these needs are met. Yinger amplifies this ‘functional’ definition:

Religion then can be defined as a system of beliefs and practices by means of which a group of people struggle with these ultimate problems of human life. It expresses their refusal to capitulate to death, to give up in the face of frustration, to allow hostility to tear apart their human aspirations.<sup>69</sup>

Another definition is based around Wittgenstein’s concept of ‘family resemblance’ which he famously applied in a discussion of ‘games’. Wittgenstein observed that it may not be possible to identify a feature or characteristic which is common to all games. Instead, he proposed that such games are connected instead by a series of observable similarities.<sup>70</sup> A number of writers have sought to apply this notion in the search for a definition of religion.<sup>71</sup> The starting point is usually to create a list of typical features of generally recognised religions against which the features of a putative religion can be compared. Audi appears to adopt such an approach in suggesting nine

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<sup>66</sup> F Mulleur, *Introduction to the Science of Religion* (Longman 1893) 13, as quoted by Clarke and Byrne, *ibid.*, 5.

<sup>67</sup> P Tillich, *The Dynamics of Faith* (Harper and Row 1957), 1; see also Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 16-22.

<sup>68</sup> Clarke and Byrne, *Religion Defined and Explained*, 6.

<sup>69</sup> J Yinger, *The Scientific Study of Religion* (Macmillan 1970), 7.

<sup>70</sup> L Wittgenstein, *Philosophical Investigations* (Blackwell 1953).

<sup>71</sup> One of the first was W Alston, ‘Religion’ in P Edwards (ed.) *The Encyclopedia of Philosophy* (vol. 7, Macmillan 1967), 140-5.

features which might assist in determining whether or not a religion is present: (1) belief in supernatural beings; (2) a distinction between sacred and profane objects; (3) ritual acts focused on those objects; (4) a moral code believed to be sanctioned by the god(s); (5) religious feelings of awe; (6) direct communication with the god(s), such as prayer; (7) a world view concerning the role of the individual in the universe; (8) a comprehensive approach to life based on the worldview; and (9) a collective organisation bound up with the latter.<sup>72</sup> Greenawalt adopts a similar set of criteria, explicitly based on observable commonalities between those religions which ‘virtually everyone’ would accept are religions (without the need to explain why).<sup>73</sup> Both Audi and Greenawalt stress that not all the features need to be present in order to establish that a legitimate religion is being described. This is of course crucial to the approach. It is how closely the features of a putative religion resemble at least some of these criteria that matters.

Notwithstanding the claims of the family resemblance approach, one of the most controversial issues historically in the search for a definition of religion is whether or not in fact theistic beliefs must be present for a religion to be so classified. Durkheim influentially thought not, given his observation that Buddhism, Taoism and Jainism, whilst in other ways performing the function of a religion and generally acknowledged as such, are non-theistic in character.<sup>74</sup> Other writers argue that if reference to the divine is not a necessary requirement for a religion then the term becomes vague and it becomes difficult in consequence to draw any meaningful distinctions between a system of beliefs

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<sup>72</sup> R. Audi, ‘Liberal Democracy and the Place of Religion in Politics’ in R Audi and N Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Rowman and Littlefield 1997), 5. Audi acknowledges that his list of categories builds on that presented in W. Alston, *Philosophy of Language* (Prentice-Hall 1964), 88.

<sup>73</sup> K Greenawalt, ‘Religion as a Concept in Constitutional Law’ (1984) 72 *California Law Review* 753, 767-768.

<sup>74</sup> E Durkheim, *The Elementary Forms of the Religious Life* (English trans., 2<sup>nd</sup> edn, Allen and Unwin 1976), 29-36.

and a religion.<sup>75</sup> For advocates of a functionalist approach this is not a difficulty – if a non-theistic belief system performs the social or individual role of a religion then it is better to classify it as such. Only this way could religion be seen to be a universal phenomenon.<sup>76</sup> This in turn elevates the importance of religion because ‘[s]omething fundamental to human life in society is being tackled by the theory of religion and not merely an institution important in some localities and epochs.’<sup>77</sup> It should be noted, however, that such a conclusion could only be possible from an entirely external perspective. Amongst those who accept the truth claims of a particular religion, many are likely to reject this purely functionalist premise as *per se* human-centred. Religion, for Christians, Jews and Muslims, for example, could be characterised rather as humankind’s obligation towards, or response to, the divine, and as such it is God-centred in the sense that God and not humankind is the initial reference point.

Thus, in addition to the extremes of exclusivity and inclusivity of definition initially outlined, law makers and judges have a range of intermediate approaches to draw on when seeking to identify whether or not a legitimate religion is being invoked. They can draw on experiential, substantive, functionalist or family-resemblance definitions, or some combination of these. The issue of whether or not a religion requires reference to a divine presence need only be of significance if, in a legal system, religion is privileged above some form of coherent philosophical framework for understanding life. Many legal jurisdictions may prefer to bracket the two together to create a joint classification of ‘religion and belief.’<sup>78</sup> This, *inter alia*, would sidestep the debate over, for example, the precise status of Buddhism – whether it is a religion or a similar philosophical belief becomes unimportant if it is to receive the same legal privileges in either case.<sup>79</sup>

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<sup>75</sup> M Spiro, ‘Religion: Problems of Definition and Explanation’ in M Banton (ed), *Anthropological Approaches to the Study of Religion* (Tavistock 1966), 85-126.

<sup>76</sup> See discussion in Clarke and Byrne, *Religion Defined and Explained*, 8-9.

<sup>77</sup> *ibid.*, 9.

<sup>78</sup> For example in the UK, under the Equality Act 2010 and, in Europe, Article 9 ECHR.

<sup>79</sup> See Vickers, *Freedom, Religious Discrimination and the Workplace*, 22.

## Legitimate religious expression

If the two-stage test is adopted, and the legitimacy of a religion is accepted, the second stage of the test will then take effect. This will involve an assessment of the legitimacy of the particular form of expression seeking to invoke the legitimate religion. Alternatively, if the two stage test is rejected, this is the initial point of inquiry. The question, in either case, can be stated thus, is the form of religious expression to be invoked ‘legitimate’ or not? It should be recalled that, in practice, this question is only likely to arise in relation to potentially contentious forms of religious expression.

Addressing this initial question involves encountering the same problem already considered when seeking to identify legitimate religion. Once again there is a continuum which, at one end, would allow individuals to express their religion in any way they wish, without any other form of legitimatisation; at the other end, would strictly recognise only certain forms of religious expression based on either an independent observation of how adherents of the major recognised religions choose to express their religious faith, or an interrogation of the sources of authority within each religion to determine what the religion requires (or desires) of its adherents. Between these two points, there may be some intermediary positions which seek, in different ways, to maintain a balance between the twin dangers of ‘under-inclusiveness’ and ‘over-inclusiveness’, with a recognition of the former as the worst evil.<sup>80</sup>

### *Individual Interpretation*

The problem with regarding as legitimate unrestrained individual expression ‘hooked on’ to a recognised religion is perhaps obvious. In a trenchant comment on the judgment in the Canadian case of *Syndicat Northcrest v Amselem*<sup>81</sup> Ogilvy notes the application in a property dispute of what she regards as just this approach – the only requirement the court imposed before recognising the

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<sup>80</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 110–115.

<sup>81</sup> [2004] 2 SCR 551.

legitimacy of the chosen ‘religious’ expression of a group of Orthodox Jews was sincerity of belief, or what she styles ‘a subjective sincerity in any self-concocted beliefs whatever’.<sup>82</sup> This decision avoided what the court thought undesirable – that it should be involved in any way in seeking to determine whether or not religious doctrine could be invoked in any particular case. Indeed this may be the advantage of allowing individuals (as long as they are sincere) to be the sole arbiters of the justice of their own forms of religious expression. Unfortunately there is a considerable disadvantage, as observed in an Australian case: ‘[t]he mantle of immunity would soon be in tatters if it were wrapped around beliefs, practices and observances of any kind whenever a group of adherents chose to call them a religion’.<sup>83</sup> In other words, the broader the view that is taken of what constitutes religious expression, the weaker the protection (or ‘immunity’) is likely, of necessity, to be.

#### *External Observation*

Another way of seeking to identify legitimate religious expression is through the study of adherents of recognised religions in order to identify types of religious expression which are common amongst adherents of those religions. This approach has been explicitly endorsed by Australian judges of the High Court:

There is no single characteristic which can be laid down as constituting a formalized legal criterion [for the recognition of religious practices] ... The most that can be done is to formulate the more important of the indicia or guidelines by reference to which that question falls to be answered. These indicia must, in the view we take, be derived from empirical observation of accepted religions.<sup>84</sup>

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<sup>82</sup> M Ogilvy, ‘And Then There Was One: Freedom of Religion in Canada – the Incredible Shrinking Concept’ (2008) 10 Ecc LJ 197, 200.

<sup>83</sup> *Church of the New Faith v Commissioner for Pay Roll Tax (Vic)* (1983) 154 CLR 120 (Judges Mason and Brennan).

<sup>84</sup> *ibid.*, 173 (Judges Wilson and Deane).

Some academic treatments of ‘religion in the workplace’ adopt a similar approach.<sup>85</sup>

Whereas this overall ‘external’ approach is useful, not least because it allows ready linkages to be made between religious and workplace practices, there are attendant disadvantages. Durkheim identifies the major problems with

... observing the complex religions which appear in the course of history. Every one of these is made up of such a variety of elements that it is very difficult to distinguish what is secondary from what is principal, the essential from the accessory.<sup>86</sup>

In other words there are two disadvantages to the observation-driven approach. Firstly, it fails to fully capture the complexity of different forms of religious expression and is therefore, at best, a rough and ready gauge, potentially unsuitable for application in complex cases in the court room or tribunal chamber. Secondly, it fails (or may fail) to distinguish between forms of expression which are primary to a religion and forms of expression which are secondary, or perhaps entirely unnecessary. Such information might be useful in an initial assessment of the cost to the religious employee of being prevented by an employer from engaging a particular form of religious expression in the workplace; being denied the right to wear a turban might, for the sake of argument, be more costly to a Sikh man than being denied the right to wear a headscarf might be to a Muslim woman – the observation approach would not assist in making that judgment.

### *Religion-led Approach*

A very different approach would involve a consideration of legitimate religious expression based on the requirements of the particular tenets or belief systems of the respective religion invoked. The great advantage of this approach is that it

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<sup>85</sup> For example, Hicks, *Religion and the Workplace*.

<sup>86</sup> Durkheim, *The Elementary Forms of the Religious Life*, 5.

allows not only the identification of legitimate practices but permits more nuanced distinctions to be explored. For example, Ahdar and Leigh identify three types of ‘conduct’ or expression – those which are respectively permitted, required or prohibited by a given religion.<sup>87</sup> Clearly absolute requirements or prohibitions are likely to be considered, from an external perspective, more fundamental to a religious adherent as opposed to that which simply permitted (in the sense of practices or conduct encouraged by a given religion, i.e. supererogation). Similarly, ECHR jurisprudence has identified a distinction between conduct ‘necessary’ to (i.e. explicitly mandated by) a religion and conduct which is ‘religiously-motivated’, with the former usually enjoying a degree of protection denied to the latter.<sup>88</sup> It is submitted here that it is only possible to make these kinds of distinctions satisfactorily with the aid of some form of analysis of belief systems themselves.

However, when such an analysis is applied, it would appear to yield some interesting results and indeed might call into question even the most seemingly well-established examples of religious expression. The debate on whether or not the wearing by Muslim women of a headscarf is mandated by Islam is well known – with a number of scholars denying that it is a tenet of the faith at all, but rather a voluntarily assumed practice.<sup>89</sup> Roman Catholic Christians claiming a religious obligation to wear a crucifix will find this deeply contested within the Christian tradition – some protestants regard the display of a crucifix (a visual image of God the Son) as breaking the second of the ten commandments and thus a grave sin.<sup>90</sup> Even the wearing of a turban by Sikh men has been contested as a religious obligation. This is on the basis that the actual requirement in Sikhism under the *Khalsa* (a ritual instituted by the last of the ten gurus of Sikhism) is for

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<sup>87</sup> See Ahdar and Leigh, *Religious Freedom in the Liberal State*, 156 – 159.

<sup>88</sup> Known as the ‘necessity test’ or the ‘Arrowsmith test’ after *Arrowsmith v United Kingdom* (1978) 3 EHRR 218; see discussion in Chapter 4.

<sup>89</sup> See S Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002), 94-100.

<sup>90</sup> This is an application of the Reformed (Calvinist) interpretation of Deuteronomy 5 v 8 (‘You shall not make you any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the waters beneath the earth’ (NKJV)).

hair to remain uncut not to be covered by a turban.<sup>91</sup> The turban in fact started life as simply the most practical way to achieve this.<sup>92</sup>

Thus it might appear that, under a religion-led approach to identifying legitimate forms of religious expression, there is danger of finding limited support for a number of forms of apparently religious expression in which a large number of followers of particular religions engage. It is submitted that this need not be the case. This problem only arises if the bases of religious belief are approached narrowly or selectively and a broader approach should provide a surer foundation for identifying legitimate forms of religious expression. Religious belief systems are in fact derived from a range of religious authorities. Audi is helpful in identifying such a range within the Judeo-Christian tradition, although also claims an application (in varying degrees) to other religious traditions. He identifies five sources:

(1) scripture; (2) non-scriptural religious authority, especially that of the clergy, but including the authority of the relevant community, such as the religion's theological community if there is one; (3) tradition, which may be quite authoritative, including as it does presumptions regarding one's religion's obligations and also habits that, whether or not they have a scriptural or theological endorsement, can have strong momentum in a community; (4) religious experience; and (5) natural theology ...<sup>93</sup>

Some of these categories may be problematic – above all 'religious experience' which, unless 'triangulated' by another source of authority runs the risk of creating precisely the kind of individualised religious expression already considered. This form of authority aside, Audi's inclusion of recognised 'secondary' forms of authority (akin to the writings of the Church Fathers, for example), and of well-established and widely shared (though not necessarily universal) religious tradition, is extremely helpful. Edge considers that English courts historically have shown a preference for drawing on well-established

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<sup>91</sup> Bedi, 'Debate: What is so Special About Religion?' 239.

<sup>92</sup> W McLeod, 'The Turban: Symbol of Sikh Identity', in P. Singh and N Barrier (eds.), *Sikh Identity: Continuity and Change* (Manohar 1999), 61.

<sup>93</sup> Audi, *Religious Commitment and Secular Reason*, 117.

textual authority (which he calls ‘the wisdom of the dead’), and, in more recent times, an increasing reliance on the contemporary practices of religious communities themselves.<sup>94</sup> Allowing additional sources of authority such as these would legitimise the Islamic headscarf, as representing a well-established religious tradition. The turban would be legitimised on the same basis, given that over time it has developed a deep symbolic importance crucial to the way in which many Sikhs understand their religious identity.<sup>95</sup> The wearing of a crucifix could perhaps also represent a well-established, if controversial, religious tradition, and might also derive authority from a secondary source; as Addison notes, the Seventh Ecumenical Council of 787 AD set out a Christian duty to venerate and display certain objects such as icons, statues and crosses.<sup>96</sup> What the religion-led approach might also do is indicate the contexts in which forms of religious expression might be regarded as legitimate. It is one thing to wear a crucifix on good authority and another to feel *obliged* to do this in the workplace – the religion-led approach would yield information as to why and when certain forms of religious expression are required by religious adherents.

Despite the merits of this approach, particularly in its broadest terms, there remain problems. Those who view religious practices as ‘frequently contested and subject to change’,<sup>97</sup> are unlikely to support an approach (heavily weighted towards ancient sources and historical traditions) which would appear to be hostile to recognising the legitimacy of innovation in religious practice. Secondly, and perhaps most significantly, a religion-led approach may require courts to involve themselves in some way in determining the requirements of religious doctrine. For many commentators this represents an unacceptable intrusion by the courts into an area beyond its legitimate scope.<sup>98</sup> Others,

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<sup>94</sup> P Edge, ‘Determining Religion in English Courts’ (2012) 1 *Oxford Journal of Law and Religion* 402, 409-411.

<sup>95</sup> McLeod, ‘The Turban’, 58-60.

<sup>96</sup> N Addison, *Religious Discrimination and Hatred Law* (Routledge Cavendish 2006), 72.

<sup>97</sup> B Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2<sup>nd</sup> edn., Macmillan 2000), 148. Parekh sees religion as a manifestation of culture (see discussion in Chapter 3).

<sup>98</sup> See, for example, Ahdar and Leigh, *Religious Freedom in the Liberal State*, 113.

however, appear to be more sanguine, pointing to the likely reliance on expert witnesses from within a particular religious tradition who would be (presumably) steeped in the knowledge and experience of the religious practices in question.<sup>99</sup>

### *The importance of sincerity*

Thus far, in this chapter a range of possible approaches towards recognising ‘legitimate’ religious beliefs and practices has been considered. Whatever the approach taken there is a hugely significant question which must also be addressed – is the individual sincere in the religious beliefs she holds? This question is clearly absolutely central if no other test of legitimacy is applied. However, it is also important in cases where religious beliefs and forms of expression are accepted as legitimate for doctrinal or historical reasons. It is one thing to invoke a belief, particularly if there is a perceived benefit in so doing; it is another to actually hold that belief with integrity. An investigation of sincerity should therefore greatly assist in separating ‘sham’ claims and claims based on genuine belief and practice. It is to this issue of sincerity - how to conceptualise and measure it - that this discussion will now turn.<sup>100</sup>

A helpful definition of ‘sincerity’ from a court’s perspective is that provided in *Amselem* as ‘imply[ing] an honesty of belief and the court’s role is to ensure a presently asserted belief is in good faith, neither fictitious nor capricious and that it is not an artifice.’<sup>101</sup> An individual’s ‘sincerity’ is generally framed as a question of fact for the court to determine.<sup>102</sup> As the court is therefore required to engage in some form of legal inquiry, it seems not inappropriate to refer to this as a ‘test’.

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<sup>99</sup> See, for example, Ogilvy, ‘And Then There Was One’.

<sup>100</sup> For a more detailed analysis see A Hambler, ‘Establishing sincerity in religion and belief claims: a question of consistency’ (2011) 13 Ecc LJ 146. The discussion in this section also draws heavily on that article.

<sup>101</sup> *Amselem* [52].

<sup>102</sup> *R (on the application of Williamson and others) v Secretary of State for Education and Employment and Others* [2005] UKHL 15 [22].

A test of sincerity can be criticised on an operational level as at best somewhat elusive in spite of judicial efforts to define it more clearly.<sup>103</sup> Indeed it may be so elusive that courts in the West have tended, as Ahdar and Leigh note, to accept all but the most patently fraudulent claims.<sup>104</sup> This being the case, and given its key role in differentiating between worthy and unworthy claims, there is surely merit in subjecting the issue of individual sincerity to greater levels of scrutiny with a view to developing a more consistent and robust approach which might be useful to both courts and, in modified terms, to those such as employers who might sometimes be required to take a view on whether or not a professed religious faith is genuine.

Sadurski, whilst rather sanguine about the need to do so, explores this issue from a judicial perspective and identifies three elements for measuring the sincerity of a claim for religious exemption:

- i. the conformity of this claim with the written or empirically verifiable traditions and proscriptions of the religion or the cult;
- ii. congruence between the professed religious tenets and one's actions; and
- iii. the willingness to undertake alternative duties and burdens, equally onerous but neutral from the point of view of that religion's proscriptions, etc.<sup>105</sup>

Unless applied at a very basic level indeed, the first element does look rather like a test of doctrine (in its loosest sense) which is surely, in reality, quite different from a sincerity test. The second and third elements are, however, more compelling. With regard to the third, certainly in the workplace, requiring that a religious employee makes some form of reciprocal 'sacrifice' in exchange for being excused from a particular task on religious grounds, might quickly reveal how far there is a genuinely held desire to abstain from that task. For example, a

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<sup>103</sup> Noonan points out some of the ambiguities between truth and sincerity in religious experience. For example, a religious truth can be believed to be literally true or metaphorically true – do both positions equate to 'sincere' belief? See J Noonan, 'How Sincere Do You Have to Be to Be Religious?' (1988) U Ill L Rev 713.

<sup>104</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 112.

<sup>105</sup> W Sadurski, *Moral Pluralism and Legal Neutrality* (Kluwer 1990), 174 (enumeration, mine).

Muslim factory worker might authenticate the genuineness of a request for time off for prayers on Friday afternoons by accepting a potentially unattractive Saturday evening shift as an alternative. However, not all occupations and not all religious beliefs lend themselves to such an easy trade off. The case of *Ahmad v Inner London Education Authority*,<sup>106</sup> for example, illustrates the difficulty of finding an appropriate time trade off in a profession with fixed hours such as that of a school teacher. In this case, Ahmad, a Muslim, wished to absent himself from the classroom on Friday afternoons for prayer – the only trade off which could be contemplated was the financially disadvantageous one of a reduction in wages to reflect the reduction in hours worked – and this was not acceptable to him. It is more problematic still to see how the principle of reciprocal sacrifice might work in cases where the right to wear a particular form of religious dress or adornment is the key claim.<sup>107</sup> The immediate difficulty would involve quantifying the ‘loss’ to another party (such as an employer) and the second very practical difficulty would lie in quantifying an appropriate means by which ‘compensation’ might be made for this loss.

Sadurski’s second element, however, appears to be potentially more all-embracing of the various ways in which individuals might manifest their religious beliefs. This element is very close, if applied systematically, to what might be termed ‘a consistency test’. In brief, this could be defined as a measure of how far the individual’s actions are in conformity with the religious belief or beliefs on which he is relying. This is potentially a very useful means of measuring sincerity as it relies on the congruence between belief and action,<sup>108</sup> and is worthy of fuller development.

It would seem that something very like a consistency ‘test’ was considered by the

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<sup>106</sup> [1976] 1 QB 36.

<sup>107</sup> Unless of course the sacrifice was of the job itself through resignation or willingness to accept dismissal – although this is more likely to be a final resort than a first option. See, more generally on this issue, P Jones, ‘Bearing the Consequences of Belief’ in R Goodwin and P Pettit (eds), *Contemporary Political Philosophy, An Anthology* (2<sup>nd</sup> edn., Blackwell 2006).

<sup>108</sup> This is by no means a new concept; see James 2 v 14: ‘What does it profit, my brethren, if someone says he has faith but does not have works? Can faith save him?’ (NKJV).

ECtHR in *Kosteki v the Former Yugoslav Republic*.<sup>109</sup> Kosteki (on two separate occasions) took a day's unauthorised absence at the expense of his employer, the Electric Company of Macedonia, during Muslim festivals. On both occasions he was fined by his employer as a disciplinary sanction. In a subsequent court case, the Bitola Municipal Court found that Kosteki had not provided evidence that he was a Muslim. His previous conduct weighed heavily with the court which noted that: he had never been absent from work during a Muslim holiday before a particular date; instead he had celebrated Christian holidays; his way of life suggested he was a Christian; and both his parents were Christians. The approach by the Court was challenged by Kosteki under Article 9. The ECtHR dismissed the case, and judged that a requirement to show evidence of allegiance to a particular faith was 'not unreasonable or disproportionate' and that it was within the scope of the margin of appreciation for member states to require this.

It should perhaps be noted at this point that there may be occasions where an individual appears to have acted inconsistently but where this may not necessarily be indicative of insincerity. Inconsistency may sometimes result from fear or other pressures;<sup>110</sup> an unconscious double standard rooted in an individual interpretation (or, to others, mis-interpretation) of religious doctrine;<sup>111</sup> or may be the natural effect of a very recent religious conversion or decision to take one's religion more seriously.<sup>112</sup> Thus, the test should be approached with caution and contextual factors fully explored. With appropriate provisos, however, it is submitted that a consistency test is nevertheless an extremely useful aid to determining sincerity in religion and belief claims.

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<sup>109</sup> [2006] ECHR 403.

<sup>110</sup> See *McClintock v Department for Constitutional Affairs* [2007] UKEAT 0223/07/3110, [2008] IRLR 29 where a Christian magistrate did not initially admit the religious basis for his objections to making same-sex adoption orders.

<sup>111</sup> As Lord Nicholls put it in *Williamson*, '[e]ach individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some.' [22].

<sup>112</sup> For a more general analysis of the shifting priorities which may be accorded to religious beliefs by individuals, see S Leader, 'Freedom and Futures: Personal Priorities, Institutional Demands and Freedom of Religion (2007) MLR 713.

## *The Nature of the Workplace*

The term workplace has been utilised in this chapter (and will be elsewhere in this thesis) in broad terms in order to be inclusive of a variety of forums (in the private, public, quasi-public and voluntary sectors) where people work under various different contractual arrangements, such as: employees (full time, part-time or fixed term), office-holders, self-employed contractors, casual workers and agency workers). There is a distinction which can be drawn, which is relevant to the analysis in this thesis, between public and private sector workers. It can be argued that public sector workers, perhaps particularly office-holders, because they carry out the functions of the Government (e.g. as judges, magistrates, registrars tax officials, etc.) could be said to ‘represent’ the state in ways that private sector workers clearly do not. If they represent the state then, under one argument, they should be more constrained in their religious expression, particularly if that form of religious expression might be perceived to have negative implications for particular communities, such as people of other religious faiths or gay and lesbian people, otherwise the impression may be given that the state is supportive of discriminatory conduct against particular social groups and the perceived neutrality of the services provided by Government would therefore be compromised. Such arguments will be considered in more detail when applied to the office of Registrar of Marriages in Chapter 5.<sup>113</sup>

As discussed in Chapter 1, the workplace in the United Kingdom is governed by employment law, many aspects of which have a wide reach beyond the ‘pure’ employment relationship to govern all worker-employer relationships (discrimination law is the most significant example of this). Most workers will also be bound by organisational internal policies and procedures, although these are often most detailed for employees (and may sometimes form part of the

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<sup>113</sup> A second distinction can be made between the two workplaces, given that the state is the ultimate employer in the public sector and so cannot absolve itself of responsibility for determining the questions of freedom of religious expression in the public sector workplace in the way in which it theoretically can in relation to the private sector (see the discussion of the ‘laissez-faire’ model in Chapter 3).

employment contract). Some public office holders will be bound by additional regulations of various kinds, such as a professional oath of office (for example in the case of judges or legislators). Members of professions will also be regulated by professional bodies, some of which have had authority conveyed upon them, by statutory instrument, to issue codes of conduct and other binding regulations on their members, and with the power to police these – the clearest example of this is the General Medical Council in the United Kingdom. This means that some groups of employees will be bound by two sets of ‘regulations’ – those applying to them by virtue of their specific professions, and those applying to them more generally in their capacity as employees of particular organisations.

### ***Conclusion***

Two central concerns have occupied this chapter. The first has been to seek to map out the various ways in which an individual might express his religious convictions and to consider the consequent effects, if any, on the workplace, and in particular other actors therein. It has been suggested that certain forms of religious expression, those which are overtly religious in nature, have the strongest potential to pose a ‘problem’, whilst not discounting the possibility that expression which is less overt and even identity and belief itself may, in some instances, lead to conflicts of some kind – although instances are likely to be rare. With this in mind, the focus of the next chapter will be concerned primarily with outward forms of manifestation of religion and the potential legal interest in regulating any resultant conflicts within the workplace.

In recognising the potential for conflict, the second part of this chapter was premised on the resulting desirability of seeking to limit any recognition of the right to expression of religious belief to situations where such belief can be considered ‘legitimate’. Whilst a measure of agreement can be found that only sincerely held-beliefs should be recognised (and it has been argued here that the consistency of individual conduct, with appropriate provisos, should be the key test to determine this), opinions differ on any further filters which should be applied. Those commentators supportive of religious rights are divided on this issue. Nevertheless, it is perhaps possible to identify two emergent positions.

Those who adopt a relativist approach to religion, for whom there is a blurring of boundaries between religion, belief and free expression (all of which are regarded as fluid), are most likely to be supportive of a form of ‘individual’ subjective understanding of legitimate religious expression. Those who adopt a more traditional approach to understanding religions as clear, bounded and (to some extent) complete systems governing the central questions of human life, may be attracted to the less individualised approaches, perhaps particularly the religion-led approach outlined here. For those with such a traditional interpretation of religion and its role, the individual-subjective approach is potentially dangerously reductionist. As Ogilvy warns, if

religion is reduced to the private personal beliefs of one person, provided a court finds that person's sincerity credible ... [then] in the face of an expanding state, a sceptical judiciary and an exceedingly hostile secularised society, in which all religious beliefs are treated as incredible ... religious belief will be reduced to whimsy.<sup>114</sup>

It is submitted that a religion-led approach to identifying legitimate forms of religious expression (such as that outlined earlier) is to be preferred and indeed will be the assumed method of characterisation of religious expression underlying the discussion in Chapter 3. This position can be justified as follows. Taking into account a range of recognised sources of religious beliefs, practices and traditions (such as those proposed by Audi) would help to prevent courts from taking an unduly narrow approach to identifying legitimate religious practices (which might follow, for example, from reliance on one source alone such as a sacred text). At the same time, limiting the range of reference points (albeit in a nuanced and generous way) would help to guard against an unattractive and ultimately unmanageable ‘free-for-all’ as individuals adopt the language of religion to refer to quite individualised ‘spiritual’ practices of various kinds. As has been seen, an indulgent over-inclusiveness risks widening any available legal protection unsustainably. More concerningly, as Ogilvy recognises, it risks trivialising religious expression in a way which might provide useful ammunition to those generally hostile to it. Why such hostility might arise

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<sup>114</sup> Ogilvy, ‘And Then There Was One’, 204.

will be considered in the next chapter when the discussion will turn from the consideration of the nature and legitimacy *per se* of forms of religious expression to the value placed on religious expression. It is thus an appropriate point to turn from the discussion of the nature and legitimacy of religious expression to the position taken in response to incidence of religious expression in the workplace by the other actors referred to by Ogilvy, and in particular the state. What, if any, interest might it have in supporting or suppressing religious expression? This is the subject of the next chapter.

## **Chapter 3: Restricting or Guaranteeing Religious Freedom in the Workplace: Legal Models**

### ***Introduction***

The purpose of this chapter is to consider the possible legal and policy approaches which might be taken within a modern liberal state towards the restriction or guarantee of religious freedom of expression in the workplace, ranging from a deliberate strategy of suppression of religious freedom to the provision of an absolute guarantee. Each model, taken individually, would represent respectively a surprisingly homogenous approach towards state intervention in respect of religious freedom in the workplace. In reality it is likely that a given state may, over time, rely on aspects drawn from several of these models and so a complex patchwork of approaches, some of which may be, at points, mutually contradictory, is likely to emerge. Nevertheless, there is value for analytical purposes in examining and critiquing each model individually.

In this chapter, six models of state approaches will first be presented and briefly described. Following this, each model will be considered individually in more detail to explore the respective underlying rationale and implications, and to offer a critique.

### ***The Six Models***

#### **I Exclusion**

Under the first model, the law acts specifically to exclude religious expression from the workplace. Within this overall approach, characterised by a desire to suppress, there are degrees of exclusion. Entirely exclusionary approaches - such as the imposition of a religious test to exclude absolutely workers who identify themselves as holding religious beliefs from entry into the workplace – would

usually be characterised as illiberal and are therefore likely to lie outside the parameters of this study.

In a liberal society, it is surely more likely as a general but not an absolute rule, that the focus would be less on workers' actual (or suspected) beliefs and more on the ways in which those beliefs find expression in the workplace (as discussed in the previous chapter) - here there might be possible justifications for imposing restrictions, for example, on particular forms of dress, or the right to follow conscience, or on workers to trying to influence others from a religious perspective.

## **II Support for a Preferred Historic Religion**

Under the second model, the law supports the expression of a preferred religion or religious denomination in the workplace. This religion may be the established religion, or historically the majority religion in a given State. For example, certain government offices or posts might be reserved for adherents of a particular religious faith. In Seventeenth Century England this was achieved through the Tests Acts of 1672 and 1678, which required that all public officeholders should take the oaths of allegiance to the Crown, and acknowledge royal supremacy over the Church, denounce transubstantiation and receive the sacrament of Holy Communion according to the rites of the Church of England. Thus, non-Anglicans were disbarred from all public office.<sup>1</sup> In a modern liberal state, preference for an historic religion is unlikely to involve such blatant discrimination against others. However, if examples of mild preferential treatment for a preferred historic religion continue to exist, this may result from a lingering desire to preserve its cultural value (or contribution to the national 'heritage').

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<sup>1</sup> Until the passage of the Sacramental Test Act 1828 and the Roman Catholic Relief Act 1829.

### III Laissez-faire

Under the third model, the state does not consider it has a sufficiently strong interest in supporting or restricting workplace religious expression. It allows employers to determine how much freedom to offer employees, and employees in turn can accept or reject those terms. This model is clearly applicable to private enterprises but its application to government workers is more problematic, given that the model gives discretion to employers to determine the level and forms of religious expression to be tolerated – the state as employer (rather than as legislator) would need to determine this for its own workers.

### IV ‘Islands of Exclusivity’

There is a tradition within Christianity of separation between ‘sacred’ work and ‘secular’ work.<sup>2</sup> It was based on an understanding of this binary division that the monastic movement developed in the fourth and fifth centuries, creating small communities of individuals, living working and worshipping together, having voluntarily accepted considerable restrictions on their liberty, including famously the vows of poverty, chastity and obedience.<sup>3</sup>

A modern state, preferring a secularised workplace, may wish to draw inspiration from this to legislate to provide ‘safe havens’ (or ‘islands of exclusivity’<sup>4</sup>) where groups of people with particular strong religious convictions could work together, their right to associate in this way protected by law, although how far this might extend is likely to be more controversial.

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<sup>2</sup> See I Benson, ‘Notes Towards a (Re) Definition of the “Secular”’ (2000) 33 *UBC Law Review* 519, for a discussion of both the origins of this distinction and the modern misuse of the same terminology.

<sup>3</sup> For a short account of the rise of the movement, see M Dunn, *The Emergence of Monasticism: From the Desert Fathers to the Early Middle Ages* (Blackwell 2003).

<sup>4</sup> A Esau, “‘Islands of Exclusivity’: Religious Organizations and Employment Discrimination’ (1999) 33 *UBC Law Review* 720.

## **V Protection for Religion**

Under this model, there is legal recognition for a right of religious expression in the workplace and a degree of corresponding protection, either through negative or positive means. Negative means might involve the employment of a basic form of anti-discrimination law preventing direct discrimination and possibly indirect discrimination.<sup>5</sup> Positive means might involve the creation of statutory rights which protect religious expression or the use of a more advanced form of anti-discrimination law preventing harassment and/or requiring the promotion of equality for religious employees in the workplace.<sup>6</sup> A variant of this model involves the widening of ‘religion’ to include ‘belief’ and thus offer equivalent protections to non-theistic belief systems in the same way as to theistic religions.

## **VI Protection for Minority Religions**

This model is a variant of the fifth model. Under this model however the focus is on protection for religious minorities and assumes that they are disadvantaged groups. Specifically protecting the religious traditions of these minority groups, in a variety of contexts, is considered desirable until such time as these groups are no longer perceived (by themselves or others) as suffering disadvantage. If and when such a point is reached, then any ‘special’ protections may be lifted.

## **Summary**

Each of the six models presented here rests upon the adoption of a number of assumptions and values within a modern state, although each can be traced to a particular principle. For the first, the principle is to ascribe most value to secularism. For the second, the principle is to value a particular religion either for its own sake or for its role in the national heritage. For the third, the principle is

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<sup>5</sup> So-called ‘second generation discrimination law’; see B Hepple, M Coussey and T Choudhury, *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart 2000).

<sup>6</sup> So-called ‘fourth generation discrimination law’, *ibid.*

the primacy in the workplace of freedom of contract. For the fourth, the principle is to make special accommodations for those out of step with the social and economic 'mainstream'. For the fifth, the principle is to ascribe (some form) of value to religious expression within the social and economic mainstream. For the sixth, a guarantee of freedom of religious expression is one means of correcting group disadvantage for members of minority groups. All of these principles require explanation and justification and are open to critique. This is the purpose of the rest of this chapter. The overall headings used when setting out the models will be employed a second time for ease.

### ***Exclusion***

As a general rule, it is religious expression rather than belief which is likely to be the target of any state interest in exclusion and this will be the primary area for discussion in this section. Nevertheless, the possibility was raised earlier that there is at least one example in a liberal society where exclusion of individuals from certain employment positions might be justified on the basis of belief rather than expression. This is on the grounds of national security where the religious belief in question is either considered subversive in its own right or a number of adherents of that religion are thought to be (or likely to be) engaged in activities which in some way are subversive of state interests. This possibility will be considered briefly now as a preface to the more substantive issue of religious expression.

### **Religious Belief**

The notion that individuals might be excluded from employment due to belief is most likely to be justified as a result of the perceived threat to the state that they pose. Thus, it is likely that the roles in question will be few in number and in areas where there is potential to do grave damage to the interests of the state. Such roles are therefore likely to encompass a restricted number of public appointments (such as officers of the security services, officials in the foreign office, the police, and members of the armed forces) and an even smaller number

of private sector roles (such as employees of government defence contractors or private security services commissioned by the government).

Prospective and current occupants of such roles might go through a ‘vetting procedure’ of some kind. The purpose of this vetting procedure will be to identify the potential threat (if any) that they pose. Such vetting in a modern liberal state will aim to ‘exclude the disloyal or those considered prone to disloyalty’ as opposed to ‘those who appear to lack the necessary impartial public stance.’<sup>7</sup> Nevertheless, it may be a difficult distinction, in practice, to identify.

It is unlikely that a vetting process would be aimed at the exclusion of employees with religious convictions *per se*. Nevertheless, this may be an indirect result of the process. Writing in 1994, Lustgarten and Leigh insightfully predicted that the list of those attitudes to be excluded with potential for subversion ‘could be extended in future (say) to views such as radical Muslim fundamentalism’.<sup>8</sup> Thus the link is established between religiously-motivated ideas which could be characterised as political and which have the potential to subvert the state. The logical conclusion therefore is that individuals with particular religious beliefs might qualify for exclusion through a vetting process.

Many people would consider that a strong case might exist for such exclusion where the national interest is threatened in some way, particularly if a terrorist threat is suspected. Nevertheless, it is perhaps worth considering in more detail exactly the basis on which an ‘exclusionary’ decision might be made following vetting. Lustgarten and Leigh provide the following examples of factors considered in the British so-called ‘Enhanced Positive Vetting’ process of the early 1990s. Not only did the process involve inquiries into the personal history of the individual but also details of relatives, contacts with individuals in

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<sup>7</sup> Lustgarten and Leigh, *In From the Cold*, 128.

<sup>8</sup> *ibid.*, 136.

‘suspect’ countries (then the communist and former communist nations of the east), and ‘all visits abroad since the age of 14.’<sup>9</sup>

Within such a regime, it is not difficult to see that the clear possibility might exist that an individual, entirely innocent of holding subversive beliefs, might be excluded from certain employment roles by virtue of an unfortunate, even unintended, association with someone less innocent. In *Home Office v Tariq*,<sup>10</sup> for example, the Home Office successfully appealed a Court of Appeal judgment in favour of a Muslim immigration officer who had his security clearance withdrawn on the grounds of national security when the Home Office learned that his brother and cousin were being investigated for alleged Islamic terrorist offences. The Home Office justified its stance on the basis that his ‘close association with individuals suspected of involvement in plans to mount terrorist attacks’ made Tariq ‘vulnerable to attempts to exert undue influence on [him] to abuse his position.’<sup>11</sup> In another example, a Muslim police officer who applied to join a protection unit for senior politicians was reportedly excluded from such employment because the imam at the Mosque which his family attended was suspected of links with a terrorist organisation.<sup>12</sup> The possibility of an ‘unfair’ outcome from such a vetting procedure, at times indirectly restrictive of those with a particular religious identity, will be magnified in proportion to the extent to which ‘subjective assessments of character, attitude, and risk’ are intrinsic to the vetting procedure employed.<sup>13</sup>

It should be noted from the argument presented thus far that outright exclusion of people with religious beliefs, however problematic in practice, can be justified in a liberal democracy only on the basis of genuine concerns for the security of the state or its citizens. There is, however, the further possibility, considered in Chapter 2, that public distaste, either real or imagined, for a particular religious

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<sup>9</sup> *ibid.*, 137.

<sup>10</sup> [2011] UKSC 35.

<sup>11</sup> *ibid.* [5].

<sup>12</sup> See Anon., ‘Muslim PC taken off Blair guard duties claims discrimination’ *London Evening Standard* (London, 7 November 2006) 5.

<sup>13</sup> Lustgarten and Leigh, *In From the Cold*, 137.

worldview to lead to the exclusion from certain workplace roles of adherents of that religion. Reconciling this within a liberal polity is likely, however, to be much more problematic.

### **Religious Expression: Rationale & Implications**

The discussion will now turn, from the relatively rare overt examples of exclusion because of religious belief from certain employment roles, to the more contested area of exclusion on the basis of religious expression.

The notion that the expression of religion or religious beliefs, verbally, through dress and grooming or through conscientious objection (as discussed in Chapter 2), might be excluded from the workplace at first glance appears somewhat illiberal and therefore requires early justification. In order to seek such justification it is necessary to apply, indirectly, a significant debate about the role of religion in public life. The essential question on which the debate rests is how far is it permissible for a person 'A' to offer reasons for courses of action which will restrict the liberty of another person 'B' which are based on the religious beliefs of A (which B does not share)? The reason the question is pressing is the desire to avoid the strife which might be caused within a pluralistic, liberal society based on conflicting religious and non-religious beliefs. Before the issue is elaborated, a *prima facie* rationale is clearly required as to why this debate, whilst relevant at a political level, should be relevant within the workplace. The justification is two-fold. Firstly, theorists from Rawls onwards explicitly include government officials as amongst those encompassed by their theories.<sup>14</sup> Greenawalt, for example, develops an illustration based on a dilemma experienced by a hypothetical tax official.<sup>15</sup> Secondly, other theorists, particularly those writing from a business ethics perspective, have developed an application of the issue to the workplace, which will be considered shortly.

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<sup>14</sup> J Rawls, *Political Liberalism* (Columbia University Press 1993), 252.

<sup>15</sup> K Greenawalt, *Private Consciences and Public Reasons* (OUP 1995), 31-32.

The debate will be presented in summary form here.<sup>16</sup> In broad terms there are two positions. Rawls is the most well-known exponent of the first theory (which will be referred to here as ‘the public reason requirement’)<sup>17</sup> although it is held, with significant variations in terminology and application, by a number of liberal political philosophers such as Audi,<sup>18</sup> Greenawalt,<sup>19</sup> Lamore,<sup>20</sup> Nagel<sup>21</sup> and Habermas.<sup>22</sup> The case for the public reason requirement will be summarised here and extended to the workplace.

Rawls believes that it is necessary when engaging in debate on what he calls ‘constitutional essentials’ to refrain from presenting arguments based on what he calls ‘comprehensive views’, a term embracing both religious and other worldviews and defined helpfully by Greenawalt as ‘overall perspectives that provide a (relatively) full account of moral responsibilities and fulfilling human lives.’<sup>23</sup> Constitutional essentials include not only the fundamental principles on which a particular political democracy rests, but also ‘equal basic rights and liberties of citizenship ... such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.’<sup>24</sup>

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<sup>16</sup> This section draws, in part, on Hamblen, ‘A No-Win Situation’.

<sup>17</sup> Rawls argument is first articulated in his book, *Political Liberalism*, 227-254; and then, with some revisions, in J Rawls, ‘The Idea of Public Reason Revisited’ (1997) 64 *University of Chicago Law Review* 765.

<sup>18</sup> Audi, *Religious Commitment and Secular Reason*.

<sup>19</sup> Greenawalt, *Private Consciences and Public Reasons*.

<sup>20</sup> C Lamore, *Patterns of Moral Complexity* (CUP 1987).

<sup>21</sup> T Nagel, *Equality and Partiality* (OUP 1991).

<sup>22</sup> For his current position, see J Habermas, ‘Religion in the Public Sphere’ (2006) 14 *European Journal of Philosophy* 1.

<sup>23</sup> Greenawalt, *Private Consciences and Public Reasons*, 5.

<sup>24</sup> Rawls, *Political Liberalism*, 227.

Rawls believes that on these issues (particularly if they involve the possibility of the coercion of others),<sup>25</sup> legislators and public office holders, as well as citizens who wish to exhibit ‘civic virtue’, have a duty of civility to employ arguments which rest on foundations which are accepted as legitimate by all ‘reasonable’ citizens. These foundations are rooted in a so-called ‘overlapping consensus’ of opinion between holders of various different comprehensive views, with a consensus emerging from a disciplined effort to identify those ‘values that the others can reasonably be expected to endorse’<sup>26</sup> within the area of overlap – public discussion based on anything else is *ultra vires* as it fails the test of ‘public reason’.

Rawls, later added a ‘proviso’ to his theory in which he accepted the legitimacy of ‘introducing at any time our comprehensive doctrine ... provided that in due course we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.’<sup>27</sup> Audi refers to his variant of the proviso as a ‘principle of secular rationale’ which imposes ‘a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless one has, or is willing to offer, adequate secular reason for this advocacy or support.’<sup>28</sup>

In other words, a religious individual may introduce arguments based on religious beliefs but is required to justify them absolutely according to the demands of public reason. The duty of civility is therefore breached if an individual introduces religious arguments which cannot be justified by another (very different) route. Audi goes further by introducing another precondition, his ‘principle of secular motivation’ which requires that not only must one offer adequate secular reasons but one must also be motivated by those reasons to the

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<sup>25</sup> Audi points out that ‘most laws and public policies do restrict human conduct to some extent and the more restrictive the laws or policies in question, the stronger the relevant obligation’, Audi, *Religious Commitment and Secular Reason*, 87–88.

<sup>26</sup> Rawls, *Political Liberalism*, 226.

<sup>27</sup> Rawls, ‘Public Reason Revisited’, 776.

<sup>28</sup> Audi, *Religious Commitment and Secular Reason*, 86.

extent that one would still advocate a particular course of action even if one's additional religious reasons were removed.<sup>29</sup>

Having set out the essence of the 'public reason' theory, it is now necessary to turn again to an application to workers. Firstly, as stated earlier, Rawls' theory is explicitly applied to public officials (above all judges) who must be guided in their decision-making and public pronouncements by the dictates of public reason. Secondly, as regards public sector workers more generally it is possible to conclude, with Pava, that '[a]lthough he does not state it in these terms, [Rawls'] theory suggests the common-sense view that political liberalism is possible to the extent that public institutions are ruled by public reasons only.'<sup>30</sup> Thus, those in positions of authority of various kinds in the public sector are also bound by the requirements of public reason in the execution of their duties. Thirdly, it is possible to see an application of the public reason requirement to workers in the private sector also, although this requires a slightly greater stretching of the theory. As Pava notes, although Rawls does identify social institutions within which actors are exempt from the requirements of public reason, the business organisation is not amongst these, but neither is the business organisation specifically cited as a public institution where a public reason requirement might be inferred.

A relevant argument has already been presented in support of the notion that the workplace is (to a certain extent) part of the public square, at least from the perspective of the religious employee.<sup>31</sup> From a secular perspective, such a conclusion may also be reached. Pava, although he allows the business organisation only 'quasi-public' status, notes that two key variables in a theory of liberalism are membership and power and that these concepts can also be applied to the workplace: '[m]ore often than not one is a member, in a broad sense of a corporation whether he likes or not, and one is subject to corporate power, even

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<sup>29</sup> *ibid.*, 96.

<sup>30</sup> M Pava, 'Religious Business Ethics and Political Liberalism: An Integrative Approach' (1998) 17 *Journal of Business Ethics* 1633, 1635.

<sup>31</sup> See discussion in this chapter (above).

if it is against one's will.<sup>32</sup> Just as leaving a given society to go to another one can be difficult and is certainly very costly, so too, argues Pava, can leaving a large corporation. To that extent it functions like a mini-society (with a 'mini-government') where workers are members and therefore owe corporate allegiance.

Thus, if Pava's argument is accepted, then it is possible to extend the theory so that workers in the private sector (or at least private corporations exhibiting some or all of the features considered above) are also covered by the requirements of public reason in the exercise of any authority they may have over others, because such 'corporate' power can be coercive of others in the same way as power exercised at a political level. This conclusion is apparently shared by Greenawalt, in respect of chief executive officers of organisations, although, frustratingly, he does not elaborate.<sup>33</sup>

Thus far it has been noted that, according to Rawls and others, public reasons must be offered in support of any actions which might lead to the coercion of others – for Audi, it is necessary to go further and have a personal commitment to these reasons as well – and that the theory can be applied to public office, the public sector and the private workplace. However, to demonstrate how it is possible to infer from this a case for legal suppression of religious expression in any or all of those three domains, it is necessary to take two further steps.

The first step is to deal with an obvious objection to this inference which is that Rawls in particular is explicitly clear that his public reason requirement is intended to impose 'a duty of civility' and not a legal obligation. Rawls himself would clearly oppose the use of his theory to create a legal rather than a moral obligation to employ public reason in the manner suggested here. However, the difficulty of relying merely on moral suasion is apparent if it is assumed that the problem to which Rawls proposes a solution (that of discord based on conflicting religious and non-religious world views in a pluralistic society or organisation) is

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<sup>32</sup> Pava, 'Religious Business Ethics and Political Liberalism', 1637.

<sup>33</sup> Greenawalt, *Private Consciences and Public Reasons*, 163.

so pressing as to require a greater imposition than mere reliance on the attractions of (what is held out to be) virtuous behaviour alone.<sup>34</sup> If a state was persuaded to such a view it might indeed seek to impose public reason, in some form, through legal as well as moral means.<sup>35</sup> Finding an overt legal mechanism to achieve this is likely to be very difficult, even impossible, without recourse to non-liberal means. This is not to say that the state might not be able to achieve this in more covert ways. The US Supreme Court has identified a concept in freedom of expression cases known as the ‘chilling effect’. At its most general, this concept refers to the recognition of ‘the potential deterrent effect [on freedom of expression] of a vague, or more commonly, an overbroad statute.’<sup>36</sup> By way of example, in *Dombrowski v Pfister*<sup>37</sup> the US Supreme Court identified that federal laws (against subversion activities) had been used to harass members of a civil rights organisation (through means including search and seizure and arrest without intention to prosecute); the operation of the anti-subversion statutes had in fact created a ‘chilling effect’ on the first amendment right of members of the organisation to freedom of expression. It should be noted that the chilling effect does not presuppose malign intent on behalf of law makers but rather it results from the inevitable imperfections in the legal system (and indeed may be an unforeseen consequence).<sup>38</sup> Nevertheless, it remains possible that a state (or some of the actors within a state) might actively seek to manufacture such a ‘chilling effect’, as a conscious and deliberate strategy, by framing or implementing law in such a way as to allow it to be used to suppress conduct incompatible with public reason.

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<sup>34</sup> In dissenting from this view, Wolterstorff points to the far greater incidence of conflict in the 20<sup>th</sup> Century arising from secular reasons or ideology, see N Wolterstorff, ‘Why We Should Reject What Liberalism Tells Us’ in P Weithman (ed.), *Religion and Contemporary Liberalism* (University of Notre Dame Press 1997), 167.

<sup>35</sup> The danger of the forcible imposition by the state of the ‘liberal’ ideal is identified in M McConnell, ‘Why is Religious Liberty the “First Freedom”?’ (2000) 21 *Cardozo Law Review* 1243, 1259.

<sup>36</sup> F Schauer, ‘Fear, Risk and the First Amendment: Unravelling the “Chilling Effect”’ (1978) 58 *Boston University Law Review* 685, 685.

<sup>37</sup> (1965) 380 U.S. 479.

<sup>38</sup> Schauer, ‘Fear, Risk and the First Amendment’, 688.

The second difficulty is reconciling a state-imposed public reason requirement with the notion that this would lead to the suppression of religious expression *per se*. Public reason applies to the words or actions of those exercising power, or seeking to exercise power, over others. It would therefore most obviously affect at least some forms of verbal religious expression, particularly the justification of decision making on the basis of religious reasons or the imposition of religious practices or opinions on others (particularly subordinates) in the workplace. However there are some forms of verbal expression of religion where a public reason argument would be more difficult to mount; in such cases it would be rather more difficult (though not impossible) to convincingly demonstrate that an employee was seeking to ‘exercise power’ over or otherwise constrain others. Examples in this category might include a member of staff who wishes to invoke God’s blessing when talking to clients or colleagues;<sup>39</sup> or a nurse who offers to ‘pray’ for an elderly patient.<sup>40</sup>

Moreover, public reason would not appear, at least at face value, to have anything to say about non-verbal religious expression such as dress, grooming or personal adornment (such as a member of staff at an airline wearing a small cross),<sup>41</sup> nor about negative manifestation of religious convictions through conscientious objection (such as a Muslim check-out assistant refusing to handle alcohol)<sup>42</sup> or for attendance at church services or religious festivals. This is in fact a likely conclusion for many as to the limits of the reach of a public reason requirement. However, there are strong arguments that the analysis need not be restricted to verbal expression: non-verbal religious expression is also considered

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<sup>39</sup> Reportedly forbidden for employees of Wandsworth Council; see the facts of *Amachree v Wandsworth BC* (2009) ET Case No. 2328606/2009 (discussed in Chapter 7).

<sup>40</sup> Caroline Petrie, an NHS bank nurse, was suspended for offering to pray for a patient; see C Gammell, “Thousands are at risk” in NHS after nurse in prayer row is suspended’ *The Daily Telegraph* (London, 4 February 2009) 9.

<sup>41</sup> Per the facts of *Eweida v British Airways* [2010] EWCA Civ 80, [2010] IRLR 322, discussed in Chapter 6.

<sup>42</sup> See D Foggo and C Thompson, ‘Muslim checkout staff get an alcohol opt-out clause’, *The Sunday Times* (London, 30 September 2007) 3.

by some to be capable of exercising power over others.<sup>43</sup> The most obvious example of this is the Islamic headscarf-*hijab*, or a more conservative variant of it such as the *burqua*, the wearing of which is sometimes perceived as capable of pressurising, even intimidating, other women of the same faith to conform to conservative Islamic values.<sup>44</sup> As such (under a public reason analysis) it is as potentially capable as verbal forms of religious expression, such as proselytism, of creating disharmony and discord in the workplace (as elsewhere).

Thus, the imposition of a public reason requirement could be a powerful stepping stone towards the suppression of many forms of religious expression, not merely verbal expression. Certainly, a number of secularists might seek to pursue, as a logical extension of the suppression of religious-based verbal expression in the workplace, the suppression of other forms of religious expression in pursuit of the (apparent) overall aim of harmony within a religiously plural society and organisation.

## **Critique**

There are significant objections to this position. The extension of the public reason requirement from a matter of voluntary restraint based on civility to a matter of legal enforcement would amount to an illiberal restraint on liberty and is firmly ruled out by Rawls.<sup>45</sup> Nevertheless, given the potential for reaching an illiberal position from the public reason approach (through overt or, perhaps more likely, covert means) it is necessary to consider a critique of the pillars on which the notion of a public reason requirement rests. Objections to the public reason requirement tend to cluster around three important points: firstly, the notion that there can be a ‘consensus’ around what is ‘reasonable’ is disputed; secondly, the potential incompatibility of the restraint imposed by public reason

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<sup>43</sup> See A Renteln, ‘Visual Religious Symbols and the Law’ (2004) 47 *American Behavioral Scientist* 1590. The author argues that a Western viewpoint often underplays the powerful significance of religious symbolism particularly to members of minority faiths.

<sup>44</sup> See discussion in Chapter 6.

<sup>45</sup> Rawls, ‘Public Reason Revisited’, 769.

and the idea of liberal democracy is highlighted; and thirdly, the issue of personal integrity is raised.

One of the most searing critiques of Rawls' theory is an essay by Paul Campos.<sup>46</sup> He is particularly effective in illuminating the apparent lack of a clear explanation as to what 'reasonable' means. Given that the theory of public reason requires a consensus about what can and what cannot be *reasonably* assumed to be a shared value then this is a significant gap. Campos thus opens up the fact that what is 'reasonable' may not necessarily be reached through the 'consensus' of 'reasonable people' with the apparent ease that Rawls, and others, seem to assume. Even if it were possible to identify such a 'reasonable consensus' it would not follow that religiously-minded people would necessarily be persuaded by the consequent duty of civility (an obligation to fellow-humans) to adhere to it. Religious people feel they have a higher calling (an obligation to God) which, if it were to conflict with a liberal duty of civility, may well be the over-riding motivation. After all, '[c]itizens have to live with their God and their consciences as well as the requirements of citizenship, and must harmonize the various moral demands as best they can.'<sup>47</sup>

Moreover, as Dworkin (in his later writings) observes, the objection may run deeper still. If people with religious convictions believe that non-believers are wilfully and stubbornly refusing to accept a revealed divine truth, then they may well ask the question, 'Why should they abandon the profound ambitions of their faith simply to satisfy those who persist in their stubbornness?'<sup>48</sup> To succumb would be less a duty of civility than an act of surrender to hostile pressure and is likely to be deeply unattractive.

Secondly, as Wolterstorff points out, there is an inherent tension in the idea that people whose primary motivations are drawn from deep religious conviction, should be constrained epistemologically from drawing on those motivations in

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<sup>46</sup> P Campos, 'Secular Fundamentalism' (1994) 94 Colum L Rev 1814.

<sup>47</sup> E Wolgast, 'The Demands of Public Reason' (1994) 94 Colum L Rev 1936, 1942.

<sup>48</sup> R Dworkin, *Is Democracy Possible Here?* (Princeton University Press 2006), 65.

public expression (particularly if the result of their argument would effectively be the same as that reached through a secular route, although Wolterstorff's overall argument does not rest on this point). To impose such a restraint on the religious person would, in a sense, violate a core principle of liberal democracy (at least as an 'idea') which 'implies the absence of any such restraint.'<sup>49</sup> As Trigg points out, '[a] restriction on the idea of public reason, confining it to what is generally acceptable, prejudices democratic debate before it has even begun. We cannot be told what cannot be discussed.'<sup>50</sup>

Eberle argues that each citizen should seek, diligently, to provide secular reasons when seeking to coerce others, but, if he or she cannot provide these, there is no impediment within a liberal society to placing reliance on a religious reason.<sup>51</sup> Habermas argues that religious citizens should try to consider their faith 'reflexively from the outside and to relate it to secular views' (what he calls the 'institutional translation proviso').<sup>52</sup> However, if they cannot find a secular 'translation' for their views, he agrees with Eberle that they should be allowed to express themselves using religious language (at least in 'the informal flows of public communication').<sup>53</sup> Indeed, if this were not permissible, a number of people who wish to make public statements drawn from their religious convictions but are unable to arrive, via a secular rationale, to the same statement would be disenfranchised as they would be unable to comply with the demands of public reason and so would lose their voice on an important issue.

However, it should be noted that Habermas does not extend his concession into the 'political public sphere and the formal proceedings within political bodies', for which 'translation' into non-religious terms is first required before arguments can be advanced.<sup>54</sup> For public officials then (and citizens who may wish to conform to the strict Rawlsian version of public reason), there must exist the

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<sup>49</sup> Wolterstorff, 'The Role of Religion in Decision and Discussion of Political Issues', 77.

<sup>50</sup> R Trigg, *Religion in Public Life: Must Faith Be Privatised?* (OUP 2007), 207.

<sup>51</sup> C Eberle, *Religious Convictions in Liberal Politics* (CUP 2002).

<sup>52</sup> Habermas, 'Religion in the Public Sphere', 10.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

constant requirement to maintain a dichotomy between their ‘secular’ public and ‘religious’ private selves,<sup>55</sup> - it is not hard to speculate on the possible psychological effects of trying to sustain long term such tension.

Thirdly, the requirements of public reason (per Rawls’ version) have been criticised on the basis that, to accommodate views motivated by religious convictions (or those based on other comprehensive views), a degree of deception is required to the extent that an individual is required to put forward these views resting on principles drawn from the overlapping consensus. The individual is not necessarily likely to be particularly committed to (or even personally persuaded by) these principles. Not only is this disingenuous, forcing religiously motivated people to carry ‘hidden agendas’, but it actually distorts the views being articulated as, arguably, ‘[o]ne’s reasons for holding a position are integral to the position itself.’<sup>56</sup>

In summary, there are sufficient objections to the notion of public reason to suggest that arguments drawn from these principles should not be used to seek to suppress religious expression in the workplace; to do so would actually represent a challenge to the very liberalism which the public reason requirement is said to support. However, there may be a qualification to this argument in respect of legislators and other public officials (both of whom are *inter alia* ‘workers’). Even those writers who are opposed in principle to a public reason requirement sometimes concede that it should apply in certain circumstances. For Chaplin, focussing on legislators, this occurs after deliberation has concluded (at which stage there should be no bar to religious argument) and at the point where decisions are taken and publicly justified.<sup>57</sup> Wolterstorff, focussing on the

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<sup>55</sup> S Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Basic Books 1993).

<sup>56</sup> Wolgast, ‘The Demands of Public Reason’, 1943. It should be noted that Audi’s principle of secular motivation (see above) resolves this issue of integrity but at a cost of further limiting the free speech of the religious individual.

<sup>57</sup> J Chaplin, ‘Law, Religion and Public Reasoning’ (2012) 1 OJLR 319, 336. This is in contrast to Habermas who would exclude religious argument even from the deliberative stage.

position of public officials, argues (indirectly) that it applies to the way they carry out their duties:

Accordingly, when people are functioning in the role of executive or judge, the question of whether they personally approve the laws and provisions never arises; a person is never asked, when functioning in either of these roles, for his personal opinion on the matter. Thus also the question of offering reasons from his religion for or against the legislation or constitution never arises. The role of the executive is only to administer and enforce, of judge, to adjudicate. If anyone in the role has moral or religious scruples against doing so, then, depending on how serious the scruples, he or she must get out of the role.<sup>58</sup>

Under this view, the public official is merely charged with implementation not moral reflection on the fundamentals of the policies he or she is required to implement. There is therefore no space for the voicing of objections. This is not to say that Wolterstorff does not accept and welcome the influence (which may be openly expressed) of religious ‘comprehensive views’ in areas where there may be discretion given to the public official. There is a critical literature on this subject in respect of North American judges and all current writers are broadly agreed that judicial opinion must at times find a basis outside of the boundaries of the usual legal materials and arguments.<sup>59</sup> Writers then differ as to what is acceptable as that basis and whether religious insights should be largely excluded.<sup>60</sup> This is not of course the real issue here where the issue of conscience is (almost axiomatically) outside the range of personal discretion. Within this context, Wolterstorff’s conclusion does seem bleak, at least in so far as the words ‘he or she must get out of the role’ are taken to mean permanent self-exclusion. An alternative approach might be temporary self-exclusion, through principled conscientious objection on religious grounds.

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<sup>58</sup> N Wolterstorff, ‘The Role of Religion in Decision and Discussion of Political Issues’ in Audi and Wolterstorff, *Religion in the Public Square*, 117.

<sup>59</sup> See, for example, R Dworkin, *Taking Rights Seriously* (Duckworth 1977), 68-71.

<sup>60</sup> Perhaps the most representative writers on the two sides of this particular debate are Greenwalt; see Greenwalt, *Private Consciences and Public Reasons*, and Carter; see, for example, S Carter, ‘The Religiously Devout Judge’, (1989) 64 *Notre Dame Law Review* 932.

## *Support for a Preferred (Historic) Religion*

### **Rationale & Implications**

The notion that the expression of one particular religion should be supported, whilst others are not, rests on the view that religious homogeneity is in the best interests of social stability. Where a measure of tolerance for people of different religious beliefs is permitted, it is likely that this would not extend to influential positions and public offices in society. This has certainly been the active view, with varying degrees of rigour in application, for the best part of the history of Western civilisation since the fall of the Roman Empire.<sup>61</sup> It is beyond the scope of this thesis to provide an in-depth treatment of different theological approaches historically to the right to religious freedom,<sup>62</sup> suffice to say that among all the major Christian groupings, with the exception of the anabaptists<sup>63</sup> and some of the later non-conformists, there has existed an intolerant attitude towards people holding other religious beliefs based on assorted scriptural texts, with particular emphasis on the parable of the wheat and the tares<sup>64</sup> and the great banquet.<sup>65</sup>

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<sup>61</sup> See for example, R Evans, *A Brief History of Heresy* (Blackwell 2003), in particular Chapter 5.

<sup>62</sup> For a detailed overview see Ahdar and Leigh, *Religious Freedom in the Liberal State*, 11 – 37.

<sup>63</sup> The first well considered theological arguments in favour of non-compulsion in religion (even for atheists) were penned by the Anabaptist, Balthasar Hubmaier in 1524 in his remarkable treatise, ‘Of Heretics and those who Burn them.’ By cruel irony, Hubmaier was himself burnt as a heretic on 10 March 1528. See W Estep, *The Anabaptist Story: An Introduction to Sixteenth Century Anabaptism* (3<sup>rd</sup> edn, William B Eerdmans 1996).

<sup>64</sup> Matthew 13: 24-30. This parable refers to ‘tares’ growing up amongst the wheat – the sower is advised not to uproot the tares lest he uproot some wheat at the same time. It is for the owner to perform this division at harvest time. Remarkably a passage identified by Hubmaier and others as a proof text for religious tolerance was read by Augustine and Aquinas as a justification for persecution if the tares are sufficiently distinct from the wheat, see P Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton University Press 2003).

<sup>65</sup> Luke 14 v 21 – 23, where the host instructs that people should be ‘compelled’ to come into the banquet (a metaphor for heaven).

Biblical arguments are also supported by a profound conviction historically that the fabric of society would be undermined by religious pluralism.<sup>66</sup>

## Critique

In modern liberal states the rationale supporting this position is no longer considered credible, given that '[a] distinctive, indeed for some the defining, feature of liberalism is its commitment to neutrality or impartiality between competing conceptions of what constitutes a good or worthwhile life.'<sup>67</sup> Arriving at this point in the Christian West has involved a gradual development with significant change arriving only with the advent of the Enlightenment and the work of John Locke amongst others.<sup>68</sup>

Nevertheless, all versions of liberalism in practice are imperfect.<sup>69</sup> Many societies, given their respective historical contexts, may come to a liberal position on the basis of a gradual evolution from something more restrictive of freedom and this may leave a cultural or institutional legacy. This legacy need not be a matter of regret; there may be, for example, positive benefits for the health of Western society which still arise from the impact of its specifically Christian heritage.<sup>70</sup> Some states may indeed retain an 'established' form of Christianity which enjoys some kind of preferential legal treatment over other religions, however trivial.<sup>71</sup> In these circumstances, it is possible that, in

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<sup>66</sup> C Cookson, *Regulating Religion: The Courts and the Free Exercise Clause* (OUP 2001).

<sup>67</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 42.

<sup>68</sup> In particular an essay in 1689; see J Locke, 'A Letter Concerning Toleration', *The Works of John Locke* (vol. 6, Scienta Verlag Aalen 1963). There was some significant theological work in this area prior to the enlightenment, chiefly by Sebastian Castellio (1515 – 1563); see Zagorin, *How the Idea of Religious Toleration Came to the West*, who devotes a whole chapter to the writings of Castellio, 93 – 144.

<sup>69</sup> Wolterstorff, 'The Role of Religion in Decision and Discussion of Political Issues'.

<sup>70</sup> See for example D Holloway, *Church and State in the New Millenium* (Harper Collins 2000).

<sup>71</sup> See Ahdar and Leigh, *Religious Freedom in the Liberal State*, for a discussion of 'Establishment' and some arguments in favour of retaining this arrangement where it exists, 75 – 84.

consequence of state actions, past or present, some or other form of preference, directly or indirectly, for particular religious beliefs may be institutionalised within certain workplaces, or within the wider socio-economic sphere. The structuring of work in Western states around the Christian calendar, with a rest day on a Sunday and a ‘shut-down’ period over Christmas, might be examples. Bradney, writing about the UK, surely describes these institutionalised arrangements accurately as ‘[v]estigial remnants of a largely Christian, Anglican past’.<sup>72</sup> ‘Vestigial remnants’ are likely to be ‘religiously benign’ at best, and so widely accepted by people with little religious affiliation as to represent national traditions rather than religious ‘norms’ – as such they are historic features of society rather than modern evidence of the imposition of a particular religious approach. Such a view is open to challenge, however.<sup>73</sup>

## *Laissez-faire*

### **Rationale & Implications**

Whilst the State may choose to operate state-run enterprises at arm’s length using artificially created market mechanisms, in reality a large part of the public sector is likely to operate as an administrative arm of the state. Thus, this model is likely to apply almost exclusively to the private sector. The model represents an outworking of a classical *laissez-faire* approach to managing the economy. Professor Richard Epstein is a helpful exponent of this view.<sup>74</sup> He argues that statutory interference in the labour market (and particularly regulation to outlaw discrimination) imposes indefensible costs on others and is thus an infringement of ‘ordinary liberties’.<sup>75</sup>

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<sup>72</sup> A Bradney, *Law and Faith in a Sceptical Age* (Routledge-Cavendish 2009), 1.

<sup>73</sup> See discussion later in this chapter.

<sup>74</sup> R Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press 1992). He extends his analysis to UK discrimination law in R Epstein, *Equal Opportunity or More Opportunity? The Good Thing about Discrimination* (Civitas 2002).

<sup>75</sup> *ibid.*, 4.

Epstein argues that laws preventing discrimination should be swept away leaving the common law to provide what little regulation is needed in the labour market which is chiefly around the enforcement of private contractual terms. He argues that the ability of the individual worker to resign and seek work elsewhere is the most powerful protection against the employer. Epstein acknowledges that a *laissez-faire* approach will allow employers to decide with whom to associate. There is therefore a risk of discrimination against certain groups occurring. For Epstein however this is not a problem. A decision to discriminate against certain groups may be rational (as in the case of age discrimination to which he devotes a full chapter in both of his books). Where it is irrational, Epstein follows Becker in suggesting that the market will eventually drive the discriminator out of business. In Becker's view, discrimination is a 'taste' for which employers decide they are prepared to pay.<sup>76</sup> This will impose additional costs as irrational discrimination will lead to a less productive workforce than would a 'merit'-based non-discriminatory approach. In the world of competition, the employer with a taste for discrimination, given the additional costs involved, will, eventually, be put out of business. That said, in organisations less constrained by market realities, Epstein for one is relaxed about allowing any kind of discrimination, including voluntary 'reverse discrimination', as a lesser evil than forced association.

Although Epstein draws most of his examples from discrimination grounds other than religion, he does draw explicit attention to one positive effect of his theory for religious organisations (those 'islands of exclusivity'). Under *laissez-faire* they are left alone to pursue employment practices as they see fit and presumably to take their chances with the market.

Market pressures tend to encourage non-discrimination. But there will be others - perhaps fundamentalist employers who want all workers to take part in morning prayers. Why should we be so confident of our judgement that we feel entitled to shut them down? There is a powerful degree of intolerance behind the

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<sup>76</sup> G Becker, *The Economics of Discrimination* (Chicago University Press, 1957).

wish to use force so freely. There is nothing glorious about using state power to prevent the continued existence and viability of fringe groups.<sup>77</sup>

If the absence of any kind of anti-discrimination law broadly favours employer discretion, albeit tempered by the threat of resignation by the unhappy employee, there is one way in which the argument is construed to benefit employees. Posner contends that the existence of discrimination law can militate against the hiring of members of a protected group because of the difficulties involved in later dismissing them or because of other costs associated with employing them.<sup>78</sup> Thus, anti-discrimination law incentivises employers to find covert means of directly discriminating against members of protected groups. Interestingly this argument may be less universally relevant to discrimination on the grounds of religion as religious affiliation, like sexual orientation, may not be immediately obvious to an interviewer unlike say sex, race or age.<sup>79</sup>

## Critique

There are a welter of objections to the thesis of Epstein and other neo-Classical economists, with probing questions about the reality of rational behaviour by both employers and consumers and the effect of imperfections in the market.<sup>80</sup> The strongest objection however, must be where Epstein's thesis is surely weakest and this is in its confidence in the employee's right to resign as a bulwark against the misuse of employer power. A number of commentators, writing in the industrial relations tradition, have provided strong arguments to illustrate that an imbalance of power exists between the individual employee and the employer and this imbalance is very much in favour of the employer.<sup>81</sup> No less a figure than the father of classical economics, Adam Smith, appears to

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<sup>77</sup> Epstein, *Equal Opportunity or More Opportunity?* 38.

<sup>78</sup> R Posner, *Economic Analysis of Law* (8th edn., Aspen Publishers 2011).

<sup>79</sup> P Elias, 'Religious and related discrimination' (2008) 175 EOR 16.

<sup>80</sup> See A Davies, *Perspectives on Labour Law* (2<sup>nd</sup> edn., CUP 2004) 118 – 123, for a summary of these.

<sup>81</sup> For a summary, see J Gennard and G Judge, *Managing Employment Relations* (5<sup>th</sup> edn., CIPD 2010), Chapter 2.

concur: ‘it is not difficult ... to see which of the two parties must, upon all occasions, have the advantage in the dispute and force the other into compliance with his terms.’<sup>82</sup> As Deakin points out (in reply to Epstein) ‘jobs are not always interchangeable, and searching for an alternative can be costly. Labour and skills cannot be stored, so that few employees can afford to be without employment for long.’<sup>83</sup>

This criticism is strongly relevant to the subject at hand. Other theorists who would not travel far with Epstein nevertheless find this measure of agreement with him that a person's freedom of religious expression is protected by the fact that he is free to resign if his work and religion become incompatible and that this protection is sufficient.<sup>84</sup> This is a controversial view, for essentially the same reasons advanced by Deakin, and has been subject to considered critique.<sup>85</sup>

### ***‘Islands of Exclusivity’***

#### **Rationale & Implications**

This model is based on the perceived desirability of permitting people with particular religious convictions to associate together to form workplace ‘communities’ to the exclusion of those with different convictions or no convictions. This might be seen as an attractive means of satisfying those who might feel that their own freedom of religious expression could only be fully realised within the company of the like-minded and, at the same time, by removing such people from mainstream employment, finding a solution to the

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<sup>82</sup> A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Book II, Nelson 1886), 26.

<sup>83</sup> S Deakin, ‘Equality, Non-discrimination, and the Labour Market: a Commentary on Richard Epstein’s critique of Anti-discrimination laws’, in Epstein *Equal Opportunity or More Opportunity?* 49.

<sup>84</sup> See A Bradney, *Religions, Rights and Laws* (Leicester University Press 1993). Vickers regards the right to resign positively as an important ‘residual right’, Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 52 – 53.

<sup>85</sup> For example, G Morris, ‘Fundamental Rights: Exclusion by Agreement?’ (2001) 30 Ind LJ 49.

‘problematic’ effects (if so perceived) of religious expression for other actors in the workplace. As a general principle, there are significant objections to this approach, particularly if it is seen as the only approach to accommodating religious expression. These will be considered shortly. Prior to this discussion, however, there are also some further issues to consider as to the circumstances in which these exclusive workplace communities might be permitted to exist and how this might be achieved.

It is submitted that it is possible to sub-categorise the principle governing the operation of these religious communities in three main ways. First, such ‘islands of exclusivity’ might be occupied solely by groups of individuals engaging in specifically religious work, intimately connected with the forms and worship, or promotion, of a respective religion – modern monasteries, a Cathedral, a theological seminary, or an organisation whose sole function is to distribute sacred texts - might be appropriate examples. This would be the closest match to the mediaeval Christian notion of a functioning religious community – the main purpose of all activity is spiritual, albeit that practical work might be encouraged as a means of fostering spiritual disciplines or achieving other religious goals.

Second, the occupants of such islands might also be engaged in work specifically inspired by their religious beliefs (and privately funded), such as a Hindu charity working towards poverty relief, or a pressure group whose purpose is to promote Christian values, or a private Islamic secondary school. Here the nature of the work is slightly different from the first model in the sense that it is religiously-motivated work as opposed to religious work *per se*.

Third, the islands might be populated by groups of workers with strong religious convictions who work together in organisational groups either to provide a ‘secular’ service, such as a Christian medical practice, a Roman Catholic adoption agency (both of which might draw on state funds) or a Church of England state-funded secondary school, or to provide goods and services to others (not necessarily of the same religion) for a profit, such as a Christian motor dealer or a Jewish law practice. Here the work (in terms of a constituent bundle of tasks) is neither religious in character nor directly religiously-

motivated; rather, it is the employees who are motivated by their religious convictions and believe that by choosing to infuse the way they approach their secular work with shared religious values, the work itself will be more successful and possibly more pleasing to God than it would be in the absence of those shared values.

In practical terms, for such ‘islands’ to function, they would need to be endowed with protections against the reach of some aspects of anti-discrimination law on the grounds of religion or other grounds (such as sex and sexual orientation). This could be achieved in one of two ways. First, these organisations could be given specific exemptions in discrimination law for their employment policies on the basis that a particular religious belief is an ‘occupational requirement’ for each employment position. In practice this would provide some useful protection but it may be problematic in that it would require the employer to establish a specific justification in respect of each employment position. For example, a Catholic school might be able to mount a strong claim for an occupational requirement that its Religious Education teacher should be a practising Roman Catholic (otherwise the religious ethos of the school would be undermined), but it may find difficulty in justifying as an occupational requirement that its laboratory technician should also be a practising Roman Catholic, however desirable this might seem to be. As a second and alternative approach the State could provide an ‘associational group rights exemption’<sup>86</sup> which would allow the religious employer, on whom this was bestowed, a general legal immunity from any discriminatory consequences of operating a religious test for employment or within employment. Under this regime, the example Roman Catholic school would be able to invoke an exemption to allow it to impose a religious test on applicants for all its posts, including both Religious Education teacher and laboratory technician.

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<sup>86</sup> Esau, *Islands of Exclusivity*.

## Critique

There are a number of potential objections to the ‘islands of exclusivity’ approach, both general and specific. In general terms, Esau notes the likely root of liberal objections to legal protections for religious groups who wish to remain exclusive:

The normative claim of the religious group that some characteristic or behaviour of a person should lead to their exclusion from the group, directly clashes with the normative claim of liberal society that such characteristics or behaviour should be treated as irrelevant and that such persons should be embraced rather than excluded.<sup>87</sup>

Esau’s point is that the liberal state tends towards inclusivity<sup>88</sup> and so has an innate discomfort with the idea of granting rights which embody the opposite principle. With this in mind, it might be assumed that a liberal state, whilst grudgingly recognising that there may be occasions where ‘islands of exclusivity’ may be justified, might seek to take a narrow rather than a broad construction of entitlement to inhabit such islands. Thus, an ‘occupational requirement’ as opposed to a general exemption approach is likely to be preferred, and, in terms of the taxonomy of religious groups presented earlier, the first category is likely to be the least objectionable to liberal sensibilities. Here, workers are all fully involved in explicitly religious activity and non-religious workers are unlikely to be able to fulfil the actual duties. The third category, on the other hand, is likely to be most objectionable, given that, as observed earlier, the respective bundles of tasks which form the actual work roles will be primarily non-religious in character. By that logic, secular work should not be withheld from potential workers on the basis of their religious beliefs (or sexual preferences) and an occupational requirement defence might be hard to mount.

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<sup>87</sup> *ibid.*, 736.

<sup>88</sup> Some writers in the liberal tradition however would restrict this inclusivity to those who share ‘liberal beliefs’; see discussion later in this chapter.

Esau counters this view by suggesting that it assumes an ‘*instrumental*’ view of employment [where] a person is given a defined task to do and the duty of the employee is to do that task and no more.’<sup>89</sup> For Esau, an ‘*organic*’ view of employment is more characteristic of religious organisations; under this model, ‘the employee is expected to participate in the mission of the organisation as a whole, and is expected to join the whole community, the whole body, in a way that transcends any narrowly defined job description.’<sup>90</sup> Esau’s point is a powerful one as it provides a stronger justification for a broad approach to island-dwelling. His organic approach to employment, as representing commitment beyond merely the wage-effort bargain, finds considerable support amongst those modern management theorists with a concern for the so-called ‘psychological contract’ which is said to apply in a range of employment contexts, not simply religious ones.<sup>91</sup> The psychological contract is a metaphor for the various expectations of employer and employee about their mutual commitment, which overlay the instrumental requirements of the strictly legal contract, and are of greater overall significance for both parties.<sup>92</sup>

There are two further objections to the ‘islands of exclusivity’ approach from a very different perspective. The model as described here could either serve as the only platform for workers to express their religious beliefs in the workplace (where there is no protection or even state hostility to protection in mainstream employment), or as one part of a broader approach to offering protections to religious workers. If it were the former, then religious workers would suffer both marginalisation into their own work ‘ghettos’ and total exclusion from a range of occupations (including the entire range of public sector job roles). Moreover, those religious workers who perceive the secular workplace as a ‘mission field’<sup>93</sup> would object, on religious grounds, to being denied access to it.

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<sup>89</sup> Esau, *Islands of exclusivity*, 734.

<sup>90</sup> *ibid.*

<sup>91</sup> D Rousseau, *Psychological Contract in Organizations: Understanding Written and Unwritten Agreements* (Sage 1996).

<sup>92</sup> J Bratton and J Gold, *Human Resource Management Theory and Practice* (3<sup>rd</sup> edn., Palgrave-Macmillan 2003), 13.

<sup>93</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 301.

The second objection is that the ‘islands of exclusivity’ approach is that special protection by the State might in some way compromise the integrity of the religious workers themselves and their organisations:

... exemptions may lull religious organisations into an idolatrous relationship with the government because religion has been bought off with beneficial exemptions to “adverse” policy so as to dull the prophetic role that religious organizations arguably ought to play in the public square.<sup>94</sup>

In summary, the ‘islands of exclusivity’ approach is controversial. It may well convey benefits, but only (to avoid the creation of religious ghettos) if pursued alongside other approaches within mainstream employment.

## ***Protection for Religion***

### **Rationale**

The notion that religious expression in the workplace is worthy of protection is entirely dependent on the value ascribed within a particular society to that right, therefore the various arguments in support of a right of religious expression in the workplace require elucidation here in order to provide a rationale. The nature and extent of these protections is a consequent ‘implication’ which will be considered separately, before a critique is considered. Prior to this, it is perhaps helpful to emphasise that the protection envisaged in this section is for the manifestation and expression of religious beliefs and identity. The protection attaches to the individual rather than the beliefs that he is seeking to articulate or act on. Thus, the kind of protection under discussion is not for ‘religious feeling’ (i.e. that an individual’s beliefs should be immune from criticism or even mockery)<sup>95</sup> but for religious expression.<sup>96</sup>

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<sup>94</sup> Esau, *Islands of Exclusivity*, 825.

<sup>95</sup> Albeit that there may be a degree of such protection within the workplace if ‘harassment’ law is drafted in a way to be inclusive of offence on the grounds of religion – see Chapter 4.

The idea that any human characteristic or activity should be valued by others must have an underlying basis. There is however a critical question as to whether it is possible to identify this ultimate rationale. For people with religious convictions, there is no difficulty. The Judeo-Christian view of human worth, for example, is based on the notion that men and women are made in the image of God<sup>97</sup> (often referred to as the *imago dei*).<sup>98</sup> As a consequence, they are also essentially equal in their humanity.<sup>99</sup> In Islam, as another example, there similarly exists an elevated concept of human worth due to the belief that there rests a divine spark (sometimes known as the *taqwa* or *hidaya*) within each human which supplies the ultimate source of moral guidance (or conscience).<sup>100</sup>

Others search for an underlying foundation without reference to a divine Creator but rather on the basis that human beings are afforded a high level of importance by virtue of their humanity itself. For some, this can find adequate foundation on the Kantian notion that human beings are special on the basis of their capacity for rational thought and as such should be treated individually as an ‘end’ rather than a ‘means’.<sup>101</sup> Others choose not to probe too deeply for fear that this would reveal the lack of an ultimately satisfying rationale.<sup>102</sup> Others are more sanguine;

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<sup>96</sup> For the case against extending protection to religious feelings (except in extreme cases), see R Ahdar, 'The Right to Protection of Religious Feelings' (2009) 11 *The Otago Law Review* 629.

<sup>97</sup> See Genesis 1 v 27: 'So God created man in His own image; in the image of God He created him; male and female He created them.' (NKJV).

<sup>98</sup> See N Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press 2008), 342-373, for an extended and nuanced treatment of the *Imago Dei* concept.

<sup>99</sup> A key biblical text is Galatians 3 v 28: 'There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.' (NKJV).

<sup>100</sup> I Oh, *The rights of God: Islam, human rights, and comparative ethics* (Georgetown University Press 2007), 28.

<sup>101</sup> See D Meyerson, *Rights Limited* (Rustica Press 1997), 12-13

<sup>102</sup> J Waldron, *God, Locke and Equality: The Christian Foundations in Locke's Political Thought* (CUP 2002). Waldron notes that some secularists outside of the modernist tradition, such as 'various Nietzscheans or radical Freudians' pose that exact challenge, 239. See also the discussion on the effects of post-modernism in Trigg, *Religion in Public Life*, 193-208.

for them, the attempt to find the ultimate foundation is either futile or unnecessary and so they do not attempt it.<sup>103</sup>

Essentially, whether or not an ultimate rationale is established, human worth translates into three concepts on which rights theories are usually based: equality, dignity and autonomy. These three concepts are to a large extent interlocked<sup>104</sup> and the boundaries between them may not always be apparent. ‘Equality’ is the oldest concept, with its foundation in the Aristotelian ideal of treating likes alike and which has subsequently broadened to encompass also the notions of equal opportunity and substantive equality.<sup>105</sup> ‘Dignity’ as a concept has developed subsequently and some theorists make a direct *a fortiori* link from equality. Dworkin, for example, writes that there is ‘a natural right of all men and women to equality of concern and respect, a right they possess ... simply as human beings with the capacity to make plans and give justice.’<sup>106</sup>

It is of course possible to reverse the direction of travel and see dignity as the foundational concept. One consequence of human dignity would be of course the need for equality of treatment, and indeed dignity may have a softening effect on the manifestation of equality (compared to the conception of equality which might result from rationality, the alternative foundation).<sup>107</sup> For example, the introduction of dignity into the equality equation might require a ‘levelling up’ in situations of inequality rather than a ‘levelling down’ which might equally result from equality as rationality.<sup>108</sup>

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<sup>103</sup> See, for example, B Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity 2001), 126.

<sup>104</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*.

<sup>105</sup> S Fredman, *Discrimination Law* (2<sup>nd</sup> edn., OUP 2011), 4–32.

<sup>106</sup> Dworkin, *Taking Rights Seriously*, 182.

<sup>107</sup> Fredman, *Discrimination Law*.

<sup>108</sup> *ibid.*, 21.

‘Dignity’ however, is a complex concept. Although it may mark a recognition of the need to ‘protect the special status and integrity of the species’,<sup>109</sup> the substantial content of ‘dignity’ beyond this recognition may be hard to precisely capture.<sup>110</sup> One helpful approach is provided by Feldman who presents human dignity as a multi-layered concept with an application at a ‘species’ level; at a group level; and at an individual level.<sup>111</sup> When considered at an individual level, Feldman draws a dichotomy between ‘objective’ and ‘subjective’ dignity. Objective dignity derives from characteristics which are unrelated to personal effort or endeavour – they are in a sense the immutable characteristics of humanity (although Feldman does not use this terminology). Drawing on Feldman’s overall analysis, religious expression can find a basis for protection at both a group and at an individual level. At a group level, such a conception of dignity would allow religious groups ‘to assert a right to respect for their existence and at least some of their traditions which is at least equal to that of other groups’.<sup>112</sup> At an individual level, dignity requires that people ‘be treated in particular ways which advance or do not unduly interfere with the acquisition or maintenance of whatever respect, self-respect, characteristics or bearing or behaviour ... [including] physical or moral integrity.’<sup>113</sup> The notion that ‘moral integrity’ is protected by ‘dignity’ provides a powerful platform for respecting the individual’s right to religious expression in many fora, including, potentially, the workplace.

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<sup>109</sup> D Feldman, ‘Human dignity as a legal value: Part 1’ (1999) Winter *Public Law* 682, 684. See also McCrudden who, in a discussion of the uses of the dignity concept in human rights legal discourse, argues that there is an acceptance that human beings have some intrinsic worth, that this is worthy of respect by others, and that the state should exist for the benefit of the individual; beyond this ‘minimum core’ definition, however, there is no consensus: C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655.

<sup>110</sup> D Reaume, ‘Discrimination and Dignity (2002-2003) 63 *Louisiana Law Review* 645, 646.

<sup>111</sup> Feldman, ‘Human dignity as a legal value’, 684

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*, 686.

The notion of autonomy in liberal political thought recognises the right of individuals to make choices and to develop and pursue their own version of the good life.<sup>114</sup> Clearly there is a large area of overlap with the notion of dignity, but the emphasis here is on valuing and protecting the decisions and choices made by individuals. To be worthy of protection, such decisions and choices need concern matters of fundamental importance to an individual's view of the world and version of the good<sup>115</sup> (lest such a large range of human 'choices' be protected that the truly special and distinctive things are 'swamped' by the general, or indeed the 'process' of choice itself)<sup>116</sup> – expressions of religious faith would, however, undoubtedly qualify.

It should perhaps be noted at this point that it is possible to advance the case for protecting religious expression based on principles unrelated to equality, dignity or autonomy. Vickers for example, argues that protection may also be extended in order to promote 'social [and presumably organisational] cohesion', 'conflict resolution and social inclusion' and in response to the 'aesthetic' value of religious expression.<sup>117</sup> Ahdar and Leigh note that a case could be mounted for protecting religious expression on the basis that religious people are likely to display personally, and perhaps help to advance generally, 'civic virtue' (which could also be translated into organisational virtue).<sup>118</sup> It is accepted that these might provide useful secondary arguments in favour of supporting religious expression in the workplace. The argument based on the value of social cohesion might in particular be a powerful one in certain social contexts, where religious identity is a particular and enduring source of antagonism, such as Northern Ireland. However, it is hard to see how this and other arguments can compete at a principled level with arguments based on the powerful concepts discussed earlier and which form the focus for the discussion below.

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<sup>114</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 58.

<sup>115</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*.

<sup>116</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 63 – 64.

<sup>117</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 33 – 36.

<sup>118</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 56 – 57.

## Implications

If religious expression is given high status for its role in promoting the dignity, equality and autonomy of individuals, then there is a compelling case for the right to religious expression to be protected in a variety of fora and this is very likely to include the workplace.

As noted earlier, such protection could take two forms – either creating positive ‘rights’ for religious expression, or creating ‘negative’ protections against discrimination. A combination of these two approaches is possible. Within either approach it is likely that there will be some mechanism required to deal with any clashes with other claimants to rights in the workplace. One such clash may be between sexual orientation rights and religious rights.<sup>119</sup> Employers may also have contractual rights which may conflict with religious expression.<sup>120</sup> A mechanism for addressing these issues might create a clear hierarchy of rights, where one right is clearly identified as subordinate to another; or it might involve the emergence of a judicial formula or approach involving the balancing of one set of rights against another to determine which has the strongest claim in any given circumstances.

## Critique

A number of critics question the importance of religious expression on the basis that religious identity is a mutable characteristic. People can opt to change religion and in this sense it is a matter of personal choice (autonomy) and levels of commitment can be ‘flexed’ accordingly. This reduces its status as an inalienable right deserving of a full measure of dignity which most properly

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<sup>119</sup> See I Leigh, ‘Hatred, Sexual Orientation, Free Speech and Religious Liberty’ (2009) 10 *Ecc LJ* 337; and I Leigh, ‘Homophobic Speech, Equality Denial, and Religious Expression’ in I Hare and J Weinstein (eds.), *Extreme Speech and Democracy* (OUP 2009).

<sup>120</sup> See Hambler, ‘A Private Matter?’

belongs to immutable characteristics, such as race and sex.<sup>121</sup> Under this analysis, religious expression may be accorded some value but it is subordinate to a range of other rights which are deserving of 'objective' dignity.

The counter argument is in four parts. Firstly, it is possible to deconstruct the concept of immutability. For example, whereas 'race' might appear an obvious contender for the status of an immutable characteristic, it has been argued that racial characteristics owe more to social context than physiology and so cannot really be described as immutable.<sup>122</sup> Unfortunately, as the same reasoning cannot realistically be applied to sex,<sup>123</sup> age and disability, this argument may serve more to cast doubt on the place of race in a potential hierarchy of rights than to fully undermine the concept of immutability itself.

Secondly, the apparent mutability of religious belief may be questioned on observational grounds, given that a very large proportion of people with religious affiliations do not in fact change those affiliations over their lifetime.<sup>124</sup> However, the fact that there plainly are conversions from one religion to another (however exceptional) does somewhat undermine this argument. Moreover, some argue that individuals do exercise choice in the degree of dedication with which they pursue their religious convictions and this in turn may change over time.<sup>125</sup>

Thirdly, the notion that religious identity is mutable can also be challenged by those who believe these 'choices' are predetermined and thus choice in any meaningful sense is excluded. There are those who argue this case from a religious perspective on the basis that they have been compelled to faith by God and not by their own free will.<sup>126</sup> This is for example the position held by

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<sup>121</sup> Vickers sets out the basic principles of this argument; see Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 30 – 31.

<sup>122</sup> See Fredman, *Discrimination Law* 50-51.

<sup>123</sup> *ibid.*, 131-132. Fredman does argue that trans-sexualism points to the essential mutability of sex as a characteristic.

<sup>124</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*.

<sup>125</sup> Leader, 'Freedom and Futures'.

<sup>126</sup> K Greenawalt, 'The Significance of Conscience' (2010) 47 *San Diego Law Review* 901, 916.

Christians in the Calvinist tradition. Some argue this case using secular reasoning from a biological-environmental perspective.<sup>127</sup> Others point to the importance of socialisation and culture in forming religious beliefs.<sup>128</sup>

The fourth and surely strongest counter-argument is to question the importance of mutability *per se*. As discussed earlier, autonomy is considered to be a significant value, informing an individual's identity and self-respect, and this is given effect through choice over the fundamentals of life.<sup>129</sup> From the religious adherent's point of view this ultimate choice is about something more significant still, beyond the normative values of self-respect and identity, as it involves a decision relating to both an objective reality of universal significance<sup>130</sup> (God and his claims on humankind), and a personal and urgent concern for 'the state of one's soul'.<sup>131</sup> In a sense there is less of a choice than an acceptance of an individual's obligation or duty towards God under conviction of conscience.<sup>132</sup> Many secular liberals have great difficulty in acknowledging that religious beliefs have this level of 'transcendent importance'<sup>133</sup> and prefer to value them as equivalent to 'other and deep genuine commitments'.<sup>134</sup> Although this may be held to reflect a limited willingness to imaginatively enter into the worldview of someone with deep religious convictions, for the purposes of this particular argument both the religious adherent and the secular liberal may be able to arrive at a similar conclusion (albeit perhaps the one more enthusiastically than the other). That is that there is no obvious reason why the result of a fundamental

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<sup>127</sup> See, for a discussion on this point, Edge, 'Religious rights and choice'.

<sup>128</sup> This view can also be held in a moderate form, see P Jones, 'Bearing the Consequences of Belief' in R Goodwin and P Pettit, *Contemporary Political Philosophy, An Anthology* (2<sup>nd</sup> edn., Blackwell 2006), 610. Jones points to the complications in establishing the link between socialisation and belief – as he notes the degree of 'choice' involved may depend upon circumstances, individuals and the belief system itself.

<sup>129</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*.

<sup>130</sup> Trigg, *Free to Believe?* 203.

<sup>131</sup> P Diamond, 'Religion or belief: the right to be wrong' (2009) 187 EOR 14.

<sup>132</sup> See Ahdar and Leigh, *Religious Freedom in the Liberal State*, 32-34.

<sup>133</sup> Dworkin, *Is Democracy Possible Here?* 68.

<sup>134</sup> D Meyerson, 'Why religion belongs in the private sphere not the public square' in P Cane et al (eds.), *Law and Religion in Theoretical and Historical Context* (CUP 2008), 54 – 55.

‘choice’ should be regarded as less worthy of protection than an immutable characteristic. If this point is accepted then the very question of the significance of mutability fades from the stage.

The final objection to be considered here is that religious expression undermines other rights cherished in a liberal state, particularly those related to sex and sexual orientation. Some feminist scholars, for example, deplore forced marriage, polygamy and the veiling of women which are often associated with the cultural subordination of women based on religious beliefs.<sup>135</sup> Equally, many liberals are critical of the religious condemnation of homosexual acts as sinful.<sup>136</sup> If religious employees are seen to be insufficiently tolerant of other ‘rights’ then this in turn serves to undermine the claim of religion itself as a right to be respected.<sup>137</sup>

In recent years the bar of tolerance has been raised by a number of liberal scholars who argue that it is no longer sufficient merely to ‘bear with’ others and their practices, per the historic understanding of the meaning of tolerance (i.e., to make a ‘deliberate choice not to interfere with the conduct of which one disapproves’).<sup>138</sup> More is required. This is based on the assumption that toleration is extended by the ‘majority’ to ‘minority groups’ the members of which feel, by reason of their minority status *per se*, unable to fully express their respective identities, and in this sense are ‘invisible’, e.g. gay and lesbian people.<sup>139</sup> To tolerate members of minority groups and their practices merely in a non-interfering way will do nothing to demonstrate ‘public respect’ and

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<sup>135</sup> See, for example, S Okin, ‘Is Multiculturalism Bad for Women?’ in J Cohen and M Howard (eds), *Is Multiculturalism Bad for Women?* (Princeton University Press 1999).

<sup>136</sup> For example, R Rorty, ‘Religion in the public square: A reconsideration’ (2003) 31 *Journal of Religious Ethics* 141.

<sup>137</sup> Barry adopts this view, whilst again employing the language of culture: ‘Equal respect for people cannot therefore entail respect for their cultures when these cultures systematically give priority to, say, the interests of men over women’, in Barry, *Culture and Equality*, 127.

<sup>138</sup> J Horton, ‘Liberalism, multiculturalism, and toleration’ in J Horton (ed), *Liberalism, multiculturalism, and toleration* (MacMillan 1993), 3.

<sup>139</sup> See A Galeotti, *Toleration as Recognition* (CUP 2002), 10–14.

encourage the building up of ‘adequate self-esteem’.<sup>140</sup> Thus, to be fully ‘tolerant’ now requires more - that members of minorities should be ‘affirmed’ or ‘embraced’ for their personal characteristics and in terms of their lifestyle choices so they can achieve the ‘full citizenship’ which would otherwise be denied them.<sup>141</sup> For some religious people, able to conform to the older definition of tolerance, the new, proactive requirements of tolerance may be far more problematic in certain cases. Taking the example of rights connected to sexual orientation, a Roman Catholic Christian is likely to be perfectly able to, courteously and respectfully, ‘bear with’ a gay colleague; however, she is unlikely to be able to positively ‘affirm’ the worth of that sexual lifestyle as to do so would, in her eyes, amount to encouraging an individual to remain under God’s displeasure, in a state of sin, and thus, spiritually, to do grave harm to her gay colleague.

In a workplace context, there may be pressure to restrict religious expression should it either conflict with other aspects of equality or be seen in some way to be less than affirming of the perceived rights or choices of co-workers. In such cases, religious expression may indeed be regarded as by some as ‘harmful’ to the dignity of others and thus worthy of censure and possibly prohibition.<sup>142</sup> Critics of this perspective draw attention to the fact that, in effect, it creates a situation where certain other rights are routinely allowed to ‘trump’ religious rights.<sup>143</sup> For a state to explicitly sanction such practices would also mean that in a sense it ‘takes sides’ against religious rights and many liberals, not to mention religious employees, would find this unsatisfactory as a general principle.<sup>144</sup>

There is a deeper problem here. In a society which cherishes a number of fundamental rights, there is likely to be inherent competition and conflict at some stage. As Galston notes, ‘in the very act of sustaining diversity, liberal unity

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<sup>140</sup> *ibid.*, 12.

<sup>141</sup> *ibid.*, 10–14.

<sup>142</sup> See discussion in Meyerson, *Rights Limited*, 5-6.

<sup>143</sup> See Trigg, *Free to Believe?*

<sup>144</sup> R Dworkin, ‘Liberal Adoption’ (2007) *March Prospect* 16.

circumscribes diversity. It could not be otherwise. No form of social life can be perfectly or equally hospitable to every human orientation.<sup>145</sup> This is likely to be as true of the workplace, where ‘diversity’ as a value may itself be promoted, as it is of other public fora of human activity. How to reconcile differences is ‘not a simple question’,<sup>146</sup> and at some stage one right will be preferred over another in any given instance. To make an absolute decision that it should be the religious right that gives way is, for some, peremptory and unjustified.<sup>147</sup> An alternative is to treat each clash individually and seek to develop some principles which ‘directly address and fully analyze ... competing interests’ in each case in order to determine finally which right must give way.<sup>148</sup>

### **A variant of the model: Protection for Religion and Belief**

As noted in Chapter 2 there may be pressing practical reasons for extending the definition of that which is to be protected in the workplace from ‘religion’ to ‘religion and similar philosophical beliefs’. This extension helps to overcome the problem, for example, of how to classify non-theistic belief systems such as Buddhism, which may fall outside many definitions of religion but which many people would regard as worthy of protection on the basis that they function as religions in the life of some people and (often) their communities.

There are, however, reasons of principle which may be invoked to support protection for beliefs which may not necessarily be as closely aligned, from a functional perspective, to religion. Many of these reasons may be derived from the arguments presented in this section concerning the importance of recognising the significance of choice and self-expression in support of the important liberal value of individual autonomy. This may be bolstered by an empirical recognition that increasing numbers of people are rejecting mainstream religions and pursuing

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<sup>145</sup> W Galston, *Liberal Purposes* (CUP 1991) 4.

<sup>146</sup> Trigg, *Free to Believe?*, 12.

<sup>147</sup> For example, Trigg; *ibid.*, 36.

<sup>148</sup> D Kaminer, ‘When religious expression creates a hostile work environment’ (2000) 81 *New York University Journal of Legislation and Public Policy* 139.

highly individualised forms of spirituality. Many would contend that people deserve protection for these beliefs too. A difficulty which is then encountered is how to conceptualise what it meant by ‘belief’. As Vickers notes, there are two possibilities, either the meaning of ‘belief’ is construed narrowly to refer to an overall system of belief or philosophical outlook analogous to a religion; or it might be expanded to refer to a single issue (such as a belief in man-made climate change or pacifism). Vickers favours protecting the former rather than the latter, lest the net of protection be cast too wide.<sup>149</sup> Indeed this is the major problem with widening the scope of protection to include belief - the inevitable consequence of protecting more people is that the nature of that protection is likely to become weaker:

The word [belief], however, introduces a further vagueness into the definition which courts have to wrestle with. The problem is that the more the category covers, the more limitations will be found legally necessary. An absolute right to freedom of a wide range of belief will have to be balanced by further restrictions in law on the “manifestation” of those beliefs. The more outlandish the beliefs tolerated, the more a society will have to be careful about how they are expressed.<sup>150</sup>

Furthermore, the very act of widening the definition to encompass belief weakens any argument that religion is ‘special’ – inevitably, when equated with ‘belief’ it becomes a subset of the latter and loses any *sui generis* claims.<sup>151</sup> As Sadurski notes: ‘[t]here is no basis, in an ideology of a liberal and secular state, to draw the line between the religiously-motivated and other deep moral beliefs.’<sup>152</sup> In other words, religious beliefs will be viewed in exactly the same way as deep moral beliefs.<sup>153</sup> This is in keeping with liberal ideals (of neutrality) and will thus be the inevitable result of equating religion and belief in terms of the distribution of protection.

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<sup>149</sup> Vickers, *Religious Freedom, Religious Expression and the Workplace*, 22-24.

<sup>150</sup> Trigg, *Free to Believe*, 46.

<sup>151</sup> Trigg makes a similar point; see Trigg, *Free to Believe*, 45.

<sup>152</sup> Sadurski, *Moral Pluralism and Legal Neutrality*, 190.

<sup>153</sup> Bradney, *Law and Faith in a Sceptical Age*, 32.

Yet, in addition to the liberal arguments presented in this section for the value of religion to individuals, there is in addition a powerful argument that religion is both unique and necessary to humanity and, by extension, worthy of the kind of special protection which other beliefs may not be. Trigg identifies the basis of this in terms of:

A readiness to detect agency, even of a supernatural kind; a willingness to see purpose and goaldirectedness in the material world; a readiness to attribute mental capacities to other people which may survive death; and an acceptance from an early age that intentional agents can have ‘super-powers’ such as the ability to know everything – these are not just the building blocks of religion, they are basic characteristics that are built into the very fact of being human.<sup>154</sup>

## ***Protection for Minority Religions***

### **Rationale & Implications**

The rationale for providing specific protections for minority religions, as opposed to religion in general, is premised on the notion that religion is one means by which groups in society which depart from the ‘norm’ identify themselves.<sup>155</sup> The major determinant of group membership is ethnicity and, ethnicity can be strongly linked to religion.<sup>156</sup> Members of such ‘ethnic-and-religious’ minority groups are disadvantaged in the West due to institutional factors, such as the structuring of the working calendar around a Christian norm and the conventional expectations of the majority culture about dress, food and

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<sup>154</sup> Trigg, *Free to Believe*, 46; see also Trigg, *Equality, Freedom and Religion*, 18-25. For discussion of the ‘cognitive science of religion’ which underlies Trigg’s argument, see J Barrett, *Why Would Anyone Believe in God?* (AltaMira Press 2004).

<sup>155</sup> Pitt is a proponent of this model: see G Pitt, ‘Religion or Belief: Aiming at the Right Target?’ in H. Meenan (ed), *Equality Law in an Enlarged European Union* (CUP 2007).

<sup>156</sup> Fredman, *Discrimination Law*, 73-75. In the earlier edition of her book, Fredman made this point more strongly.

drink.<sup>157</sup> Special protection should therefore be offered to guarantee minority religious expression in order to counter the inherent disadvantage of operating within a majority culture with its institutional legacy (in the West) of Christian practices in many workplaces. Such protection might permit practices (such as allowing Sikhs to carry a *kirpan*, a small dagger) which would not be permitted to non-members of minority religious groups.<sup>158</sup> As such this approach might be characterised as a mild form of ‘affirmative action’ or ‘positive discrimination’ entailing a degree of preferential treatment.<sup>159</sup>

Indeed this may be an element of a more radical strategy of positive discrimination which would aim to increase the workplace participation (at various levels) of members of ethnic and religious minority groups in pursuit of ‘substantive equality’.<sup>160</sup> Substantive equality takes the final outcome for members of different groups (a relevant example here might be the relative proportions of members of different ethnic groups in a management cadre) as its starting point, as opposed to equality of opportunity which emphasises a level playing field for all individuals at the point of entry (recruitment or promotion). The substantive equality approach, at an organisational level, is essentially a ‘redistributive’ strategy which seeks to directly intervene in decision making on personnel matters to the benefit of members of disadvantaged groups.<sup>161</sup>

A society pursuing such a strategy might either permit or impose a ‘quota’ system (or otherwise set targets) requiring organisations to recruit a certain percentage of employees, managers, directors, etc, from minority religious groups. Clearly, in reserving posts for members of religious minorities, it would be a necessary corollary that forms of religious expression be protected so that members of religious minorities would be willing to take up the available positions.

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<sup>157</sup> A McColgan, ‘Class wars? Religion and (In)equality in the Workplace’ (2009) 38 Ind LJ 1.

<sup>158</sup> See Parekh, *Rethinking Multiculturalism*, 248.

<sup>159</sup> See discussion in Fredman, *Discrimination Law*, 232-278.

<sup>160</sup> *ibid.*, 25-33.

<sup>161</sup> C McCrudden, *Buying Social Justice* (OUP 2007), 70.

In summary, under this analysis, the focus of protecting religion and religious expression is on removing disadvantage experienced because of membership of a minority religious group. Once disadvantage is alleviated, the justification for protection for minority religion disappears and should be removed.<sup>162</sup> Thus, under this model, there also exists an expectation that, in parallel with legal protection for minority religions at an individual level, legal and policy efforts are also made as a matter of urgency to tackle sources of disadvantage at an institutional level. For some commentators, such as McColgan, this also involves removing any lingering workplace features of the historical majority religion (such as the institutional legacy of Christianity considered earlier).<sup>163</sup>

## Critique

Where this model is most vulnerable to critique is that it is not based on any overall acceptance that religion is important and deserving *per se*. Instead, the governing principle is that religion is a proxy for race or ethnicity. Inevitably this leads to a view of religious expression as one form of ‘cultural expression’ and the terms of the debate change.<sup>164</sup> It would of course be naïve to deny or underplay the links between religion and culture, but if the language of culture only is adopted, religion becomes a secondary characteristic of something apparently more important – collective identity. Religious practices are assumed by people as expressions of identity with a particular culture and not as ends in themselves. In a related point, as Jones notes, ‘a person’s culture may be invoked as a *causal* explanation of his beliefs but it cannot be offered by the believer himself as a *reason* for believing what he does.’<sup>165</sup> This model makes no assumption that there is any kind of serious thought about the truth or merit of a religion’s claims on behalf of its adherents – religion becomes instead ‘a mere

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<sup>162</sup> Barry, *Culture and Equality*, 13.

<sup>163</sup> McColgan, ‘Class wars?’ 14.

<sup>164</sup> Both Barry and Parekh are leading thinkers who tend to merge the boundaries between religion and culture; see Barry, *Culture and Equality* and Parekh, *Rethinking Multiculturalism*.

<sup>165</sup> Jones, ‘Bearing the Consequences of Belief’, 610.

quirk of culture'<sup>166</sup> and is worthy only for its role in shoring up that culture or even for sentimental reasons connected to the value of heritage. This of course serves to strongly undermine any special *sui generis* claims for religion which might otherwise be advanced. This point is clearly recognised by a proponent of this model, McColgan, who, in support of her own argument, is keen to underline it:

The identification of [ ] practices as 'religious' as distinct from 'cultural' is strongly contested, and privileging those accepted as 'religious' from merely 'cultural' increases the incentive to categorise them as 'religious' and thereby helps to perpetuate them.<sup>167</sup>

A second line of critique stems from the fact that this model encourages the dismantling of the legacy of Christianity in the workplace (and elsewhere) in pursuit of the reduction of disadvantage. There are objections to this at a practical as well as at a theoretical level. Galeotti, whilst keen to promote the questioning of 'traditions and conventions', acknowledges the 'difficulty for society as a whole of finding a new network of conventions that suits everyone from every group'.<sup>168</sup> Taking the example of the 'Christian' tradition of structuring of the working week to allow Sunday as a holiday; an attempt to change this, whilst for Galeotti, potentially desirable at one level, 'would create enormous practical problems in all sectors of social life, from business to school ...' and is thus impractical as a solution.<sup>169</sup> Indeed as Jones observes, it appears hard to escape the conclusion that seeking to remodel institutionalised features of life such as the working week to make them 'religiously neutral' would in actual fact risk creating a situation which was 'equally inconvenient for all religions' thus 'making some people worse off whilst making no one better off'.<sup>170</sup>

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<sup>166</sup> *ibid.*

<sup>167</sup> McColgan, 'Class wars?' 12.

<sup>168</sup> Galeotti, *Toleration as Recognition*, 92 – 93.

<sup>169</sup> *ibid.*, 201-202.

<sup>170</sup> Jones, 'Bearing the Consequences of Belief', 617.

As Parekh notes, removing the cultural legacy of Christianity in the United Kingdom might also create potentially a new source of disadvantage to religious and ethnic minority groups in terms of incurring the resentment of members of the majority population and any ensuing effects of this.<sup>171</sup> For Parekh, however, it is not even a case that the cure is worse than the cause. He also argues positively that the central proposition is wrong: the continued existence of the Christian legacy need not in itself result in disadvantage to minority groups:

Besides, once the religious beliefs of all citizens are equally respected, no apparent injustice is done to minorities if the religion of the overwhelming majority is given some precedence over theirs, especially when it is a long-established part of the structure of the state and doing so has no adverse effects on their rights and interests.<sup>172</sup>

A third and potentially most significant criticism is that this model is potentially implicitly hostile to the expression of a major religion, Christianity, which, as ‘mainstream’, is seen as a major contributor to the ‘disadvantage’ that requires removal. Thus, Christians would not be ‘protected’ in law whilst members of other religions would be – creating a major inequality. Arguably this might not matter if, as is assumed under this model, Christian self-expression is mainstream and is not subject to serious challenge.<sup>173</sup> The problem is that although perhaps even a majority of the Western population self-identify in some vague way as Christian,<sup>174</sup> they do so, as Bradney observes, without necessarily knowing what to be Christian actually means;<sup>175</sup> moreover ‘[f]or such people their religion neither tells them what they should do nor does it prevent them from pursuing anything that they see to be in their interest. It is neither a guide nor a limitation to their behaviour on a day-to-day basis.’<sup>176</sup>

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<sup>171</sup> Parekh, *Rethinking Multiculturalism*, 259.

<sup>172</sup> *ibid.*

<sup>173</sup> Vickers appears to take this view; see Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 92.

<sup>174</sup> See G Davie, *Religion in Britain since 1945: Believing without Belonging* (Blackwell 1994).

<sup>175</sup> Bradney, *Law and Faith in a Sceptical Age*, 8.

<sup>176</sup> *ibid.*, 9.

Others, whilst taking their Christianity slightly more seriously, perhaps through Church attendance, may fall within a different grouping – those who exhibit ‘religiosity’ as opposed to a genuine commitment to the doctrines of the Christian faith.<sup>177</sup> Neither of these groups is likely to challenge the dominance of secular thinking and mores which are surely the more defining characteristic of Western European states. Thus, it might be suggested that this model rests on a false premise – Christianity (in any meaningful sense) as representative of the ‘mainstream’ in Western society. It may be suggested rather that this honour falls to secularism. If this is the case, then it follows that practising Christians are a minority group and are just as likely to face hostility as any other religious grouping.<sup>178</sup> Thus, Christians need as much legal protection as people of other religious faiths and, under this model, they fail to receive it.

## ***Conclusion***

Six overarching models of legal approaches towards religious expression by employees in the workplace have been presented, and the implications discussed and critiqued. As stated at the outset it is unlikely that a liberal society would adopt any one of these models as a single strategy. The models all rest on particular assumptions, economic and socio-political in nature, which are likely to be a subject of debate within a liberal society. Approaches may alter over time depending on the point at which the debate rests and, as a result, legal responses to religious expression may be, at times, ad hoc and even inconsistent.

The models presented here will be utilised again in the next chapter to consider how far law in England and Wales, at a legislative level, can be seen to embody aspects thereof. What is of value in the concluding part of this chapter is to identify any cross-cutting themes and key questions which might have a strong

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<sup>177</sup> Such a group is likely to be shrinking as ‘obligation’ declines as a motive for church attendance; see G Davie, ‘From obligation to consumption: A framework for reflection in northern Europe’ (2005) 6 *Political Theology* 281.

<sup>178</sup> See *Clearing the Ground*.

influence on overall state approaches at different times, depending upon the nature of the political and social context and other factors.

One of the key questions is how religion is perceived in terms of its effect on society. One underlying view would be to see religion essentially as divisive and a barrier to 'socially progressive' ideas, such as gay rights and equality for women. Another view would be to see religion in much more positive terms for its positive moral and other individual and social effects. If the initial perception is negative, a degree of hostility, implicit or explicit, is likely to characterise attitudes towards religious expression in whatever forum. A second important question (which to some extent follows from the first) is how far religious convictions, where not shared by others, should be kept private – the expression of religious convictions excluded from the public square (including the workplace) either by voluntary restraint or through some form of imposition (whether directly by law or indirectly through a 'chilling effect').

If the answers to these initial questions are positive from a religious employee's perspective, then a third and vital question arises. If society perceives some value in religious expression then how great is this value? This hinges to a large extent on whether religion is seen as either one of many important choices which give expression to an individual's personal autonomy, or as an expression of culture and identification with members of an ethnic grouping; or whether it is seen as a response to an obligation to the divine – where 'choice' as normally understood is not a factor. If it is the latter, then religious expression is likely to be seen as worthy of a greater level of protection certainly than the first and possibly than the second category. This leads on to a further question, which is how to treat religious expression in the face of competing rights in the workplace (such as employers' rights, or rights connected to sex or sexual orientation) – what should its place be in any hierarchy of rights? At what point is it appropriate to subdivide religious expression into different forms, some being more 'offensive' than others? Those who see religion as obligation as opposed to choice are likely to have a much stronger case to argue for a high place for religious expression in its various forms in the hierarchy. Those who see religion as a manifestation of culture only risk trivialising religion by seeking to subordinate to another

category (race) which may be thought to have a higher standing in the hierarchy of rights – this also has the effect of forcing the disaggregation of the term ‘religion’ in practice as different religious groups will be afforded different protections according to how far they can show an obvious link between the way they manifest their religion and to ‘ethnic’ culture.

There is, finally, a significant question as to whether or not the state has a legitimate role at all in seeking to intervene in the employment relationship to protect or proscribe forms of religious expression. Some would argue that such matters should be resolved through the normal process of negotiation between employer and employee. Those employees unhappy with the arrangement reached could work instead for other organisations (perhaps organisations with a religiously exclusive employment policy) which are more accommodating. Others would argue that religious expression is sufficiently important to require protection even in the workplace, particularly in a context where other characteristics or choices are similarly protected and where the bargaining power of employers far outweighs that of employees.

## **Chapter 4: The Legislative and Policy Landscape in England and Wales**

### ***Introduction***

The purpose of this chapter is to explore the legal authorities which are relevant to freedom of religious expression in the United Kingdom workplace, both European and domestic; the two most significant areas of law concerned are human rights law and employment law. The law and, in very broad terms, the way in which it has been interpreted (including at a policy level), will be examined with reference to the European Convention on Human Rights and Fundamental Freedoms and domestic law in England and Wales, most of it employment law (which in turn is largely derived from European Union directives).

As each area of legal jurisdiction is examined, its congruence with the models set out in Chapter 3 will be considered.

### ***Approaches under the European Convention***

#### **General**

There are two overarching areas of European legal authority which are fundamental. The first, under the authority of the Council of Europe, is the European Convention on Human Rights (ECHR). The second, under the authority of the European Union, entails those clauses of the EC General Framework Directive<sup>1</sup> which deal with religion and belief, as mediated into domestic law originally through the Employment Equality (Religion and Belief) Regulations, and since 2011 (when it came into force), the Equality Act 2010. The first will be the concern of this section.

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<sup>1</sup> 2000/78/EC.

There are two articles of particular relevance to religious freedom of (adult) individuals in the Convention – Articles 9 and 14 respectively – although other articles could also be construed as offering protections for religious freedom, particularly Article 10 which guarantees freedom of expression.<sup>2</sup> Article 9 states that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice or observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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<sup>2</sup> See the discussion in M Evans, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4 *Religion and Human Rights* 197.

Article 14 reads:

The enjoyment of the rights and freedoms set out in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a minority, property, birth, or social status.

Of these articles, the meaning and implications of Article 9 is of most concern here. Article 14, however, offers, at face value, significant protection for, *inter alia*, adherents of religious faiths, setting out clearly the principle of non-discrimination against them in the enjoyment of their convention rights (although it is only exercisable ‘within the ambit’ of other convention rights<sup>3</sup>). Thus far, Article 14 has not featured prominently in applications concerning restrictions on religious expression. The application in *Ladele v UK*<sup>4</sup> is a recent exception, and the reasoning of the ECtHR will be interesting on this point, once judgment is given.

In terms of the models presented in Chapter 3, it is clear that Article 9(1) of the Convention creates putative rights protective of religion and religious expression. These positive rights explicitly extend beyond the right to hold a religious belief in private and encompass the right to ‘manifest’ religion in various ways (including in ‘practice’) and to do this in ‘public’. In its interpretation of the ECHR, the European Court of Human Rights (ECtHR) takes a high view (in theory at least) of the importance of Article 9 rights, basing these rights on the importance of religious expression as a function of individual autonomy and dignity. As it famously said in *Kokkinakis v Greece*:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for

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<sup>3</sup> *Rasmussen v Denmark* (1985) 7 EHRR 371.

<sup>4</sup> Appl No. 51671/10.

atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends upon it.<sup>5</sup>

Although a very positive statement of the importance of religious belief and expression, overall and in context, it is clear that the Convention does not in fact place particular and unique value on religion itself. This is apparent in two fundamental ways. The first is with reference to the juxtaposition of ‘religion’ and ‘belief’ in the overall definition under Article 9. The two are seen as inextricably linked. As Evans puts it:

It is both unhelpful and unnecessary to seek to distinguish those patterns of thought and conscience which are religious in nature from patterns of belief which are not since all those systems of thought and conscience which fall within the scope of the article are to be equated with ‘beliefs’, the manifestation of which is to be protected.<sup>6</sup>

Intentionally or not, Evans’ analysis of Article 9 reduces religion to a function of ‘belief’ which is arguably more representative of ECHR jurisprudence – there is no sense in which religion itself carries *sui generis* claims to special protection, despite the warm words in *Kokkinakis*. The second arises from the scope of Article 10. Although Article 10 arguably increases or at least reinforces protection for religious expression, it also provides a separate avenue to protect many forms of putative individual expression; indeed ‘an all-embracing provision providing for the transmission of ideas, views and opinions through a potentially limitless array of mediums.’<sup>7</sup> As the ECHR does not distinguish between the rights it conveys in terms of a hierarchy of importance, Article 10 potentially serves, *inter alia*, to widen and thereby potentially reduce protection for religion (and analogous beliefs) by creating a further category which provides equivalent protection for forms of individual expression which fall short of admission into the Article 9 category.

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<sup>5</sup> (1993) 17 EHRR 397 [31].

<sup>6</sup> Evans, ‘The Freedom of Religion or Belief and the Freedom of Expression’, 205.

<sup>7</sup> *ibid.*

This point can be clearly illustrated with reference to *Arrowsmith v UK*.<sup>8</sup> Pat Arrowsmith was convicted under the Incitement to Disaffection Act 1934 for distributing pacifist literature (encouraging soldiers, *inter alia*, to desert the army) outside army bases. Arrowsmith applied to the European Commission on Human Rights (ECommHR) arguing that her conviction violated Articles 5, 9, 10 and 14. Her Article 9 claim was on the basis that she was manifesting ‘belief’. This claim was rejected by the ECommHR, as it did not meet the standard to be considered a practice or manifestation.<sup>9</sup> However, her Article 10(1) claim (although ultimately unsuccessful on the grounds of the restrictions in Article 10(2)) encountered no such difficulties. Her actions were accepted at face value as a legitimate form of expression, potentially worthy of protection, thus providing an equivalent avenue of redress for beliefs which fail to adequately demonstrate that they constitute a legitimate ‘religion or belief’.

Another problem is how ‘manifestation’ of religion has been interpreted under Article 9. In its well-known ruling in *Arrowsmith*, the ECommHR adopted a restrictive interpretation, arguing that ‘Article 9(1) does not cover each act which is motivated or influenced by a religion or belief.’<sup>10</sup> Whilst the Commission accepted pacifism as a belief, it went on to reject the Article 9 application on the basis that the act of distributing pamphlets was motivated by Arrowsmith’s pacifism but not in fact a manifestation of that pacifism. Thus, the Commission set out a ‘manifestation/motivation requirement’<sup>11</sup> which focuses on the nature of the manifestation itself, and whether it is truly and fully related to the religion or belief espoused, rather than the motivation of the individual which underpins it.<sup>12</sup> Looked at from the perspective of the claimant, this means that an individual must show that the particular practice, for which he wishes to obtain protection as a ‘manifestation’ of religion or belief, is necessary to, or mandated by, the

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<sup>8</sup> (1978) 3 EHRR 218.

<sup>9</sup> See discussion below.

<sup>10</sup> *Arrowsmith* [15].

<sup>11</sup> M Hill, R Sandberg and N Doe, *Religion and Law in the United Kingdom* (Wolters-Kluwer 2011), 51.

<sup>12</sup> See P Cumper, ‘The Public Manifestation of Religion’ in R O’Adair and A Lewis (eds), *Law and Religion* (OUP 2001), 320.

religion or belief system he espouses.<sup>13</sup> This is often referred to as a ‘necessity test’.<sup>14</sup> Such a test was applied in the UK court in the high-profile case of *Playfoot v Governing Body of Millais School*<sup>15</sup> to reject an Article 9 claim by a schoolgirl forbidden to wear a silver ring which was said to symbolise her Christian commitment to sexual abstinence before marriage but which the court found not to be necessary to that belief.

Although the test appears to be well established, it should be noted that there have been a few recent departures from it. For instance, in its decision in *Jakowski v Poland*,<sup>16</sup> the ECtHR found that the refusal of a Buddhist prisoner’s request for vegetarian food engaged Article 9 (even though vegetarianism is not a requirement of the Buddhist religion). In *Bayatyan v Armenia*,<sup>17</sup> the same court accepted that when opposition to military service is motivated (rather than required) by sincerely held religious beliefs then it falls within the protection of Article 9. In *R (Imran Bashir) v The Independent Adjudicator and Anor*,<sup>18</sup> the High Court of England and Wales accepted that a prisoner’s decision to fast prior to a court appearance was motivated by his religious beliefs and as a result consideration should have been given to his Article 9 rights. This was in spite of the fact that his decision to fast was a personal one rather than a requirement of his Islamic faith. It is perhaps too early to seek to draw general inferences from some isolated examples (which may be context-specific), suffice to note that they may point to the possibility of a more flexible approach by the courts towards the question of ‘necessity’ in the future.

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<sup>13</sup> See also *Valsamis v Greece* (1997) 24 EHRR 294.

<sup>14</sup> Cumper, ‘The Public Manifestation of Religion’, 323. Cumper however draws a distinction between the ‘manifestation/motivation requirement’ and the ‘necessity test’.

<sup>15</sup> [2007] ELR 484.

<sup>16</sup> (2010) 30 BHRC 417.

<sup>17</sup> Appl. No 23459/03 (7 July 2011).

<sup>18</sup> [2011] EWHC 1108 (Admin).

## Application to Workplace

The Convention itself is binding upon the United Kingdom<sup>19</sup> and any breaches at a national level can be appealed directly to the European Court of Human Rights. In addition, the Convention has been applied in domestic law in the form of the Human Rights Act 1998. This Act provides an avenue of redress for individuals where public authorities have breached their convention rights.<sup>20</sup> Within the context of the workplace, this means that public sector workers can, in theory, make a claim directly against their employer, as can anyone working for a privately-owned enterprise which performs a public function (e.g. a former public utility company).<sup>21</sup> On the face of it, this might imply that public sector workers have potentially more ‘rights’ than those in the private sector.<sup>22</sup> However, the HRA expressly states that employment tribunals and courts are themselves public bodies,<sup>23</sup> to which the ECHR therefore applies. The Act also states that ‘[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’<sup>24</sup> Thus, Convention rights must also be taken into account by the courts as part of the interpretation of statute, including employment statutes – to what extent there is an implied obligation to interpret common law in this way is less certain.<sup>25</sup>

Thus, Convention rights extend to apply to public bodies and, to a certain degree, private employers. However, in practice, the extent to which this provides additional rights for workers is debatable. This is because Convention rights have traditionally been construed to apply to individuals but not necessarily in all contexts – the employment sphere being one of those contexts where applications

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<sup>19</sup> Who signed up to the convention in 1950; this was ratified by Parliament in 1951.

<sup>20</sup> Human Rights Act 1998, s 6.

<sup>21</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 85.

<sup>22</sup> See L Vickers, *Freedom of Expression and Employment* (OUP 2002), 74-76.

<sup>23</sup> Human Rights Act 1998, s 6(3).

<sup>24</sup> s 3(1).

<sup>25</sup> See I Leigh and R Masterman, *Making Rights Real – The Human Rights Act in its First Decade* (Hart 2008), 238 – 242.

have often been ruled to be inadmissible.<sup>26</sup> This approach has been referred to by some commentators as ‘the specific situation rule’ as it serves to limit the exercise of Article 9 rights in ‘specific situations’,<sup>27</sup> perhaps the most important of which would appear to be the workplace, although it has also been applied in the context of education.<sup>28</sup> Four examples concerned with putative Article 9 claims in the workplace will help to illustrate the rationale(s) employed by the European Commission on Human Rights (ECommHR) to defend this position.

In *Ahmad v UK*,<sup>29</sup> a Muslim school teacher claimed constructive unfair dismissal against his former employer, the Inner London Education Authority, when it refused to allow him a 45-minute absence from his school on Fridays to attend a Mosque without reducing his paid working week from five to four and a half days. The Court of Appeal rejected his claim<sup>30</sup> and, in response to Ahmad’s subsequent case against the UK government, the ECommHR, in refusing to admit his claim, concluded that refusal to provide time off did not amount to an interference with his Article 9(1) right. Ahmad had accepted the contract ‘of his own free will’, thereby voluntarily surrendering the claims on his time of religious duties, and what remained of his Article 9 rights were guaranteed by the fact that he was free to resign.

The argument that the ‘right to resign’ is the ultimate guarantee of religious freedom was subsequently consolidated as a position by the ECommHR. In *Konttinen v Finland*,<sup>31</sup> for example, a Seventh Day Adventist had been dismissed for leaving before sundown on a number of Fridays in accordance with his religious convictions. The Commission again denied any interference with Article 9(1) rights and determined that the complainant had been dismissed for

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<sup>26</sup> Originally, by the European Commission on Human Rights, which determined admissibility; see Evans, *Freedom of Religion under the European Convention on Human Rights*, 8.

<sup>27</sup> *Kalac v Turkey* (1997) 27 EHRR 552 [27]. See also discussion in Hill, Sandberg and Doe, *Religion and Law in the United Kingdom*, 53.

<sup>28</sup> For example, in the context of a university student, see *Karaduman v Turkey* (1993) 74 DR 93.

<sup>29</sup> (1982) 4 EHRR 126.

<sup>30</sup> *Ahmad v Inner London Education Authority* [1978] ICR 36.

<sup>31</sup> Appl No. 24949/94 (3 December 1996).

refusal to carry out his contractual obligations *vis-à-vis* working hours, not for manifesting his religious beliefs. In respect of the latter, there was no protection anyway because Konttinen retained the ‘ultimate guarantee’ of his freedom of religion – that is he could leave his employment if he considered that there was any conflict with his religious beliefs.

In *Stedman v UK*,<sup>32</sup> this principle was applied in different circumstances, when the complainant was dismissed for refusing to sign a new contract with her employer which included Sunday working. The Commission found that she had been dismissed for a failure to agree to adopt a particular work pattern rather than for her religious beliefs. In this case the Commission was unable to argue that the employee had voluntarily forgone any rights upon entering the employment relationship as it was for refusing to surrender such rights (upon variation of her contract) that she was dismissed. Thus it relied entirely on the argument that the ability to leave employment was sufficient to guarantee her religious freedom.

In *Pichon and Sajous v France*,<sup>33</sup> a claim by two French pharmacists, who had been penalised for refusing to prescribe contraceptive pills, that their Article 9 rights had been violated was ruled inadmissible by the ECtHR. The court noted, *inter alia*, that the applicants were free to manifest their beliefs outside of the work sphere.

In a case before the Court of Appeal of England and Wales, *Copsey v Devon Clays Ltd*,<sup>34</sup> in which an employer had sought to vary an employee’s working hours to require Sunday working despite his long-standing objection, Lord Justice Mummery, in rejecting an Article 9 application, endorsed the specific situation rule, thus setting a clear precedent for future domestic cases:

There is, however, a clear line of decisions by the Commission to the effect that Article 9 is not engaged where an employee asserts Article 9 rights against his

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<sup>32</sup> (1997) 23 EHRR CD (Commission).

<sup>33</sup> Appl No. 49853/99 (2 October 2001).

<sup>34</sup> [2005] EWCA Civ 932.

employer in relation to his hours working. The reason given is that if the employer's working practices and the employee's religious convictions are incompatible, the employee is free to resign in order to manifest his religious beliefs.<sup>35</sup>

In *Begum v Denbigh High School*,<sup>36</sup> a case involving a schoolgirl forbidden to wear the *jilbab* at the secondary school she attended, the specific situation rule was also endorsed in an educational context because 'there was nothing to stop her [the claimant] from going to a school where her religion did not require a *jilbab* or where she was allowed to wear one'.<sup>37</sup> The rule was stated more generally that 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'.<sup>38</sup> Lord Bingham noted that that 'there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established'.<sup>39</sup> This reasoning was swiftly followed by Lord Justice Silber in *X v Headteacher of Y School*<sup>40</sup> and has become a problematic precedent in education as well as employment cases.<sup>41</sup>

In a partially-dissenting opinion in *Copsey*, Rix LJ took a more sceptical view of the European precedents, arguing that the circumstances of *Ahmad* and *Kottinen* did not in fact apply to those of *Copsey*. This was because in these two cases it was the employee and not the employer who was seeking to change the terms of the contract. The facts of *Stedman* alone were materially similar because the employer had attempted to vary the terms of employment. However, in this case,

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<sup>35</sup> [31].

<sup>36</sup> *ibid.* [2006] UKHL 15.

<sup>37</sup> *ibid.* [50], Lord Hoffman. Hill and Sandberg point out that it is difficult to see how the rule could apply in full as a school pupil has not voluntarily chosen to accept a role which might limit his Article 9 rights; see M Hill and R Sandberg, 'Is nothing sacred? Clashing symbols in a secular world' (2007) *Public Law* 488.

<sup>38</sup> [50] (Lord Hoffman).

<sup>39</sup> [23]. Two of the five law lords were more equivocal about the specific situation rule and preferred to dispose of the appeal on the basis of Article 9(2).

<sup>40</sup> [2007] EWHC 298.

<sup>41</sup> See Hill and Sandberg, 'Is nothing sacred?'

Rix argued that the Commission had acted ‘without attempt at explanation.’<sup>42</sup> Thus, the court was under no obligation to apply the decision in *Stedman*, nor any of the other decisions, as this line of apparent authority failed to meet the test of ‘clear and constant jurisprudence’.<sup>43</sup>

It is not difficult to find evidence to support Lord Justice Rix’s critique. Although, as has been seen, the voluntary surrender of rights and the right to resign arguments have been employed to deny opportunities to exercise Article 9 rights in the workplace, such exclusion is not derived from a plain reading of the ECHR itself; moreover, the ECtHR has not been consistent in applying these exclusionary principles to other convention rights. Although there have been some instances in largely older case law of other convention rights being declared non-admissible in employment,<sup>44</sup> there are numerous examples to the contrary. In *Halford v UK*,<sup>45</sup> for instance, the Court determined that a senior police officer’s right to privacy was infringed when her telephone calls from work were intercepted without her permission. Similarly, in *Niemietz v Germany*, the Court determined that the right to privacy was violated by the search of an employee’s workplace office. In *Smith and Grady v UK*,<sup>46</sup> the court found that the discharge of two men from the Royal Navy because of their homosexuality breached their right to a private life. Similarly, in *Sidabras v Lithuania*,<sup>47</sup> the ‘exclusionary approach’ was rejected in circumstances where a former KGB officer was dismissed from a public appointment under legislation restricting the employment of former KGB officers. The ECtHR did not accept the argument that Convention rights did not extend to guaranteeing a right to remain in a particular employment; instead, it judged this dismissal a violation of the right to a private life as more than simply work life is affected by the denial of employment opportunities (and earning potential). In *Sorensen and Rasmussen v*

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<sup>42</sup> *Copsey* [65].

<sup>43</sup> *ibid.* [66].

<sup>44</sup> For example, *Kosiek v Germany* (1986) 9 EHRR; *Glaserapp v Germany* (1987) 9 EHRR 25; and *Bozhilov v Bulgaria* Appl No. 41978/98 (22 November 2001).

<sup>45</sup> Appl No. 20605/92 (25 June 1997).

<sup>46</sup> (1999) 29 EHRR 493.

<sup>47</sup> Appl Nos. 55480/00 and 59330/00 (27 July 2004).

*Denmark*<sup>48</sup> the ECtHR explicitly rejected an argument that employees, who were forced to join a trade union against their wishes in order to secure employment, were free to take up alternative employment and so there could be no infringement of their Article 11 rights. In so doing, it commented on the labour market realities which constrain employees' freedom of action when applying for jobs.

The reasoning in these rulings under Articles 8 and 11 run directly counter to the equivalent Article 9 jurisprudence in failing to impose a 'specific situation rule' to filter out the claim. Some commentators have argued that this is particularly unfortunate because it implies that there is a hierarchy of rights where some rights are applicable in all circumstances (such as those protected under Article 8) and rights connected to the manifestation of religion and belief are exercisable only in restricted circumstances. As Leigh notes, one explanation for this approach is offered by those who argue that religion and belief are matters of choice, and this justifies the decision to impose restrictions.<sup>49</sup> This argument was considered in Chapter 3 and some objections raised.

It should however be noted that there has also been a degree of inconsistency in applying the specific situation rule to Article 9 itself. In an educational context, the ECtHR did not invoke the specific situation rule as a filter in either *Leyla Sahin v Turkey*,<sup>50</sup> nor in *Dahlab v Switzerland*<sup>51</sup> (although in neither case was it asked to do so). These judgments will be discussed in detail in Chapter 6. In applications concerning other employment situations there have also been departures from the rule. For example, in *Pitkevich v Russia*,<sup>52</sup> the ECtHR found

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<sup>48</sup> Appl Nos. 52562/99 and 52620/99 (11 January 2006). See also *Young, James and Webster v UK* [1981] IRLR 408, where a closed shop arrangement was considered to interfere with an individual's Article 11 rights; and *Sibson v UK* (1994) 17 EHRR 462, where a closed shop was not an interference but only because the applicant had no objection to union membership.

<sup>49</sup> I Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 OJLR 109, 123.

<sup>50</sup> (2004) Appl No. 44774/98 (29 June 2004).

<sup>51</sup> (2001) Appl No. 42393/98 (15 Feb 2001).

<sup>52</sup> (2001) Appl No. 47936/99 (8 February 2001).

that Article 9 was *prima facie* engaged in respect of a judge dismissed for expressing her religion (by praying audibly in the court room and promising favourable outcomes to parties willing to join her church). Although she lost her claim when the court considered the application of Article 9(2), it is nevertheless significant that the specific situation filter was not initially employed to exclude the claim. Similarly, in *Siebenhaar v Germany*<sup>53</sup> where an applicant had been dismissed from employment as a day care worker by a Church having been found to be a member of an religious group with views incompatible to those of her employer, the ECtHR did not apply the specific situation rule, but instead focussed its enquiries on whether or not the national courts had sufficiently balanced the interests concerned. This case followed two earlier ECtHR cases involving Church employees who had been dismissed – however the grounds of dismissal in these earlier cases related to the incompatibility of individuals’ respective private lives and so the cases were argued under Article 8 where, of course, the specific situation rule was not applied.<sup>54</sup> Arguably the ECtHR was forced to confront its own inconsistency when faced with an Article 9 claim in such similar circumstances, hence the decision to overlook the specific situation rule.

Of course *Pitkevich* was determined some time ago, and *Siebenhaar* relates to a religious employer and may indeed be an unusual decision out of the main stream of ECtHR jurisprudence.<sup>55</sup> Therefore, at present, it may be assumed that the specific situation rule is still likely to apply in employment cases. However, it should be noted that, at the time of writing this thesis, four high-profile applications are pending a hearing at the ECtHR.<sup>56</sup> These all relate to the applicability of Article 9 in the UK (secular) workplace and the submissions

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<sup>53</sup> [2011] Appl No. 18136/02 (3 February 2011).

<sup>54</sup> *Obst v Germany*, Appl No. 425/03 (23 September 2010); *Schuth v Germany*, Appl No. 1620/03 (23 September 2010).

<sup>55</sup> Although Leigh argues that not to apply the reasoning in this case beyond a narrow religious employment context would be ‘counter-intuitive’ and ‘difficult to justify’; see Leigh, ‘Balancing Religious Autonomy’, 124.

<sup>56</sup> *Ladele and MacFarlane v United Kingdom*, Appl Nos. 51671/10 and 36516/10; *Eweida and Chaplin v United Kingdom*, Appl Nos. 48420/10 and 59842/10.

include a considered challenge to the specific situation rule, albeit that the UK government's submissions continue to rely on this doctrine.<sup>57</sup>

Nevertheless, even if, as a result either of the outcome of these cases or of a more gradual evolution, Article 9 applications in workplace cases begin to be accepted *prima facie*, there is another potential impediment to the full flourishing of protection for religious expression. This is evident from Article 9(2) which sets out the limitations on the freedom to 'manifest' religion or belief which a convention signatory state may impose. No such limitations are placed on the freedom to hold a religion or belief itself.<sup>58</sup> Of the range of rationales for limitations on the manifestation of religion (listed in Article 9(2)), 'the protection of the rights and freedoms of others' must surely be potentially the most wide-ranging in scope, particularly in a workplace context. As with other freedoms, the ECtHR allows signatory states a 'margin of appreciation', albeit under European oversight,<sup>59</sup> to determine for themselves the circumstances in which Article 9(2) may be invoked (and enshrined in national law).<sup>60</sup> In exercising its margin of appreciation, a member state is nevertheless expected to show evidence that its courts have considered the extent to which any restrictions on ECHR rights are 'proportionate' and in the process that they have sought to balance the interests involved. As Baker puts it succinctly:

The basic European principle of proportionality requires that invasions of a right impose no greater restrictions on the right (or on the 'rights interests') than can be balanced out by the need of the state to invade the right; the state's 'need' refers both to the importance of the objective and to the need for the particular means employed to achieve it.<sup>61</sup>

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<sup>57</sup> The facts of these four important cases and their treatment in domestic courts will be considered in Chapters 5 and 6 respectively.

<sup>58</sup> See discussion in Chapter 2 on the distinction between the *forum internum* and *forum externum*.

<sup>59</sup> See Leigh and Masterman, *Making Rights Real*, 53-56

<sup>60</sup> See *Handyside v United Kingdom* (1979) 1 EHRR 737 [22].

<sup>61</sup> A Baker, 'Proportionality and Employment Discrimination in the UK' (2008) 37 Ind LJ 305, 309.

Depending upon the outcome of the four workplace Article 9 applications before the ECtHR, there may be increased focus on the application of proportionality to restrictions on the manifestation of religion and belief in the workplace. Thus far, due to the application of the specific situation rule, few applications have reached that stage.

### ***England and Wales (Before 2003)***

The purpose of this section is to present a brief survey of domestic legislation and its context which directly or indirectly addresses religious expression in the workplace (or some aspect of it) prior to the major legislative innovation in 2003.

#### **Vestigial Remains of Historic Legislation**

##### *Public Appointments*

Some of the legislation which has applied historically was surveyed earlier in Chapter 3 in considering the approach of providing exclusive protection for Christianity as the national religion. Historically and directly this took the form of legal measures which had the effect of excluding Roman Catholics and Dissenters from public office and the professions. Most of these ‘disabilities’ were removed in 1829,<sup>62</sup> although a few remained. For example, until as late as 1974, the position of Lord Chancellor could not be occupied by a Roman Catholic on the basis that he was ‘keeper of the Queen’s conscience’ and had a ceremonial role in appointing bishops.<sup>63</sup> It is for a similar reason, i.e. the office-holder’s role in appointing Church of England bishops, that the convention exists that neither a Roman Catholic nor a Jew should not occupy the office of Prime

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<sup>62</sup> Under the terms of the Roman Catholic Relief Act 1829.

<sup>63</sup> The Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions ) Act 1974 permits the office to be held by a Roman Catholic, albeit that some of the ceremonial functions must then pass to another office-holder; see Ahdar and Leigh, *Religious Freedom in the Liberal State*, 81, ft 83.

Minister. Cumper and Edge point out that although there is no absolute legal bar to a Roman Catholic taking up the appointment, in practice there are significant legal constraints; not least amongst these, a Roman Catholic (or Jewish) Prime Minister may not advise on clerical appointments on pain of criminal prosecution and loss of office,<sup>64</sup> but no provision is made for this power to be delegated to another officeholder.<sup>65</sup> The continued influence of this convention can be seen in the decision by the former Prime Minister, Tony Blair, to delay his public conversion to the Roman Catholic Church until after his tenure in that office had come to an end.<sup>66</sup> Nevertheless, the significance of this convention should not be over-stated. The convention merely refers to allegiance to the Church of England. It does not require the incumbent Prime Minister to act in conformity with Anglican teachings, either in private or public.<sup>67</sup>

There is, however, one remaining office, excepting those specific to the Church of England, for which there remains a legal requirement that the incumbent is a Protestant Christian - this is the office of Monarch.<sup>68</sup> The Monarch must attest to this by means of a coronation oath<sup>69</sup> and must join the Church of England to perform the functions of Supreme Governor.<sup>70</sup>

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<sup>64</sup> Roman Catholic Relief Act 1829, s 18; Jews Relief Act 1858, s 4.

<sup>65</sup> P Cumper and P Edge, 'First Among Equals: The English State and the Anglican Church in the 21<sup>st</sup> Century' (2005-2006) 83 U Det Mercy L Rev 601, 605-606. The authors do concede, however, that the office of Prime Minister 'is a creature of convention and so can be changed informally' (606).

<sup>66</sup> S Bates, 'After 30 years as a closet Catholic, Blair finally puts faith before politics' *Guardian* (London, 22 June 2007) 3.

<sup>67</sup> Thus, the Prime Minister, David Cameron, was entirely at liberty, in 2012, to initiate a legislative process intended to legalise same-sex marriage, despite the fact that this conflicts with Church of England teaching.

<sup>68</sup> Under the terms of the Act of Settlement 1701.

<sup>69</sup> Coronation Oath Act 1688, s 3.

<sup>70</sup> Act of Supremacy 1558.

## *Working Patterns*

With the exception of the unique public office of monarch, which to a limited extent reflects the a Model II imperative ('religion as heritage'), the only other institutional arrangements which serve to support Christianity uniquely in the workplace are those identified in Chapter 2 concerning the structuring of the working calendar. In terms of their entrenchment in legislation, there are now few examples.

Dealing first with the working year, it is notable that four of the eight officially recognised public holidays in England and Wales are timed to coincide with the two major Christian festivals of Christmas and Easter. Significantly, a fifth public holiday, the Christian festival of Whitsun, a holiday which used to fall on a date between 11 May and 14 June, was secularised in 1971 as the second May public holiday (observed on the last Monday of that month) and has so lost its Christian associations.<sup>71</sup> Although these holidays are officially recognised, the Working Time Regulations 2008<sup>72</sup> do not entitle employees to these specific days as holiday.<sup>73</sup> The tradition is quite entrenched, however, such that the Trade Union Congress estimates that only one-third of all workers works on at least one public holiday in the year.<sup>74</sup>

In terms of the working week, there is an established convention that Sunday is the day when most workers expect to take a holiday. This convention is firmly rooted in notions of the Christian 'Sabbath' as falling on a Sunday; the Sabbath being a day which, by divine command, is kept separate from work as a day of rest.<sup>75</sup> As late as 1950 this principle continued to form the basis of actual law-

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<sup>71</sup> See Schedule 1 of the Banking and Financial Dealings Act 1971 which sets out the statutory bank holidays in England and Wales, Scotland and Northern Ireland. In addition, there are common law public holidays such as Good Friday in England and Wales.

<sup>72</sup> SI 1998 No. 1833.

<sup>73</sup> s 15.

<sup>74</sup> TUC, *Bank Holiday Fact File*, available at <<  
<http://www.tuc.org.uk/extras/bankholidays.pdf>>>, accessed 31 March 2010.

<sup>75</sup> One of the Ten Commandments: see Exodus 20 v 8-11; Deuteronomy 5 v 12-15.

making in England and Wales. Part IV of the Shops Act of that year regulates Sunday trading, with restricted exceptions, starting from the principle that ‘Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday’.<sup>76</sup> It is clear that the rationale behind this general prohibition of Sunday trading was at least in part religious, from the fact that some of the exceptions were specifically and uniquely available to ‘person[s] of the Jewish religion’<sup>77</sup> who would not be celebrating the Sabbath on a Sunday but rather the day before. It is also of note that this Act did not repeal, but rather modified, more explicitly ‘Christian’ restrictive legislation in the forms of, for example, the Sunday Fairs Act 1448 and the Sunday Observance Act 1677.<sup>78</sup> This position changed with the passage of the Sunday Trading Act 1994 which relaxed, to a considerable extent, Sunday trading restrictions. Indeed, any meaningful restrictions apply only to ‘large shops’ (those where the floor space exceeds 280 square metres<sup>79</sup>) and again with some exceptions.<sup>80</sup> Those falling within the restrictions may only open for a maximum of six consecutive hours on a Sunday, between 10am and 6pm; and they may not open on Easter Sunday or on Christmas Day when it falls on a Sunday.<sup>81</sup>

Where workers themselves are concerned, there are some exemptions in the retail and betting trades (such that employers cannot force employees to work on Sundays<sup>82</sup>), but the general principle from the perspective of the state is that of *laissez-faire*, such that workers are expected to work as their contracts require.

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<sup>76</sup> Shops Act 1950 s 47 as originally enacted; copy at <<[http://www.opsi.gov.uk/acts/acts1950/pdf/ukpga\\_19500028\\_en.pdf](http://www.opsi.gov.uk/acts/acts1950/pdf/ukpga_19500028_en.pdf)>>, accessed 31 March 2010; repealed by the Sunday Trading Act 1994 s 1(2).

<sup>77</sup> s 53(1). A legacy of these provisions also appears in reduced form in the Sunday Trading Act 1994, Sch 2, part II.

<sup>78</sup> See s 59(2).

<sup>79</sup> Sunday Trading Act 1994, Sch 1, s 1.

<sup>80</sup> Sch 1, s 3.

<sup>81</sup> A temporary relaxation of these restrictions occurred during the period surrounding the London Olympics in the summer of 2012 opening up the controversial possibility that a more permanent relaxation might follow; see A McSmith, ‘A Sunday trading trade-off too far?’ *The Independent* (London, 22 August 2012) 22.

<sup>82</sup> Employment Rights Act 1996 Part IV.

Sunday is not even mentioned in the Working Time Regulations 2008, although there is (consciously or perhaps unconsciously) a recognition of a Christian pattern of weekly rest by the requirement that, with very limited exceptions, workers must be given a minimum rest period of an uninterrupted 24 hours in every seven-day cycle.<sup>83</sup>

It should be noted that Knights sees the existence of the protections from Sunday working for shop workers as an example of a favouring the established religion and, for that reason, should be ‘subject to challenge’.<sup>84</sup> Assuming her analysis is to be accepted (although no actual reference is made in the legislation to religion and thus all can benefit from the option of refusing to work on Sunday, irrespective of religious convictions), Knights arguably underplays the context in which the exemptions came into force – they are of course concessions in the face of a loss of much greater freedoms (since 1994) to observe Sundays as a day for worship and rest for the Christians, rather than positive rights created specifically to favour the established religion.

This example notwithstanding, it is submitted that there is little at a statutory level which amounts to evidence of exclusive ongoing support in ‘a workplace context’ for the historical religion of England and Wales. In fact there remain two examples. In terms of public office, the role of the monarch continues to require a religious test of commitment to Anglican Protestant Christianity, and this is largely for reasons connected to the constitutional position of the Church of England and the role of the monarch as Supreme Governor. In terms of the working calendar, there now remains only Easter Sunday where large shops must be closed; otherwise, there are few restrictions on Sunday trading. However, although there is little in the way of statutory restriction, the convention of

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<sup>83</sup> Working Time Regulations 1998, SI 1998 No. 1833, reg 11.

<sup>84</sup> S Knights, *Freedom of Religion, Minorities and the Law* (OUP 2007), 149.

treating Sunday as a weekly day of rest remains strong in such that on that day ‘many social activities (such as education and government) are suspended.’<sup>85</sup>

## **Race Discrimination Protections**

It will be argued that anti-discrimination law provides the most obvious vehicle for the protection of religious expression in the workplace. Although specific protection for religion and belief has only been available since 2003, there is some older anti-discrimination law in the form of the Race Relations Act 1976, which has been interpreted to offer protection to workers who are members of certain religious groups on the basis that these also represent defined ‘racial groups.’<sup>86</sup> The Race Relations Act, in its amended version, outlaws discrimination on ‘racial grounds’ or against ‘racial groups’ where the latter term ‘means a group of persons defined by reference to colour, race, nationality or ethnic or national origins’.<sup>87</sup>

This principle that this definition might encompass groups more usually identified as religious was first established at the Employment Appeals Tribunal (EAT), with reference to a Jewish man. Although without employing any significant legal reasoning, except that it reflected a common understanding between the parties, the EAT determined that he could be considered to be a member of an ethnic or racial group for the purposes of the Race Relations Act.<sup>88</sup>

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<sup>85</sup> R Gavison and N Perez, ‘Days of rest in multicultural societies: private, public separate’ in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP 2008), 189.

<sup>86</sup> There is also a potential (but rather less obvious) avenue of redress for women who are denied the opportunity to manifest their religion originally under the Sex Discrimination Act (now under the sex discrimination provisions of the Equality Act). For example Hepple and Choudhury note the unreported tribunal case of *Sardar v McDonalds* (1998), where the claimant, a Muslim woman, was successful in a sex discrimination claim having been denied the right to wear a headscarf at work (Hepple and Choudhury, *Tackling religious discrimination*, 5).

<sup>87</sup> Race Relations Act 1976, s 3(1).

<sup>88</sup> *Seide v Gillette Industries Ltd* [1980] IRLR 427.

The same principle was recognised in respect of Sikhs, and with much more sophistication, in the House of Lords judgment in *Mandla v Dowell Lee*.<sup>89</sup> This case was brought under the wide reach of the Race Relations Act by the father of an orthodox Sikh who was a prospective pupil at a private school. The headmaster, who in the cause of racial harmony, wanted to minimise religious and social distinctions in the school, refused to admit the boy unless he removed his turban and cut his hair. Mandla and his father held that this represented indirect discrimination which could not be justified, as the rationale rested on the headmaster's subjective opinion, and was therefore unlawful. The case rested on whether or not the Sikh identity was purely a function of religion or also a function of ethnic origin. The House of Lords determined that unlawful indirect discrimination had occurred under the Race Relations Act. In determining that Sikhs are in fact members of an ethnic group, the following 'content-based' rationale was offered:

The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors (4) a common language, not necessarily peculiar to the group (5) a common literature peculiar to the group (6) a common religion different from that of neighbouring groups or from the general community surrounding it (7) being a minority or being an oppressed or a dominant group within a larger community ... . A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purpose of the 1976 Act, a member.<sup>90</sup>

These criteria have been used in subsequent cases to determine that Rastafarians are not an ethnic group because they cannot show a separate identity either from

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<sup>89</sup> [1983] 2AC 548 (HL).

<sup>90</sup> *ibid.* 4 (Lord Fraser of Tullybelton)

other Jamaicans or indeed from the rest of the Afro-Caribbean community.<sup>91</sup> Muslims have been unable similarly to establish protection on the grounds of race because they are geographically widely dispersed, and so cannot point towards a common ethnic origin.<sup>92</sup> Jehovah's Witnesses have also failed to establish that they are a distinct ethnic or racial group.<sup>93</sup>

As noted by Hepple and Choudhury, the concept of indirect discrimination (discussed below) has also been invoked under the Race Relations Act in order to seek redress for detriments suffered on religious grounds.<sup>94</sup> In *CJH Walker v Hussain*,<sup>95</sup> for example, a blanket rule by an employer preventing employees taking leave during a busy period of time (which happened to be a Muslim holiday) was challenged by seventeen employees under the Race Relations Act. Their case relied on the fact that all seventeen claimants originated from the Indian subcontinent and could thus claim a common ethnic origin. Both the first instance tribunal and the EAT found that the respondent had indirectly discriminated against the claimants: the only group affected (negatively) by the application of the blanket rule were 'Asian Muslims', and the respondent was unable to offer a satisfactory justification. Although in this case the claimants were successful, when the same reasoning under the Race Relations Act was applied in different circumstances, the limitations of this avenue of redress for 'religious' claimants is clear. For example in *Safouane & Bouterfas v Joseph Ltd and Hannah*<sup>96</sup> two Muslim employees had been summarily dismissed for, *inter alia*, taking time for prayers during the lunch period. An industrial tribunal concluded that this did not amount to indirect racial discrimination by the employer, because both the claimants and the respondents belonged to the same

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<sup>91</sup> *Dawkins v Department of the Environment* [1993] IRLR 284, CA.

<sup>92</sup> *CJH Walker Ltd v Hussain* [1996] IRLR 11, EAT.

<sup>93</sup> *Lovell-Badge v Norwich City College of Further and Higher Education* (1999) ET Case No. 1502237/97.

<sup>94</sup> Hepple and Choudhury, *Tackling religious discrimination*, 4-5.

<sup>95</sup> [1996] IRLR 11 EAT.

<sup>96</sup> (1996) ET Case No. 12506/95 and ET Case No. 12568/95, cited by Hepple and Choudhury, *Tackling religious discrimination*, 5.

North African ethnic Arab minority – the former were Muslim, the latter respectively Jewish and Christian Coptic.

### **‘Conscience Clauses’<sup>97</sup>**

Outside of discrimination law, there are a small number of specific exemptions from certain workplace activities enshrined in particular statutes.

Probably the most well-known and long-standing example is the clause in the Abortion Act 1967 which allows medical staff to refuse to participate in abortion procedures if they have a ‘conscientious objection.’<sup>98</sup> This right of refusal was extended to embryo research in 1990<sup>99</sup> and would have been extended to apply to assisted dying under a private members Bill introduced to Parliament in 2004.<sup>100</sup> Where abortion is concerned, conscientious objection is not referenced to a religious or other form of belief. In fact, no grounds for this objection are specifically required, albeit that the burden of proof that a genuine objection exists rests with the medical practitioner.<sup>101</sup> It is perhaps safe to assume that a large number of practicing members of religious faiths will be amongst those medical practitioners who avail themselves of this clause,<sup>102</sup> but it is significant that it is the objection, not the motivation for the objection, which triggers the available protection.

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<sup>97</sup> This section draws extensively on A Hambler, ‘Recognising a right to “conscientiously object” for registrars whose religious beliefs are incompatible with their duty to conduct same-sex civil partnerships’ (2012) 7 *Religion and Human Rights* 157.

<sup>98</sup> Abortion Act 1967, s 4(1).

<sup>99</sup> Human Fertilisation and Embryology Act 1990, s 38.

<sup>100</sup> Assisted Dying for the Terminally Ill Bill [HL] 2004, s 7; interestingly, however, such a clause was not included in the End of Life Assistance (Scotland) Bill 2010.

<sup>101</sup> Abortion Act 1967, s 4(1). In Scotland this can be discharged simply by ‘making a statement on oath by any person to the effect that he has a conscientious objection’ (s 4 (3)).

<sup>102</sup> It is known, for example, that members of the Christian Medical Fellowship have been amongst those who have utilised the conscience clauses; see P Saunders, ‘Abortion and Conscientious Objection’ (1999) *Spring Nucleus*, 4.

There are limits on the exercise of the conscience clause under the Abortion Act. For example, those medical professionals who oppose abortion in all circumstances absolutely are required, conscientious objections notwithstanding, to participate in abortions if this is required to save the life or prevent serious and permanent physical or mental injury to a pregnant woman.<sup>103</sup> This is likely to affect only a small group of particularly stringent conscientious objectors. However, many more are likely to be affected by a more significant limitation on the exercise of conscientious objection - that it has been held to apply to medical treatment only. Thus, in *R v Salford AHA ex parte Janaway*,<sup>104</sup> a doctor's secretary, who was Roman Catholic, was unsuccessful in arguing that she was entitled to use the exemptions under Section 4(1) of the Abortion Act to justify her refusal to type a letter of referral for a patient seeking an abortion. The exemption was held to apply only to actual participation in the hospital *treatment* leading to abortion. Similarly, in a Scottish case under the same legislation, *Doogan & Anor, Re Judicial Review*,<sup>105</sup> the exemptions for conscience were held not to apply to two midwifery sisters (both Roman Catholic) who opposed being required to 'delegate, supervise and support staff in the treatment of patients undergoing termination of pregnancy'.<sup>106</sup> These activities were held not to constitute direct involvement in abortion because '[n]othing [the applicants] have to do as part of their duties terminates a woman's pregnancy.'<sup>107</sup>

These judgments strongly suggest that any *indirect* participation in abortion does not fall within the available protections for conscientious objection. Thus, participation in pre- and post-operative care would be excluded, including potentially the referral by GPs to an abortion clinic.<sup>108</sup> There is, however, a second conscience clause which permits GPs to refuse to make such referrals where they have a conscientious objection to abortion, but which requires them

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<sup>103</sup> Abortion Act 1967, s 4(2).

<sup>104</sup> [1988] 3 All ER 1079.

<sup>105</sup> [2012] ScotCS CSOH\_32 (29 February 2012).

<sup>106</sup> *ibid.* [10].

<sup>107</sup> *ibid.* [80].

<sup>108</sup> D Hill, 'Abortion and Conscientious Objection', 16 (2010) *Ethics in Brief*; copy at <<<http://klice.co.uk/uploads/EiB/Hill%20v16.1%20pub.pdf>>>, accessed 2 December 2011.

to make ‘prompt referral to another provider of primary medical services who does not have such conscientious objections’.<sup>109</sup> What this means is that the GP must indirectly assist the patient to be referred to an abortion clinic, via another GP who is not opposed to terminating a pregnancy. This represents a serious limitation on the exercise of conscience. *Inter alia*, it excludes from protection those GPs who struggle to see a moral difference between referring a patient to an abortion clinic and referring a patient to another GP, for inevitable onward referral to an abortion clinic.<sup>110</sup> In other words (to adopt the language of moral philosophy), it accommodates only those who adopt a rigidly deontological view of the moral rightness of their own actions, and not those who take a broader consequentialist view of the likely ultimate effect of those same actions.<sup>111</sup>

Equally, for those to whom it does apply, the mechanism for conscientious objection may also be flawed so as to make it difficult, in the face of various pressures, to exercise it without cost.<sup>112</sup> This point was made clearly in the Parliamentary debate on the issue of abortion during the passage of the Human Fertilisation and Embryology Bill in 1989:

Unfortunately, however, there are many different ways in which the present conscience clause of the Abortion Act does not work effectively. Management can indicate that promotion prospects will be damaged if medical personnel do not take part in abortions. Candidates for interview for medical appointments will not be successful in some cases unless they agree in advance that they will take part in abortions. Peer group pressure—the burden falling upon other overworked medical

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<sup>109</sup> The National Health Service (General Medical Services Contracts) Regulations 2004, s 3(e).

<sup>110</sup> See J Jackson, *Ethics in Medicine* (Polity 2006).

<sup>111</sup> For a discussion of these concepts see T Beauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy* (2nd edn, McGraw Hill 1991).

<sup>112</sup> There is some evidence of an increasing intolerance in practice of doctors who object to abortion. For example, a survey of Christian doctors by the Christian Medical Fellowship revealed a perception, by a sizeable minority of respondents, of ‘discrimination’ against them because of their views on abortion, including some instances of being refused jobs; see E Burton and A Fergusson, *Members’ Attitudes to Abortion: a survey of reported views and practice* (Christian Medical Fellowship 1996).

personnel—can persuade individuals to become involved in abortions about which they are unhappy.<sup>113</sup>

These criticisms of an ‘opting out’ arrangement may well find an echo in other examples where conscientious objection is a legitimate option but is not viewed with a friendly eye by managers to whom it may create a measure of administrative or operational inconvenience.

Another example of an apparently religiously-neutral conscience clause, and which was noted earlier, is that available to retail and betting workers.<sup>114</sup> Here, the mechanism is very different to that employed in the Abortion Act – rather than requiring the conscientious objector to ‘opt out’ or otherwise be assumed to have consented to involvement, the retail or betting worker is assumed *not* to be a Sunday worker, unless she chooses to ‘opt in’ (a similar arrangement to that in force for those who wish to waive their rights to work only a 48 hour week<sup>115</sup>). Thus, any need to establish the basis of any conscientious objection is entirely obviated.

A rather different conscience clause is that available to Sikh construction workers. They are excused from wearing a hard hat in place of a turban on construction sites by virtue of the Employment Act 1989.<sup>116</sup> This represents a rare example of a specific statutory exemption relating to employment (in this case from health and safety legislation) on the apparent grounds of ‘religion’.<sup>117</sup> There are some extenuating circumstances which help to explain why, uniquely, health and safety legislation should give way to religious obligations. This is a

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<sup>113</sup> HC Deb 27 July 1989, vol 157, col 1371-72, Mr Kenneth Hargreaves MP.

<sup>114</sup> Employment Rights Act 1996 Part IV.

<sup>115</sup> Working Time Regulations 1998, reg 5.

<sup>116</sup> *ibid.*, s 11.

<sup>117</sup> Another example existed from 1971 – 1992. Prior to the ending of the ‘Closed Shop’ under the Trade Union and Labour Relations (Consolidation) Act 1992 s 137 and, where this practice existed, a ‘genuine religious objection’ was one of the few reasons accepted, without loss of position, for refusal to join a trade union; see R Benedictus, ‘Closed Shop Exemptions and their Wording’ (1979) 8 Ind LJ 160.

function of the universal requirement that construction workers should wear hard hats (this is distinct from other occupations where Sikhs might be accommodated by being assigned to other duties not requiring the wearing of a hard hat) – thus, without an exemption, Sikhs would be entirely excluded from construction work, thought to be an important source of paid occupation for Sikhs in the UK.<sup>118</sup> In another example with implications beyond employment, Sikhs enjoy an exemption from the otherwise universal obligation to wear a motorcycle helmet; *inter alia*, this prevents their exclusion from courier and delivery work.<sup>119</sup> Whether such provisions, considered in terms of the models in Chapter 3, actually represent significant concessions specifically for freedom of religious expression is cast into doubt by the curious position of the Sikh, for whom, as has been noted, the boundaries are blurred between religion, race and culture. This being the case, the exemptions for Sikhs, limited as they, may rather represent support for the Model VI (protection for minority religions only), where religion is a proxy for the apparently more important ‘rights’ connected to race under its widest meaning.

There is a further source of conscientious objection provisions which may exist by virtue of professional codes of conduct. For example, empowered by the Pharmacy Order 2010,<sup>120</sup> the General Pharmaceutical Council has produced a binding code of conduct which includes, at face value, a potentially wide-ranging conscience clause; it requires pharmacists to:

Make sure that if your religious or moral beliefs prevent you from providing a service, you tell the relevant people or authorities and refer patients and the public to other providers.<sup>121</sup>

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<sup>118</sup> See Barry, *Culture and Equality*, 49.

<sup>119</sup> See the Road Traffic Act 1988 s 16(2).

<sup>120</sup> SI 231/2010.

<sup>121</sup> General Pharmaceutical Council, *Standards of conduct, ethics and performance*, September 2010 [3.4]; available at: <<

<http://www.pharmacyregulation.org/sites/default/files/Standards%20of%20conduct,%20ethics%20and%20performance.pdf>>>, accessed 17 April 2012.

As the services which pharmacists may refuse to provide are not specified,<sup>122</sup> nor the circumstances in which such refusals may be made, this represents a much more inclusive approach to conscientious objection than that contained, for example, within the Abortion Act.

There are thus a small number of statutory exemptions for workers on the basis of ‘conscience’. Those that are controversial relate to medical practice and are religious-neutral – objections do not need to be located with reference to a particular religious or philosophical world-view. As has been seen, these exemptions are narrowly interpreted by the courts. They are fiercely opposed by some, particularly in respect of abortion.<sup>123</sup>

For conscientious exemptions on other grounds which affect workers, there appears to be little appetite to legislate to accommodate these. This is clearly evident from the failure to amend legislation to include ‘opt outs’ for workers and officials required to implement legislation advancing same-sex rights - such as civil partnerships and gay adoption – and who might object on religious grounds. Such an amendment<sup>124</sup> was unsuccessfully moved in 2003 by Lady Blatch during a debate on the Local Government Bill of that year; had it been

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<sup>122</sup> It is likely that the Morning After Pill will be amongst those services which some pharmacists will refuse to provide, on grounds of conscience (as it is seen as destroying post-conception human life); see E Fenton and L Lomasky, ‘Dispensing with Liberty: Conscientious Refusal and the Morning-After-Pill’ (2005) 30 *Journal of Medicine and Philosophy* 579 (the authors present a nuanced case in favour of a conditional right of conscientious objection for pharmacists).

<sup>123</sup> One argument against conscientious objection to abortion is to see the practice as a core part of the job of clinicians – those who oppose are quite simply entering the wrong profession; see J Savulescu, ‘Conscientious objection in medicine’ (2006) 332 *BMJ* 294. Another argument is that conscientious objection to abortion imposes unnecessary obstacles to a woman’s ‘rights’ in this respect; see discussion in B Dickens and R Cook, ‘The scope and limits of conscientious objection’ (2000) 71 *International Journal of Gynecology and Obstetrics* 71. In response, it may be argued that the business of medicine is a ‘moral enterprise’ and doctors are bound by professional codes of ethics based on the ancient Hippocratic oath, where respect for life (including, for many, the life of the unborn child) is a core value, trumping other considerations; see M Wicclair, ‘Conscientious Objection in Medicine’ (2000) 14 *Bioethics* 205.

<sup>124</sup> Amendment No. 217.

successful, it would have permitted a right to ‘opt out’ for Christian social workers who did not want to participate in adoptions by homosexual couples.<sup>125</sup> A more recent amendment,<sup>126</sup> wider in potential scope, was moved by Lady O’Cathain in the House of Lords during a debate on the Equality Bill in 2005:<sup>127</sup>

(1A) For the avoidance of doubt the prohibition in subsection (1) shall include—

- (a) requiring a registrar or any other person to arrange, officiate at or otherwise participate in the registration of a civil partnership under the Civil Partnership Act 2004 (c. 33),
- (b) requiring a registrar or any other person to arrange, solemnise or otherwise participate in the registration of a marriage involving a person whose gender has become the acquired gender under the Gender Recognition Act 2004 (c. 7),
- (c) requiring any person to participate in any placement under section 18 of the Adoption and Children Act 2002 (c. 38) (placement for adoption by agencies), or any application under section 49 of that Act (application for adoption) where the placement is with, or the application is made by, a couple who are not a married couple, or one applicant is part of a couple within the meaning of section 144(4)(b) of the Adoption and Children Act 2002 (general interpretation etc.),

where the person concerned has a conscientious objection on the basis of his religion or belief.<sup>128</sup>

Lady O’Cathain withdrew the amendment after the Government refused to accept it. Baroness Scotland, on behalf of the Government of the day, supported this decision with reference to the more general protections offered by the Employment Equality (Religion or Belief) Regulations 2003 – the inference being that these offer sufficient protection in such cases (although with hindsight this has proved to be somewhat misleading).<sup>129</sup>

The reliance on the Employment Equality (Religion or Belief) Regulations (and now the relevant provisions of the Equality Act 2010) in lieu of a specific

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<sup>125</sup> HL Deb 23 Jun 2003, vol 650, col 39GC.

<sup>126</sup> Amendment No. 191A.

<sup>127</sup> Enacted as the Equality Act 2006.

<sup>128</sup> HL Deb 13 Jul 2005, vol 684, col 1147.

<sup>129</sup> HL Deb 13 Jul 2005, vol 684, col 1154.

conscience clause does of course create a much more qualified right to protection for conscience as opposed to the absolute right which would be conveyed through a specific opt-out clause.

What is not explained is why these regulations are considered to provide sufficient protection for those opposing, for example, civil partnerships and not those opposing abortion. Indeed, the passage of the Human Fertilisation and Embryology Act 2008, provided a clear and recent opportunity to withdraw the conscience clause on the basis that sufficient protection for conscientious objection lay elsewhere in domestic law. This did not occur. An explanation as to the differential treatment of these two types of conscience claim is mooted by Kenneth Norrie. He suggests that

health care professionals are not carrying out public duties in the way that registrars are; abortion is not an inherent and necessary part of health care, in the way that registration of civil partnership is within the registration system; and refusing to perform abortions does not constitute systemic discrimination against an equality-vulnerable class.<sup>130</sup>

Norrie's analysis implies: firstly, that there is a critical distinction of some kind between the conduct of a public duty, for which no opt-out can be countenanced, and the conduct of an activity which cannot be so classified; secondly, there is a distinction between activities which are core and non-core to the job role, and opting out of the former is less acceptable than opting out of the latter; thirdly, the characteristics of the group in some way potentially disadvantaged by the conscience clause should be taken into account – if this group is considered to be disadvantaged then this should be weighted against the conscientious objector (who is recast as a 'discriminator'). The problem with this analysis is that it considers the case from all perspectives save that of the conscientious objector. The demands of individual conscience presumably do not change in response to the public nature of the role or task in question, nor how core the task is thought to be, nor who might be in some way 'offended' by the objection. Nevertheless,

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<sup>130</sup> K Norrie, 'Conscience and public service', *thejournalonline* (11 April 2008); copy at <<<http://www.journalonline.co.uk/Magazine/53-4/1005151.aspx>>>, accessed 28 June 2010.

from the perspective of the legislature, it would seem that it is a policy decision not to promote religious rights in these circumstances and to insist that public officials act against conscience or leave their role. This aspect of public policy is most congruent with Model I (exclusion).

### ***England and Wales (Post-2003)***

Based on Article 13 of the Treaty of Amsterdam, the EU adopted the Framework Equality Directive in 2000.<sup>131</sup> The directive outlawed discrimination in employment and vocational training on the grounds of religion or belief, sexual orientation, disability and age. In transposing the Directive into law, the British Government introduced, *inter alia*, the Employment Equality (Religion or Belief) Regulations 2003 which came into force on 2nd December 2003 and apply in England, Wales and Scotland.<sup>132</sup> These regulations were, in turn, replaced by the Equality Act 2010, where the drafting was broadly replicated with minor changes.

### **Definitions**

How religion is defined is of some significance. The relevant EU directive provides little steer in terms of definition - ‘religion and belief’ is one of the prohibited grounds for discrimination in employment, but no further elucidation of the reach of these terms is offered.<sup>133</sup>

This was transposed into the original text of the 2003 Regulations in an expanded form as follows: ‘In these Regulations, “religion or belief” means any religion, religious belief, or similar philosophical belief.’<sup>134</sup> Under the Equality Act,<sup>135</sup> the

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<sup>131</sup> EC Directive 2000/34 on equal treatment [2000] OJ L303/16.

<sup>132</sup> Separate legislation applies in Northern Ireland (The Fair Employment and Treatment Order 1998).

<sup>133</sup> See the preamble to EC Directive 2000/34.

<sup>134</sup> Reg 2(1), Regulations as enacted.

<sup>135</sup> s 10.

definition changed slightly, largely to incorporate protections for those without religion or belief:

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

In 2006 the Regulations had been amended in order to remove the word ‘similar’ from ‘philosophical belief’ and this revised formula was carried across into the Equality Act.<sup>136</sup> Ostensibly this would appear to weaken the link between religion and belief suggesting that the bar was being in some way lowered to allow beliefs which could not quite sufficiently similar to a religion or a religious belief. Vickers suggests however, that the change in wording was put into effect merely in order to placate some humanists and atheists who objected to the implication that their beliefs were similar to religious beliefs.<sup>137</sup> This issue was considered by the judge in *Grainger Plc & Others v Nicholson*<sup>138</sup> who, examining the relevant debates in Hansard, agreed with Vickers and thus concluded that the amendment to the wording was not materially significant in terms of adding or subtracting from the original definition.

Nevertheless, *Grainger* was a highly significant ruling in terms of understanding the legal definition of belief. In brief, the case was concerned with whether or not a belief in man-made climate change was capable, if genuinely held, of being a philosophical belief for the purpose of the 2003 Religion and Belief Regulations. The judge in the case concurred with the employment tribunal (pre-hearing review) that it was. In doing so, he determined five criteria to apply in determining whether or not a given belief or set of beliefs fall under the scope of the 2003 Regulations:

- (i) The belief must be genuinely held.

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<sup>136</sup> Equality Act 2006, s 77(1).

<sup>137</sup> Vickers, *Religious Freedom*, 23.

<sup>138</sup> (2009) UKEAT/0219/09/ZT.

- (ii) It must be a belief and not [ ] an opinion or viewpoint based on the present state of information available.
- (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
- (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others

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In applying these criteria, in the instant case, the judge found that a belief in man-made climate change was capable of being protected under the Regulations, despite the fact that it may be ‘a one-off belief’ (as opposed to a comprehensive world-view, or, in the judge’s words, an ‘-ism’) and not necessarily shared by others.<sup>140</sup> This judgment would seem to suggest a broadening of protection for sincerely held beliefs, including beliefs based on science and political beliefs,<sup>141</sup> albeit that the judge still clearly intended that boundaries should still apply – not all beliefs will qualify. Perhaps particularly interesting is the fifth criteria – compatibility with dignity and the fundamental rights of others, a criteria drawn from ECHR jurisprudence and originally applied in considering the definition of ‘belief’ in *McClintock*.<sup>142</sup> Although perhaps a mechanism to continue to exclude racist beliefs from protection,<sup>143</sup> it nevertheless imposes a relative requirement

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<sup>139</sup> *ibid.* [24] (Burton J).

<sup>140</sup> *ibid.* [27] (Burton J).

<sup>141</sup> *ibid.* [28–30]. See also subsequent cases, as a result of which the following have been accepted as protected beliefs: opposition to fox hunting and hare coursing (*Hashman v Milton Park (Dorset) Limited t/a Orchard Park* (2011) (ET Case No. 3105555/09)); a belief in the ‘higher purpose’ of public service broadcasting (*Maistry v BBC* (2011) ET Case No. 1313142/10); and a commitment to vegetarianism (*Alexander v Farmtastic Valley Ltd and others* (2011) ET Case No. 2513832/10). A belief in wearing a poppy does not, however, qualify (*Lisk v Shield Guardian Co and others* (2011) ET Case No. 3300873/11).

<sup>142</sup> *McClintock* [41] (Elias J).

<sup>143</sup> BNP beliefs have been deemed beyond the scope of the regulations (*Baggs v Fudge* (2005) ET Case No. 1400114/05) as have Socialist beliefs (*Kelly and others v Unison* (2010) ET Case No. 2203854-57/08). However, the failure in discrimination law to protect employees from dismissal

that a belief should be generally considered acceptable ‘in a democratic society’. Unless the meaning here is restricted to outlawing physical harm to others (akin to beliefs in human sacrifice, genital mutilation, etc) and then extended to apply to religious beliefs, then a number of beliefs which might otherwise be worthy of protection could be called into question, including, for example, any religious beliefs which may appear to be incompatible with the dignity of women or gay and lesbian people, or which might involve a denial of vital medical treatment to minors.

### **Direct Discrimination**

The focus in this section will be on how far the direct discrimination provisions of the Equality Act offer protection for forms of religious expression in the workplace.

The definition of direct discrimination is found under section 13 of the Equality Act: ‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.’<sup>144</sup> Religion and belief is ‘a protected characteristic’, as are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation.<sup>145</sup>

Fundamentally, the definition of direct discrimination is designed to identify and render unlawful any behaviour by an employer (or another actor in the workplace) which involves subjecting a worker to a ‘detriment’ because of their protected characteristic. For example, a failure to promote someone because she is a Hindu would amount to direct discrimination because of the protected characteristic of religion and belief.

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or detriment because of their political beliefs is likely to fall foul of the ECHR as a result of the decision in *Redfearn v United Kingdom* [2012] ECHR 1878.

<sup>144</sup> This wording essentially replicates the definition in the Employment Equality (Religion and Belief) Regulations 2003, at Reg 3(1).

<sup>145</sup> Equality Act 2010, s 4.

Direct discrimination is potentially a powerful protection for employees for a number of reasons. Firstly, the normal obligation on the claimant to show an adequate degree of ‘proof’ before proceeding with a claim is reversed.<sup>146</sup> The claimant need only show a *prima facie* claim; the onus is then on the employer to satisfy a tribunal that it did not in fact engage in discrimination.<sup>147</sup> Secondly, aside from the occupational requirement provisions of the legislation, there is no defence against a direct discrimination claim on the basis of religion and belief (unlike indirect discrimination which can be defended as proportionate). As noted in *R (E) v JFS Governing Body*<sup>148</sup> this means that direct discrimination in favour of minority religious or racial groups cannot be justified, just as discrimination against such groups cannot. For some this represents a regrettable ‘defect’ in the law;<sup>149</sup> certainly it does not align with Model VI (protection for minority religions).

For a direct discrimination claim to succeed, a ‘comparison’ is usually required.<sup>150</sup> In religion and belief cases, a tribunal will examine whether or not, for instance, a Buddhist was treated less favourably than a Hindu either was, or would have been, treated in the same circumstances. Thus the comparison can be either real or hypothetical, but the circumstances of the comparator and the claimant must be the same, with only the religion being different. Once less favourable treatment has been established, the question then arises, was religion the ground of the less favourable treatment, or did the less favourable treatment have some other cause? The formula was set out by the House of Lords thus: would the claimant have been treated in the same way *but for* his (in this case) religion or belief?<sup>151</sup>

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<sup>146</sup> Equality Act 2010, s 136.

<sup>147</sup> *Igen v Wong* [2005] IRLR 258.

<sup>148</sup> [2009] UKSC 15, [2010] 2 AC 728 [9] (Lord Phillips).

<sup>149</sup> *ibid.*; see also, in a similar vein, Lady Hale’s comments [69] and those of Lord Hope [184].

<sup>150</sup> *Glasgow City Council v Zafar* [1988] ICT 120 HL.

<sup>151</sup> *James v Eastleigh Borough Council* [1990] 2 AC 751 HL.

The pressing question for the subject at hand is how far the basis of direct discrimination, thus defined, actually protects religious ‘expression’ as opposed to ‘belief’ itself; in other words, how far might tribunals adopt the ECtHR approach of distinguishing between a *forum internum* and a *forum externum*, and protecting the latter not the former? If they do so, how might they draw the line between the two? For example, would a blanket requirement that all male staff be clean-shaven directly discriminate on the basis of belief (protected) or merely on the basis of conduct inspired by belief (unprotected)?<sup>152</sup> As a second example, might an employer be able to treat a grievance from a Christian member of staff less favourably than a grievance from a gay member of staff, if it could argue that the Christian’s grievance was, or was related to, a manifestation of the belief rather than the belief itself? Could it thus admit that it subjected the Christian to a detriment but argue that this was on a basis unprotected by the Regulations, arguing that the circumstances were not the same?<sup>153</sup>

### **Indirect Discrimination**

Indirect discrimination is defined under section 19 of the Equality Act as occurring when:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

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<sup>152</sup> Such an employer would be unlikely to avoid an indirect discrimination claim in these circumstances!

<sup>153</sup> See the facts of *Ladele v Islington Borough Council* [2009] EWCA Civ 1357 (CA), [2010] IRLR 211.

- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.<sup>154</sup>

Indirect discrimination because of the protected characteristic of religion and belief extends protection to workers whose employer imposes an apparently neutral requirement which has a much more significant and detrimental effect on people (otherwise in the same circumstances as others to whom the requirement applies) who hold a particular religious belief. For example, if an employer imposed a uniform requirement which prevented staff wearing any form of head covering, then this would be a requirement which would be difficult for many Muslim women to meet on the basis of their faith-based conviction that they must wear a headscarf in the company of men.<sup>155</sup> This requirement would be therefore ‘indirectly discriminatory’. As another example, if a pharmacy required that all staff issue contraceptives to customers this would indirectly discriminate against Roman Catholic Christians who have a faith-based objection to the practice of contraception and who would thus find it difficult to comply with the requirement.

In order to be successful in an indirect discrimination claim, the claimant must show that he has suffered (or would suffer) a ‘particular disadvantage’ as a Christian, Muslim, etc, as a result of a specific requirement in the workplace, a disadvantage from which others do not or would not suffer. Thus, at its most basic, the claimant would need to show that a specific requirement has disadvantaged, or would disadvantage, a religion that he belongs to, or a belief arising from that religion which is shared by others. This test is more relaxed than its forerunner; the wording of the Sex Discrimination Act 1975, as

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<sup>154</sup> This is essentially the same formula for defining indirect discrimination which appears at Reg 3(1) of the Employment Equality (Religion and Belief) Regulations 2003.

<sup>155</sup> It is not necessary to show that it is impossible to meet the requirement; see *Price v Civil Service Commission* [1978] ICR 27.

originally enacted, required proof that the proportion of women who could comply with a work requirement was ‘considerably smaller’ than the proportion of men who could so comply.<sup>156</sup> As Fredman notes, quantifying what was meant by ‘considerably smaller’ gave rise to some considerable legal dispute.<sup>157</sup> The wording of the Equality Act (and before that the Religion and Belief Regulations), by avoiding the need to quantify the scope of the disadvantage, tends to obviate the first problem. The second problem may however remain to some extent. For example, is a ‘particular disadvantage’ suffered by a single Roman Catholic protected, or is it necessary to identify a group, or ‘pool’ of Roman Catholics who share the same disadvantage?<sup>158</sup> Tribunals may favour the need to identify a group disadvantage as this is more in the spirit of the origins of the concept of indirect discrimination.<sup>159</sup> However, there is also a view that more individualised religious beliefs should be admitted into the scope of protection. Vickers, for example, argues that this is more in keeping with the ECHR, which courts are legally obliged to take account of.<sup>160</sup> Thus, the expression of a sincerely held religious belief, which may be shared by few if any others, would not be excluded from the scope of indirect discrimination *per se*. That said, when the test of proportionality is subsequently applied, it would be possible for a group disadvantage test to apply indirectly. As Vickers observes:

If an employer refuses to adapt a uniform rule to reflect the dress codes of a large proportion of the local workforce, such a refusal may be viewed as disproportionate; failure to accommodate one employee's religious views may be more easily regarded as proportionate.<sup>161</sup>

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<sup>156</sup> Sex Discrimination Act 1975, s 1(1)(b)(i), before amendments.

<sup>157</sup> Fredman, *Discrimination Law*, 110-111.

<sup>158</sup> This issue was tested in *Eweida v British Airways* (see discussion in Chapter 6); see also on this point, G Pitt, ‘Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination’ (2011) 40 Ind LJ 384.

<sup>159</sup> The concept was first articulated and applied in the US case of *Griggs v Duke Power* 401 U.S. 424 (1971), and was based on the desire to tackle the ‘group disadvantage’ which might result from apparently neutral employment practices.

<sup>160</sup> L Vickers, ‘Indirect discrimination and individual belief: *Eweida v British Airways Plc*’ (2009) 11 Ecc LJ 197.

<sup>161</sup> *ibid.*, 202.

The test of proportionality forms part of the defence against indirect discrimination claims – in essence there is a justification defence which is currently framed in UK law as showing that a particular criterion, provision or practice represents ‘a proportionate means of achieving a legitimate aim.’ For example, a chocolate factory might be able to justify as proportionate a policy of requiring all staff who are directly involved in the production process to be clean shaven for reasons relating to the legitimate aim of hygiene, even though this would represent *prima facie* indirect discrimination towards would-be Sikh employees.<sup>162</sup> It should be noted that the notion of a legitimate aim is not restricted to the economic interests of the employer and there is the clear possibility that employers may be able to offer justification arguments based on for example, the interests of other staff members or the desire to project a secular image to the public.<sup>163</sup>

It is worth noting the difference in this wording from that used in the original directive which requires that the indirectly discriminatory provision, criterion or practice ‘is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’<sup>164</sup> As Vickers observes, although tribunals are required to interpret discrimination law in the light of the original, the alternative wording of the regulations (and subsequently the Equality Act) appears to put less emphasis on the ‘necessity’ of any practice before an assessment of proportionality is carried out,<sup>165</sup> which would appear to be to the potential advantage of the employer. Baker locates the responsibility for the same problem with the judiciary, arguing that judges in the UK have deliberately avoided the ‘necessity’ requirement ‘in order to avoid exposing employers to the harsh scrutiny represented by the ECJ requirement that indirectly discriminatory

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<sup>162</sup> See *Singh v Rowntree Mackintosh* [1979] IRLR 199 (EAT Sc); and *Panesar v Nestle* [1980] ICR 60, (EAT), 64 (CA).

<sup>163</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 132.

<sup>164</sup> Directive 2000/78/EC, Art 2(2)(b)(i). This directive follows an earlier ECJ ruling that indirect discrimination can only be justified when it corresponds to a real need of the employer’s and is necessary (*Bilka-Kaufhaus Case C-170/84* [1987] ICR110).

<sup>165</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 131.

rules be necessary to meet a real need for the business.’<sup>166</sup> Instead, he argues, the UK courts have applied a form of ‘proportionality balancing’ which allows an employer to offer apparently acceptable reasons to justify its indirectly discriminatory provision, criterion or practice (PCP) but without needing to show a real need for that PCP. Thus, the employer’s ‘justification succeeds regardless of the availability of less discriminatory means’.<sup>167</sup>

## Harassment

The general definition of ‘harassment’ is defined under section 26(1) of the Equality Act as follows:

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B’s dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.<sup>168</sup>

Harassment is a legal concept which originally emerged from case law as a form of direct discrimination. A successful claim for harassment (under one of the protected grounds under discrimination law) therefore required the claimant to identify a comparator. As a result of the staged implementation of the 2002 EU Equal Treatment Amendment Directive,<sup>169</sup> existing domestic law changed and new discrimination legislation thereafter incorporated a free-standing definition

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<sup>166</sup> Baker, ‘Proportionality and Employment Discrimination in the UK’, 328.

<sup>167</sup> *ibid.*, 312. The force of this point is particularly clear when considering the judgment in *Ladele* (see discussion at Chapter 5 below). It should be noted that Baker favours a more sophisticated form of proportionality balancing based on the approach taken by the ECtHR in Article 14 ECHR judgments.

<sup>168</sup> This is essentially the same wording as that found at Reg 5 under the Religion and Belief Regulations 2003.

<sup>169</sup> Directive 2002/73/EC.

of harassment. Harassment no longer requires a comparator to be identified. Rather, the law now reflects an approach based on the concept of ‘dignity’. If someone’s dignity is (seriously) violated on the grounds of a protected characteristic, then it is likely to constitute an unlawful act of harassment. Since the implementation of the Equality Act 2010, it is not necessary for an individual actually to possess the relevant protected characteristic to make a claim of harassment.

The primary determinant of harassment is individual perception, above a certain threshold of ‘reasonableness’ to protect against claims by those who are (or choose to appear) very easily offended. A single act, if sufficiently serious, can be considered to constitute actionable harassment, but in most cases more than a single act will be required. It is generally agreed that fairness requires that the would-be harasser (‘Person A’) should be aware that his actions are offensive to Person B on the grounds of the protected characteristic.<sup>170</sup> This will not necessarily be immediately obvious to Person A, not least if Person B’s religious sensibilities are unknown. Nevertheless, the perception of B remains highly significant,<sup>171</sup> such that what might be inoffensive, even amusing to some, might be sufficiently offensive to another to trigger a harassment claim.

When an act of harassment takes place against one employee by another, it is primarily the employer who is considered liable for the consequences under the doctrine of vicarious liability which applies in discrimination law even if the employer does not know that a discriminatory act has taken place.<sup>172</sup> The employer can mitigate its liability by demonstrating that it took all reasonable steps to prevent discrimination or harassment taking place.<sup>173</sup> Having a policy, which is communicated to staff, is one way in which it can seek to do this.<sup>174</sup>

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<sup>170</sup> The law changed in respect of sex discrimination in 2007 so that unlawful harassment may be ‘sex-related’ rather than on the grounds of sex – the former reflecting more closely the wording of the original EU directive and widening the scope of protection.

<sup>171</sup> This is made explicit at section 26(4) of the Equality Act 2010.

<sup>172</sup> Equality Act s 109.

<sup>173</sup> Equality Act s 109(4).

<sup>174</sup> *Balgobin and Francis v London Borough of Tower Hamlets* [1987] ICR 829.

An illustrative example of harassment on the grounds of religion and belief is provided by the Muslim Council of Britain:

Following a particular incident, Islam features largely in the media. Consequently, stereotypical and hurtful comments in the workplace are routinely made about Muslims, upsetting certain Muslim employees. Such behaviour may amount to harassment, even if not specifically directed at one or more individuals, but at Islam as a religion or Muslims as a group more generally.<sup>175</sup>

Equally, harassment might result from unwelcome remarks about a co-worker's chosen form of religious expression, such as the wearing of a headscarf or cross, or to beliefs he or she is thought to hold.<sup>176</sup> To this extent, the harassment provisions of the Equality Act are likely to provide a degree of protection for employees who wish to express their religious identity or religious convictions without enduring various forms of hostility from co-workers or managers.

Far more problematic, for the purposes of this thesis, is the potential for the protections against religious harassment to be used as a means of *suppressing* religious expression in the workplace. Harassment on the grounds of religion could easily encompass giving offence to non-religious co-workers or co-workers of a different religious faith. The intention is not likely to be a deliberate attempt to cause offence – this is merely a potential by-product of a more worthy aim. The religious employee may well rather have an urgent concern for the spiritual well-being of co-workers and strongly desire to see them converted to the same religious faith. This is quite distinct from a deliberate desire to offend which may come from taunting religious colleagues because of their religious

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<sup>175</sup> MCB, *Muslims in the Workplace*, 7.

<sup>176</sup> Interestingly, the possibility that a religious employee might be subjected to harassment because of a perceived negative attitude to homosexuality is noted by the British Humanist Association (BHA), *Guidance on Equality of 'Religion or Belief'* (undated), 9; copy at: <<<http://www.humanism.org.uk/uploads/documents/GuidanceFinal2.pdf>>>; accessed 29 July 2010.

faith. The distinction between the two has led some American commentators to distinguish helpfully between ‘animus-based’ and ‘non-animus-based’ harassment.<sup>177</sup> However, although it is helpful analytically to consider the difference in motive, motive is in fact irrelevant in the UK; from a legal point of view, it is the ‘offensive’ result which is of significance.<sup>178</sup> There is a further possibility which exists by virtue of the harassment provisions of other aspects of discrimination law. For example, a religious employee may feel constrained to point out to a homosexual colleague that her lifestyle is ‘sinful’ and urge her to repent. This may constitute harassment because of the protected characteristic of sexual orientation, again despite the non-animus motive. However, there exists a further complication. To discipline a religious employee for harassment when seeking to convert or morally guide a colleague is likely to infringe his rights if he sincerely believes that to seek to convert or to point out sin in others is a requirement of his religious faith. Thus, he himself may be subject to indirect discrimination and possibly harassment by his employer. Vickers summarises the difficulty succinctly:

Take the example of a religious employee who attempts to convert a non-religious colleague, but who offends him in the process. In such a case, three rights interact: the nonreligious employee’s right to be free from religious harassment, the religious employee’s right to free speech, and both parties’ rights to freedom of religion. In some cases, the religious interests of an employer may also become involved. The entry of freedom of religion into an already complex equation makes the correct parameters of religious harassment more difficult to draw.<sup>179</sup>

With this in mind, the harassment provisions are potentially a double-edged sword, with one blade congruent with Model V (protection) and one blade congruent with Model I (exclusion).<sup>180</sup>

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<sup>177</sup> See, for example, Kaminer, ‘When religious expression creates a hostile work environment’.

<sup>178</sup> Although intention may affect the remedies awarded; see B Hepple, *Equality: The New Legal Framework* (Hart 2011), 68.

<sup>179</sup> L Vickers, ‘Is All Harassment Equal? The Case of Religious Harassment’ (2006) 65 *Cambridge Law Journal* 579.

<sup>180</sup> That harassment laws could negatively impact on religious expression, at least where broadly drawn, was also recognised (in the case of sexual orientation harassment in the provision of

## A Duty to make Reasonable Adjustments

Under the provisions of the Equality Act an employer is under what is known as ‘a duty to make reasonable adjustments’ to the workplace or to work practices in order to accommodate the needs of disabled employees such that they are able to work in particular roles.<sup>181</sup> The duty may involve some additional costs to the employer and may also entail a modest element of ‘positive discrimination’ in favour of disabled employees.<sup>182</sup> Such a duty does not extend beyond the protected characteristic of disability. However, it has been mooted that a similar duty should be introduced in the UK in respect of religion and belief akin to that employed, for example, in the USA under Title VII of the Civil Rights Act 1974,<sup>183</sup> which establishes a duty to ‘reasonably accommodate’ the needs of religious employees.<sup>184</sup> Such a duty would require employers to alter workplace rules and practices in order to accommodate workers’ religious beliefs where it is ‘reasonable’ to do so. For example, it may be that an employer would be required to alter a shift rota to accommodate the wish of a Christian employee not to work on a Sunday.

What is meant by ‘reasonable’ is perhaps the area which is likely to be most problematic. In the USA, for example, the duty of reasonable accommodation is circumscribed at the point that it creates ‘undue hardship on the conduct of the

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goods and services) in an *Application for Judicial Review by the Christian Institute & ors* [2007] NIQB 66, [2008] IRLR 36. The application was successful and the harassment clauses of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 were quashed.

<sup>181</sup> Equality Act 2010, s 20.

<sup>182</sup> *Archibald v Fife Council* [2004] IRLR 651 HL

<sup>183</sup> 42 U. S. C. 2000e-2 (1994).

<sup>184</sup> It was recommended, for example, that ‘reasonable accommodation’ be adopted in religion and belief claims in advance of the drafting of the Religion and Belief Regulations (2003): see Hepple and Choudhury, *Tackling Religious Discrimination*. A similar recommendation was made in July 2011 by the EHRC, see: ECHR, ‘Commission proposes “reasonable accommodation” for religion or belief is needed’, Press Release 11 July 2012; available at: << <http://www.equalityhumanrights.com/news/2011/july/commission-proposes-reasonable-accommodation-for-religion-or-belief-is-needed>>>, accessed 15 July 2012.

employer's business.'<sup>185</sup> Courts in the US have interpreted this in favour of employers such that undue hardship is suffered if the costs of accommodation are more than 'de minimis', and complaints by other workers can be considered a 'cost'.<sup>186</sup> Although this formula, applied to the United Kingdom, is satisfactory to some commentators,<sup>187</sup> it is submitted that it is unlikely to provide a significant boost to the protection model. However, there is no reason to adopt a 'de-minimis' threshold and the more stringent requirements of the duty to make reasonable adjustments for disabled employees might provide a more robust template for future innovations. Such a proposal is likely to encounter some resistance, however, as it may be considered to create more protection for religion than is enjoyed in respect of other protected characteristics, thus creating unequal treatment.<sup>188</sup> How far differential treatment for religion and belief vis-à-vis other protected characteristics can be justified will depend on the extent to which it is possible to argue that religion and belief by its very nature requires a different legal approach to that which is applied for example to sex or race. If so, it would not be unique amongst the protected characteristics; as has been seen, disability is also treated differently.

## **Occupational Requirements**

Given the presentation in Chapter 3 of Model IV ('islands of exclusivity'), attention will now turn to those aspects of discrimination law which have a bearing on opportunities for people to work together within the environment of the religious beliefs they share – i.e. within a religious organisation. One consequence of anti-discrimination legislation, in terms of general principles, is that it acts to prevent discrimination on the grounds of religion in any context unless by exception. Thus, organisations with a religious character would

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<sup>185</sup> Title VII Civil Rights Act 1964, s 701(j).

<sup>186</sup> *Trans World Airlines v Hardison*, 432 U.S. 63 (1976).

<sup>187</sup> See for example Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 223.

<sup>188</sup> R Allen and G Moon, 'Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights and their Implications' (2000) EHRLR 580, 601.

normally be prevented from failing to consider candidates for employment with a different, or no, religious affiliation. This effect led to some Christian groups opposing the original legislation on the basis that it would be potentially injurious to the religious identity of churches and religious organisations.<sup>189</sup> It will be recalled that there are two basic legal mechanisms to address this problem in order to protect organisations from the reach of particular aspects of discrimination law, in full or in part – through general exemption or through the mechanism of (in the UK) occupational requirement exceptions.

Under the Equality Act 2010,<sup>190</sup> occupational requirement exceptions are made in two circumstances for employers with a religious ethos. The first is to allow such employers to make it a requirement for a jobholder ‘to be of a particular religion or belief’ if they can show that, based on the ‘nature or context of the work’, it is an ‘occupational requirement’ to reserve a particular job for someone holding a particular set of religious beliefs, and that it is ‘a proportionate means to achieve a legitimate aim’ to apply this requirement.<sup>191</sup> The Explanatory Notes to the Act illustrate how this occupational requirement exception is intended to apply:

A religious organisation may wish to restrict applicants for the post of head of its organisation to those people that adhere to that faith. This is because to represent the views of that organisation accurately it is felt that the person in charge of that organisation must have an in-depth understanding of the religion’s doctrines. This type of discrimination could be lawful. However, other posts that do not require this kind of in-depth understanding, such as administrative posts, should be open to all people regardless of their religion or belief.<sup>192</sup>

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<sup>189</sup> See for example, Christian Institute, *Government 'equality' plans will kill freedom of religion*, Press Release, 30 June 2000; available at <<<http://www.christian.org.uk/press-releases/government-equality-plans-will-kill-freedom-of-religion/>>>, accessed 21 July 2010.

<sup>190</sup> As previously under the Religion and Belief Regulations 2003.

<sup>191</sup> Equality Act 2010, Sch 9, s 3.

<sup>192</sup> *Explanatory Notes to the Equality Act 2010* [796]. See also *St Matthias Church Of England School v Crizzle* [1993] ICR 401, a race discrimination case, where it was found to be justifiable for an Anglican school to appoint a communicant Christian as head teacher.

However, it may be objected that this example takes an instrumental rather than an organic view of the nature of working for a religious organisation.<sup>193</sup> A religious organisation may well argue that a very large number of job roles, even those apparently lacking a particular ‘religious’ purpose, should be reserved for people with a shared religious commitment, given the context in which the religious organisation operates. This argument was successful in *Muhammed v The Leprosy Mission International*,<sup>194</sup> where a tribunal accepted that it was a legitimate occupational requirement for a Christian ethos organisation to restrict the job of finance administrator to Christians because of the context in which the job role was carried out, in particular a core emphasis on the importance of Christian prayer across all of its activities. However, in two cases brought against *Prospects*, a Christian charity dedicated to helping adults with learning disabilities, a rather different conclusion was reached.<sup>195</sup> In these cases, *Prospects*’ staffing policy, which required all staff except some administrators to be practising Christians, was found to be discriminatory: each post should have been considered separately to determine whether or not it could be reasonably covered by an occupational requirement exception.

On the face of it, therefore, the occupational requirement exceptions for religion under the Equality Act 2010 do permit employees, sharing the same religion, to work together where their organisation has a religious ethos and where it is considered ‘proportionate’ in the particular ‘employment context’ to be inclusive only of those of a particular religion.<sup>196</sup> These conditions do, however, represent two considerable caveats, and how narrowly they will be applied by an employment tribunal is somewhat uncertain.

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<sup>193</sup> See discussion of ‘Islands of Exclusivity’ in Chapter 3.

<sup>194</sup> (2009) ET Case No. 2303459/09.

<sup>195</sup> *Sheridan v Prospects* (2008) ET Case No. 2901366/06, and *Hender v Prospects* (2008) ET Case No. 2902090/06.

<sup>196</sup> There is a partial exemption from these requirements in the case of schools with a religious ethos. Under the School Standards and Framework Act 1998 (s 58) such schools may reserve up to one-fifth of their teaching posts for staff sharing the religious doctrines of the school. For a critical commentary, see L Vickers, ‘Religion and Belief Discrimination and the Employment of Teachers in Faith Schools’ (2009) 4 *Religion and Human Rights* 137.

There is however a further issue to explore. This is the detailed interpretation of what constitutes a religious ethos. For example, if for these purposes an organisation is considered to have a ‘Christian’ ethos and is thus able, subject to the caveats highlighted, to employ only Christians, then there remains the question of what actually constitutes a Christian – is this for the organisation to decide? One possibility is to allow further subdivisions by Christian denomination, or, perhaps more helpfully, by broad theological grouping, such that an organisation’s evangelical Christian ethos or Anglo-Catholic Christian ethos might be recognised as distinctive – even then, due to differences of emphasis within theological traditions,<sup>197</sup> it would perhaps be desirable that organisations define their own ethos, for example, by way of a ‘statement of faith’ to which would-be job applicants would be required to subscribe.

The second area of occupational requirement exceptions under the Equality Act apply in circumstances where a religious ethos organisation would be otherwise engaged in unlawful discrimination on the basis of other protected characteristics such as sex, sexual orientation and gender reassignment. It is strongly arguable that religious employees are not free to associate together within ‘islands of exclusivity’ if their respective religion’s requirements for individual lifestyle are not enforceable. A Christian organisation may be able to justify a policy of reserving the job role of, for example, youth worker, for practising Christians, but can it also insist that the youth worker conforms to Christian teaching on human sexuality and so agrees to abstain from same-sex activity? In employment such exemptions apply when ‘the employment is for the purposes of an organised religion’<sup>198</sup> and the exemption is necessary to meet either of what are referred to as the ‘compliance’ and the ‘non-conflict’ principles.<sup>199</sup> The compliance

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<sup>197</sup> See the reports of a split amongst evangelical Anglicans in a theological seminary, and a consequent tribunal application alleging religious discrimination by ‘conservative evangelicals’ against ‘open evangelicals’ by Dr Elaine Storkey: B Bowder, ‘Wycliffe Hall admits breach of law over sacked lecturer’ *Church Times* (Issue 7556, 11 January 2008), copy at: << <http://www.churchtimes.co.uk/content.asp?id=49739>>>, accessed 21 July 2010.

<sup>198</sup> Equality Act 2010, Sch 9, s 2(1)(a).

<sup>199</sup> *ibid.*, s 2(1)(b).

principle is engaged if the exception is applied ‘so as to comply with the doctrines of the religion.’<sup>200</sup> The non-conflict principle is engaged if the exception is applied ‘so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers’.<sup>201</sup> In other words, people can be excluded from certain employment roles in religious organisations because the religion itself teaches that certain protected characteristics are incompatible (in certain employment roles) with that religious belief, or because a significant number of adherents of that religion believe that there is an incompatibility (for example, and on either basis, women can be lawfully excluded from the Roman Catholic priesthood<sup>202</sup>). The second principle is helpful as it circumvents the need for a court to conduct a detailed inquiry into religious doctrine.

This second category of exceptions from the effects of discrimination because of religion and belief on the basis of other protected characteristics, is more narrowly drawn than the first category of occupational requirement exceptions for religion and belief *per se*.<sup>203</sup> Critically, this category applies only to ‘organised religion’ rather than religious ethos organisations. The significance of this was explored in *R (Amicus MSF Section) v Secretary of State for Trade and Industry*,<sup>204</sup> a case in which aspects of discrimination law, relating to religious exemptions on the basis of sexual orientation as it then stood, were challenged as to their compatibility with the relevant parts of the original EU Framework Directive 2000. Richards J observed that the term ‘organised religion’ was narrower than ‘religious organisation’ and provided the rather significant example that the employment of a teacher in a faith school is likely to be ‘for purposes of a religious organisation’ rather than ‘for purposes of an organised religion’ and thus likely to be outside the scope of the exemption.<sup>205</sup> Vickers

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<sup>200</sup> *ibid.*, s 2(5).

<sup>201</sup> *ibid.*, s 2(6).

<sup>202</sup> An example offered in the *Explanatory Notes to the Equality Act 2010* [793].

<sup>203</sup> See also on this point, in reference to the previous legislation, R Sandberg and N Doe, ‘Religious Exemptions in Discrimination Law’ (2007) 66 *Cambridge Law Journal* 302, 308.

<sup>204</sup> [2004] EWHC 860.

<sup>205</sup> [116].

concludes, writing in 2003, that overall there is ‘significant leeway to religious organisations to discriminate in favour of their own members but [it] stops short of allowing discrimination on other grounds in the name of religion.’<sup>206</sup> It would seem that this conclusion might, in certain circumstances at least, apply to ‘organised religions’ (applying the *Amicus* bifurcation) following the (first instance) decision in *Reaney v Hereford Diocesan Board of Finance*,<sup>207</sup> where the refusal by a diocese (clearly conforming to the definition of organised religion) to employ a gay Christian youth worker was judged to constitute sexual orientation discrimination. This case was complicated by the fact that Reaney had undertaken, at interview, to remain celibate whilst employed in the role, but the diocese seemingly had doubts about whether or not he would be able to meet that commitment. It was this issue, rather than the requirement for gay employees to be celibate *per se*, which resulted in the particular outcome of the case.<sup>208</sup>

Although the exemptions under discussion are narrowly drawn, it is significant that, during the passage of the then Equality Bill 2009, the Government attempted to narrow them further: by recasting the exemptions as applying exclusively to roles wholly or mainly concerned with the ‘liturgical or ritualistic practices of the religion’, or ‘promoting or explaining the doctrine of the religion’,<sup>209</sup> and by requiring that this be applied only when it is ‘proportionate’ to do so.<sup>210</sup> It is clear that the job prospects of a prospective gay Christian youth worker (such as Reaney) were prominent in the minds of those involved in the drafting of the Bill, hence an explanatory note which stated: ‘This exception is unlikely to permit a requirement that a church youth worker who primarily organises sporting activities is celibate if they are gay.’<sup>211</sup> Faced with strong

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<sup>206</sup> L Vickers, ‘Freedom of religion and the workplace: the draft Employment Equality (Religion or Belief) Regulations 2003’ (2003) 32 Ind LJ 23, 36.

<sup>207</sup> (2007) ET Case No. 1602844/2006.

<sup>208</sup> Interestingly, the *Explanatory Notes to the Equality Act 2010*, suggest that a church youth worker who ‘mainly teaches Bible classes’ may be included within the scope of the exemption [793].

<sup>209</sup> Equality Bill 2009, Schedule 9(2)(8).

<sup>210</sup> *ibid.*, Sch 9(2).

<sup>211</sup> Equality Bill 2009, *Explanatory Notes* [778].

opposition in the House of Lords over the possible consequences for religious freedom<sup>212</sup> and with limited time before the 2010 general election, the government accepted an amendment<sup>213</sup> proposed by Lady O’Cathain, and carried by the House, which had the effect that the legal position in respect of occupational requirements, enshrined in the Equality Act 2010, remains fundamentally that of 2003.<sup>214</sup>

A further issue is concerned with whether or not religious employees within the islands of exclusivity are actually able to conduct their work according to the religious principles they espouse. Whereas it may be assumed that there is no reason why this should not generally be the case, it may be more difficult in certain circumstances which typically arise when the religious organisation is involved in providing an educational, commercial or a funded ‘public service’. The most high-profile example of such a difficulty arose during the passage of the Equality Act 2006 Sexual Orientation Regulations 2007<sup>215</sup> which outlawed discrimination on the grounds of sexual orientation in terms of the provision of goods and services, with only a narrow exemption for ‘organisations relating to religion or belief’ (with the same caveats which apply under the Equality Act 2010), *unless* they are educational establishments, mainly ‘commercial’ in character, or they provide services with and ‘on behalf of a public authority under the terms of a contract’ - in which cases there are no exemptions at all.<sup>216</sup> The plight of the Roman Catholic adoption agencies which faced either closure under the Regulations or the requirement to act against faith by asking their staff to facilitate adoptions by homosexual couples is illustrative of the difficulties which religious employees will encounter if the religious organisation to which they belong is required to act against the teaching or doctrines of that religion. For most religious organisations the resulting strains may well become

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<sup>212</sup> HL Deb, *Hansard*, Cols. 1211-1240, 25 January 2010.

<sup>213</sup> Amendment 98.

<sup>214</sup> See *Explanatory Notes to the Equality Act 2010* [796].

<sup>215</sup> SI 2007 No. 1263.

<sup>216</sup> *ibid.*, reg. 17.

intolerable forcing their closure<sup>217</sup> (or at best secularisation) and thus, *inter alia*, leading to the abrupt exile from an island of exclusivity for religious employees who had hitherto found refuge there.

## ***Public Policy***

### **Procurement and the Equality Duty**

Daintith employs the classical term *imperium* to describe the state's power to identify and define rights and to enforce these rights through the imposition of sanctions.<sup>218</sup> However, he utilises a second term, *dominium*, to describe the power the state exercises through its influence, particularly the influence based on its 'buying power'. As modern states have considerable procurement power and seek to engage the private sector in providing numerous services, it is argued that they have an immense power to influence organisations which seek lucrative contracts with the state government to provide such services. This power could be used in the equality field, for example to require organisations to behave in particular ways which might constrain their normal freedom of action and require them to promote objectives which they might not otherwise have pursued.<sup>219</sup>

In the UK there is clear evidence that state buying power has been used in this way. For example, any organisation tendering to supply legal aid work is required by the Legal Services Commission (a non-departmental public body) to have an equality and diversity policy which 'sets out how you will promote equality and tackle discrimination in your organisation and meet the diverse

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<sup>217</sup> As was predicted to be the case for the Roman Catholic adoption agencies by Cardinal Cormac Murphy O'Connor, the head of the Roman Catholic Church in England and Wales; see discussion in Sandberg and Doe, 'Religious Exemptions in Discrimination Law', 308. One such adoption agency lost a subsequent attempt to secure exemption from the reach of the regulations (*Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007, 26 April 2011).

<sup>218</sup> T Daintith, 'The Techniques of Government' in J Jowell and D Oliver (eds.), *The Changing Constitution* (3<sup>rd</sup> edn, OUP 1994).

<sup>219</sup> See C McCrudden, *Buying Social Justice* (OUP 2007).

needs of the clients you serve.’<sup>220</sup> Some quite detailed guidelines are provided on what should be included in the policy and how it should be monitored.

For many organisations, such requirements may not be unduly burdensome. However, for some religious ethos organisations, the effects may be, for them, malign. For example, in 2008, residents at a care home belonging to the Christian charity, Pilgrim Homes, refused to circulate a questionnaire four times per year to residents asking about their sexual orientation in support of its ‘fair access and diversity policy’; nor would it agree to use images of elderly gay, lesbian, bisexual and transgender people in its promotional literature, arguing that this would be disrespectful to the beliefs and values of its Christian residents.<sup>221</sup> The Local Authority withdrew £13,000 of funding from the charity as a result on the basis that ‘there had been limited progress in making the home open to the gay and lesbian community’.<sup>222</sup> Although this decision was later overturned after Pilgrim Homes threatened legal action, it illustrates the difficulties that islands of exclusivity (and by extension those who work there) can have if they are found not to be sufficiently committed to promoting aspects of ‘equality’, such as sexual orientation equality, which are fundamentally at odds with their religious ethos. Where these organisations are reliant on funding from central or local government, withdrawal of funds may be a significant threat to their continued financial viability.

That public policy should be used to promote equality, including in procurement activities,<sup>223</sup> has to a large extent become a legal obligation as a result of the

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<sup>220</sup> Legal Services Commission, *Equality and Diversity Guidance and Policy 2010*, July 2010; available at: <<[http://www.legalservices.gov.uk/docs/criminal\\_contracting/LSC\\_Equality\\_and\\_Diversity\\_Policy\\_Guidance\\_for\\_Providers\\_FINAL.pdf](http://www.legalservices.gov.uk/docs/criminal_contracting/LSC_Equality_and_Diversity_Policy_Guidance_for_Providers_FINAL.pdf)>>, accessed 19 April 2012.

<sup>221</sup> D Harrison, ‘Christian care home victorious in gay dispute’ *The Daily Telegraph* (London, 7 April 2009); copy at: <<<http://www.telegraph.co.uk/health/healthnews/4548761/Christian-care-home-victorious-in-gay-dispute.html>>>, accessed 19 April 2012.

<sup>222</sup> *ibid.*

<sup>223</sup> That the reach of the equality duty includes procurement is implied by the general duty; the Act also gives Government Ministers the power to impose additional specific duties on public

Equality Act 2010. In the Act, there is a proactive ‘equality duty’ which applies to ‘public authorities.’<sup>224</sup> This includes a general duty which requires public authorities, in the exercise of their functions, to have due regard for the need to:

- (i) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (ii) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- (iii) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.<sup>225</sup>

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it is further defined as involving duties to ‘tackle prejudice’ and ‘promote understanding.’<sup>226</sup>

It has been suggested that one of two possible effects of such an objective on state approaches to religious ethos organisations is likely to follow over time. The first would be that public authorities increase their funding of religious ethos organisations in order to increase the reach of these organisations, on the assumption that they contribute to ‘fostering good relations’ and ‘advancing equality’ (a Model V interpretation of the duty). The second would be that public authorities would reduce or even cease financial support for religious organisations, presumably on the basis that they are divisive and do not contribute to the relevant equality goals (a Model I interpretation).<sup>227</sup>

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authorities, including those relating to their respective public procurement functions (Equality Act, s 155(3)).

<sup>224</sup> Defined by Equality Act 2010, Sch 19.

<sup>225</sup> Equality Act 2010, s 149(1).

<sup>226</sup> *ibid.*, s 149(5).

<sup>227</sup> A Lester and P Uccellari, ‘Extending the equality duty to religion, conscience and belief: Proceed with caution’ (2008) EHRLR 567.

## Promoting Religious Equality?

As one of the protected characteristics which the equality duty commits public authorities to promote is religion and belief, it might be anticipated that efforts would be made in support of religious manifestation at an individual level. Although the duty dates back to the implementation of the Act in 2011, it is nevertheless telling to consider the efforts made by the Government in support of religious equality prior to 2010. Two areas will be examined: firstly, the role of the EHRC; and secondly government-sponsored guidance in the area of religion and belief.

The Equality and Human Rights Commission (EHRC) was established under the Equality Act 2006 and became operational on 1 October 2007, at which point three earlier commissions became defunct – the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission.<sup>228</sup> The purpose of the EHRC is to promote equality and diversity across all of the protected characteristics; to encourage good practice and to work towards eliminating unlawful discrimination and harassment.<sup>229</sup> This clearly includes the workplace. It is also required to promote understanding and good relations between members of different groups (defined as those who share a protected characteristic) and to work towards reducing hostility and prejudice.<sup>230</sup>

It is important therefore to highlight that the EHRC is required to promote equality on the basis of religion and belief in the same way as for any other protected characteristic. Thus, on the face of it, the creation of the EHRC is congruent with Model V (protection for religious expression). However, at the time the EHRC was set up, there began to be concerns that ‘relatively powerful interest groups ... would swamp other less powerful interests’ and so the EHRC might not be impartial and even-handed in upholding the interests of the various

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<sup>228</sup> Hepple, *Equality*, 145.

<sup>229</sup> Equality Act 2006, s 8(1).

<sup>230</sup> Equality Act 2006, s 10.

protected characteristics.<sup>231</sup> If this analysis is correct, there is other evidence which suggests that religion and belief (particularly with regard to religious expression) may be one of the characteristics which has been ‘swamped’. Indeed, it is possible to go further and contend the EHRC has at times displayed a degree of hostility towards religious expression, particularly the expression of Christianity in the workplace. When the Chairman of the EHRC, Trevor Phillips, was interviewed by the Daily Telegraph in 2011, he made the following rather telling observations about those seeking protection for their religious beliefs:

I think the most likely victim of actual religious discrimination in British society is a Muslim but the person who is most likely to feel slighted because of their religion is an evangelical Christian ... I think for a lot of Christian activists, they want to have a fight and they choose sexual orientation as the ground to fight it on. I think that whole argument isn't about the rights of Christians. It's about politics. It's about a group of people who really want to have weight and influence and they've chosen that particular ground.<sup>232</sup>

The comments would appear to imply a rather negative assumption about the motivation of evangelical Christians with which many may disagree; it also minimises the difficulties that they face in response to legislation which impinges on their freedom of conscience or freedom of religious expression, which is apparent in the workplace. Clearly these are only comments by an official of the EHRC (albeit the most senior official). However, the actions of the EHRC itself also appear to suggest, at times, a lack of sympathy towards Christian religious expression.<sup>233</sup> In *Bull & Bull v Hall & Preddy*,<sup>234</sup> a case where the rights of Christians to run their bed and breakfast establishment in conformity with their religious beliefs clashed with the rights of a homosexual couple to share a double

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<sup>231</sup> Hepple, *Equality*, 146.

<sup>232</sup> J Wynne-Jones, ‘I'll defend faith, says equality chief: Watchdog can help lift “siege” on religious believers, Trevor Phillips tells Jonathan Wynne Jones Interview’ *The Sunday Telegraph* (London, 19 June 2011) 12.

<sup>233</sup> A report commissioned by the EHRC confirmed that this perception is widely held by Christians; see Donald, *Religion or belief, equality and human rights in England and Wales*, 124-130.

<sup>234</sup> [2012] EWCA Civ 83.

room, the EHRC financially supported the sexual orientation rights against the religious rights, funding the legal expenses of the homosexual couple concerned. Earlier, when the Christian B & B owners lost their case at first instance, it was the EHRC who, apparently against the wishes of the gay couple involved and thus unnecessarily, decided to cross-appeal for more damages (an appeal it later dropped on the basis that it had been an ‘error of judgment’).<sup>235</sup> This and other evidence suggests that the EHRC may at times display a degree of hostility to (Christian) religious expression (a Model I approach).<sup>236</sup>

The discussion will now turn to government-funded sources of advice, and their content, concerning how the law affects religious expression in the workplace. Perhaps the most significant of these is a guide prepared by the Advisory, Conciliation and Arbitration Service (ACAS), a non-departmental public body with a brief, *inter alia*, to provide legal and good practice guidance to employers and employees.<sup>237</sup> Written in 2005, the guide dwells largely on dress and grooming requirements and religious holidays. Supportive of religious expression in these domains, the ACAS guide tends to focus on accommodating the practices of minority religions in the workplace (in keeping with Model VI).<sup>238</sup> No references are made to forms of active manifestation or conscientious

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<sup>235</sup> Anon, ‘Dramatic U-turn as gay couple who won £3,600 from Christian B&B owners ditch taxpayer-funded fight for more cash’ *Daily Mail* (London, 9 May 2011); copy at: <<<http://www.dailymail.co.uk/news/article-1365168/Gay-couple-won-3k-Christian-B-B-owners-ditch-taxpayer-funded-fight.html#ixzz1sZoSqBzR>>>, accessed 20 April 2012.

<sup>236</sup> Another example was the reference in a legal submission for the EHRC to Christian moral views as an ‘infection’ – for which the ECHR was forced to issue an apology; see <<<http://www.equalityhumanrights.com/legal-and-policy/legal-updates/johns-v-derby-city-council/>>>, accessed 24 April 2012.

<sup>237</sup> ACAS, *Religion or Belief in the Workplace: A guide for employers and employees* (November 2005); copy at: <<[http://www.acas.org.uk/media/pdf/f/l/religion\\_1.pdf](http://www.acas.org.uk/media/pdf/f/l/religion_1.pdf)>>, accessed 20 April 2012.

<sup>238</sup> Of the examples of religious expression given, only 1 refers directly or indirectly to specifically Christian religious expression; 7 relate directly or indirectly to Muslim religious expression; 3 refer directly or indirectly to Hindu religious expression; 3 relate directly or indirectly to Sikh religious expression and 3 relate directly or indirectly to Jewish religious expression; 3 are generally applicable to religious expression (analysis, mine).

objection to activities involving the promotion of sexual orientation rights, which have become closely associated with Christian forms of expression in the workplace, except a critical and rather unlikely example of active manifestation (which is clearly designed to discourage it as a form of harassment):

A member of staff is devout in her belief. She continually refers to her colleagues as “heathens” and warns them of the consequences they may suffer as a result of their lack of belief. Distressed by her intimidating behaviour, her colleagues complain to their manager that they are being harassed.<sup>239</sup>

Whereas the ACAS guide is the source of guidance most likely to be used in the workplace, other guidance is available which has been funded or part-funded by the UK government.<sup>240</sup> It is perhaps telling that the following organisations have been provided with government funding to provide quasi-official ‘good practice’ guidelines for employers on religion and belief in the workplace: the Muslim Council of Britain,<sup>241</sup> Stonewall,<sup>242</sup> and the British Humanist Association.<sup>243</sup> That a Muslim organisation should be supported in providing advice to employers on religion in the workplace is unsurprising. Rightly, the MCB guidance focusses on issues specific to Muslims. It is surprising however that no guidance has been provided by other religious groups with support from a government department or other public authority.<sup>244</sup> What is more surprising still is that the government should be providing funding to organisations with interests which are frequently

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<sup>239</sup> ACAS, *Religion or Belief in the Workplace*, 7.

<sup>240</sup> Either by the Department of Trade and Industry (now Business Innovation and Skills) or the EHRC.

<sup>241</sup> MCB, *Muslims in the Workplace*.

<sup>242</sup> R Hunt, *Religion and Sexual Orientation: how to manage relations in the workplace* (Stonewall 2009); copy at:

<<[http://www.stonewall.org.uk/at\\_work/research\\_and\\_guides/4907.asp](http://www.stonewall.org.uk/at_work/research_and_guides/4907.asp)>>, accessed 24 April 2012.

<sup>243</sup> BHA, *Guidance on Equality of ‘Religion or Belief’*.

<sup>244</sup> An unofficial guide advising Christians of their rights in the workplace has been published by the Christian Institute; see M Jones, *Religious Liberty in the Workplace: a guide for Christian employees* (Christian Institute 2008); copy at: <<[http://www.christian.org.uk/rel\\_liberties/ldf/employeesbooklet.pdf](http://www.christian.org.uk/rel_liberties/ldf/employeesbooklet.pdf)>>, accessed 21 April 2012.

opposed to religious interests, to advise on religion in the workplace. Such guidelines are unlikely to be free from influence from the interests of Stonewall and the British Humanist Association. The latter, for example, suggests that '[a]ttempts by employees to convert people or to use the work environment to proselytise are highly likely to amount to harassment of their colleagues.'<sup>245</sup> This statement is controversial as it ignores the distinction between 'proper' and 'improper' proselytism<sup>246</sup> and seems likely to mislead employers as to the likely reach of the law, and may thus have a chilling effect on religious speech.<sup>247</sup> The net effect of all the guidance appears to be support for both Model I (exclusion) and, not without contradiction, Model IV (support for minority religions).

It should be noted at this point that there are also ethical codes of practice issued by professional bodies (often as a result of secondary legislation empowering them to do so) which may act to encourage or discourage religious expression. Such codes, for example, have been issued by: the (now defunct) General Teaching Council for England (GTCE), the General Social Care Council, the General Pharmaceutical Council, the General Medical Council (GMC) and the Nursing and Midwifery Council (NMC). Some of these codes (in fact those applying in the healthcare sector) make specific reference to a practitioner's own religious beliefs and provide guidelines as to how these may or may not influence their professional activities.<sup>248</sup> Other guidelines do not make specific reference to a practitioner's religious beliefs, but provide general guidelines on

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<sup>245</sup> BHA, *Guidance on Equality of 'Religion or Belief'*, 8.

<sup>246</sup> As recognised by the ECtHR in *Kokkinakis v Greece* (1993) 17 EHRR 397; see discussion in Chapter 7.

<sup>247</sup> See comments to this effect in J Wynne-Jones, 'Christians risk rejection and discrimination for their faith, a study claims', *Telegraph*, 30 May 2009; copy at:

<http://www.telegraph.co.uk/news/religion/5413311/Christians-risk-rejection-and-discrimination-for-their-faith-a-study-claims.html>>>, accessed 27 April 2012. See also Chapter 7 for a more detailed discussion of proselytism and religious speech in the workplace.

<sup>248</sup> The guidelines for pharmacists were considered earlier in this respect; and the GMC and NMC guidelines respectively will be considered in Chapter 7.

upholding equality and diversity as values which have the potential to impact negatively on an individual's religious beliefs.<sup>249</sup>

The draft code of conduct for secondary school teachers, written by the GTCE in 2009, is illustrative of this problem. One of the underlying principles of the code ('principle 4') was that teachers should 'promote equality and value diversity', and this included the obligation to '[p]roactively challenge discrimination, stereotyping, and bullying, no matter who is the victim or the perpetrator'.<sup>250</sup> Concerns were raised about this draft principle by Christian groups, on the basis that the wording might require Christian teachers to act against their consciences to 'promote', for example, homosexual relationships, or the teachings of another religion, with which they disagreed.<sup>251</sup> In this case, the problem was obviated by the response of the GTCE, which changed the wording to remove the requirements to 'promote diversity' and to 'proactively challenge' discrimination.<sup>252</sup> However, not all professional bodies have been willing necessarily to accommodate such concerns, and professional obligations with regard to valuing diversity may remain a stumbling block for religious expression.<sup>253</sup>

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<sup>249</sup> It should be noted that the 'healthcare' professional codes also allude to equality and diversity more generally.

<sup>250</sup> General Teaching Council for England, *Code of Conduct and Practice – Draft for Consultation* (November 2008), 14.

<sup>251</sup> See, for example, the briefing document by the Christian Institute: *New GTC Code of Conduct: Help protect Christian teachers from the new 'equality' code*, Christian Institute, February 2009; copy at: <<[http://www.christian.org.uk/pdfpublications/gtccode\\_feb09.pdf](http://www.christian.org.uk/pdfpublications/gtccode_feb09.pdf)>>, accessed 24 April 2012.

<sup>252</sup> See Curtis, 'Teachers' anti-discrimination code reworded after faith groups object'. Since the abolition of the GTCE (on 31 March 2012) the Code ceased to be in force, and has been withdrawn from the internet.

<sup>253</sup> The NMC code exemplifies this problem – see discussion in Chapter 7.

## *Conclusion*

In this chapter, a range of legal and policy materials have been considered, all of which have a bearing, directly or indirectly, on freedom of religious expression in the UK workplace. In the process of examining these materials, consideration has been given, in each instance, to the congruence with the models presented in Chapter 3. The purpose of this concluding section is to provide a summary and an overall assessment.

Given the range of legal and policy materials and the overall time frame during which they have appeared, it is perhaps unsurprising that the picture is complicated. *Prima facie*, it might appear that overall ‘protection for religious expression’ (Model V) is the dominant model. After all, the ostensible purpose of much of the legislation is to support religion. This includes both the recognition of positive rights, principally through the incorporation of the ECHR into UK law (through the Human Rights Act 1998) and also the recognition of ‘negative’ rights (the right not to be discriminated against because of religion and belief) through the relevant provisions of the Equality Act 2010 (and earlier discrimination law). However, it is quickly evident that although these legal provisions provide a degree of protection, this is only unequivocal in respect of certain core religious ‘activities’ (such as the right to a religious identity or the right to worship). Religious ‘expression’ in the workplace is far less protected. In terms of the ECHR, such protection is eroded firstly by a recognition (in Article 9(2)) that ‘manifestation’ of religion may be constrained by various factors and, secondly, through the application of two ‘filters’ – the manifestation/motivation requirement (which takes a narrow view of what forms of religious expression will be recognised as a legitimate ‘manifestation’) and the controversial ‘specific situation rule’ (which provides a possible basis to exclude protection in the workplace sphere). Under the provisions of UK discrimination law religious belief and identity are protected, chiefly through direct discrimination provisions. However, in terms of religious expression, employers are able to provide a justification defence for ‘indirectly’ discriminating against people when they manifest their religious beliefs in the workplace. There are a few examples of opt

outs to particular laws which serve to protect some very specific examples of religious expression in particular contexts (e.g. in healthcare) but these are few, often historic, and narrow in scope. Attempts to extend opt outs to other areas have been resisted by the UK government.

In respect of the other models, it is plain that the law itself provides virtually no 'special' support for Christianity, the historic religion of the United Kingdom (Model II), albeit that the 'convention', that many economic and social activities cease on a Sunday, is still strong (although not in the retail sector). There is perhaps more evidence in support of Model VI (protection for minority religions) at least in terms of the development of discrimination law. The Race Relations Act 1976 provides an ongoing basis for supporting Sikh and Jewish expressions of religion, and it was partly in response to Muslim pressure that discrimination law was extended to cover religion and belief (a development opposed by some Christian groups), with the clear expectation that other minority religions, thus far unprotected, would benefit. It may also be inferred from the ACAS guidance, published shortly after the introduction of the original Employment Equality (Religion and Belief) Regulations, that the needs of religious minorities were at the forefront of policy development at that time. The very specific regulations applying to Northern Ireland only are perhaps the clearest example of the law seeking to protect 'minority' religion (in this case Roman Catholicism).

The Equality Act 2010 does recognise 'religious ethos organisations' and 'organised religions' for the purposes of 'occupational requirement' exceptions to discrimination law. To this extent at least, the concept of 'islands of exclusivity', and the rights of religious staff to populate them (Model IV), are recognised. However, the freedom of such islands is significantly curtailed by the very limited extent of the exceptions on religious grounds (not least the apparent need to justify exceptions for each post rather than according to a more generally applicable principle) and the even greater limitations when other strands of equality are invoked, such as sexual orientation. No religious ethos organisations seem able to restrict employment according to religious teaching on sexual orientation, and organised religions appear able to do this only in very restricted circumstances.

There is one form of ‘prohibited conduct’ which has significant potential to adversely affect workplace religious expression – this is ‘harassment’ on the basis of a protected characteristic. As the law is unconcerned with motive, both animus and non-animus harassment are prohibited. As a result, there is a significant question mark concerning how far employees are free to express their religious beliefs verbally, particularly if those beliefs have the capacity to offend others on the grounds of their religion (or non-religion), sexual orientation or gender. Employers concerned about their liability for religious harassment of employees may have an incentive to significantly restrict religious speech in the workplace. This aspect of the law is therefore congruent with Model I (exclusion of religious expression). Religious expression for some employees may also be constrained by the provisions of codes of conduct issued by professional bodies (which are empowered to do this by secondary legislation).

Thus far, it is clear that elements of the various models (with the exception of Model II) can be identified from the legislation and policy landscape presented in this chapter. What is also evident is that there has been a considerable expansion in the reach of the relevant legislation, particularly since 2003. This in turn has had a considerable impact in reducing employer discretion (Model III, *laissez-faire*). As noted above, employers can still restrict forms of religious expression when they can provide a clear justification of the need to do so (i.e. where this represents a proportionate means of achieving a legitimate aim). However, in respect of any employer which consciously chooses to support religious expression, there are also some potential legal restrictions, particularly in terms of verbal expression. Policy initiatives too may affect an employer’s approach towards religious expression by employees (it might for example ban proselytism in the workplace outright on the advice of the EHRC-funded British Humanist Association guidance), this is particularly likely when acting on such policy advice might bring rewards (such as success in a bid for government funding).

## Chapter 5: Negative Manifestation

### *Introduction*

This chapter considers how tribunals have dealt with cases in which employees have objected to performing aspects of their contractual work for reasons connected to their religious beliefs. The objections fall into two broad categories. The first concerns objections to working at particular times or on particular days due to the desire or perceived obligations of (in the language of article 9 ECHR) ‘worship’ and ‘observance’, ‘either alone or in community with others’. For example, a Muslim employee might object to working during a Friday lunchtime because he feels obliged to attend Friday prayers; equally, a Christian may object to working on a Sunday because she feels obliged to attend Church. The second category concerns objections for reasons intrinsic to the work itself, or an aspect of it, because it is objectionable on religious grounds.

Both categories are reactive to the demands of the workplace itself rather than proactive – it is the employer who initiates or perpetuates the work or environment which gives rise to the objection. They can thus be characterised as forms of ‘negative manifestation’ of religion in the workplace and some of the consequent legal and policy issues raised will be the same, not least whether or not the employer is bound to rearrange contractual work in order to accommodate the religious employee and, if so, in what circumstances. However, objections to the nature of the work (or some aspects of it)<sup>1</sup> are rather different in a number of ways from objections to the structuring of that same work. The employee is, after all, saying that he disapproves of something the employer

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<sup>1</sup> Generally objections for religious conscience have been raised concerning particular tasks or duties of employment. There has been, however, at least one recent tribunal claim (for sexual harassment) involving an objection by a young Muslim woman to the wearing of uniform she considered to be immodest; see L Cockcroft, ‘Muslim waitress told to wear sexy, low-cut dress wins payout’ *The Daily Telegraph* (London, 16 June 2009) 13. Cases such as this raise questions overlapping conscientious objection and symbolic expression (considered in Chapter 6).

wants him to do - there is an implicit moral judgment which is absent from requests to rearrange the timing or structure of that something. The former arguably represents a different and more direct challenge to the employer, its discretion or its values, than the latter. From the point of view of the employee, this form of what may reasonably be termed 'conscientious objection' is also likely to be more personally challenging. It is arguably rather more difficult to say to an employer that one feels that something an employer wants one to do offends against conscience than to say that the timing is wrong. To make a stand in this way will thus require more courage. For both parties to the employment relationship, the stakes may thus be higher.

In this chapter both categories of negative manifestation will be considered in turn before a general conclusion is drawn.

### ***Negative Manifestation during working time due to Religious Obligations***

In the first part of this chapter, how far the desire (or obligation) felt by employees with religious convictions to engage in one or more of these three elements might relate to their employment obligations will be considered. There is clearly the potential for conflict if the employer requires the employee to be present in the workplace at a time when the employee has a religious obligation which he may well consider to be more important than the obligation owed to the employer. In such cases, the employee may wish to 'negatively manifest' his religious convictions by seeking to 'opt out' of working at particular times in order to pursue worship or observance alone or in the company of others. Such activities are most likely to take place outside of the workplace, although in some instances the religious obligation might be discharged on the employer's premises (e.g. daily Islamic prayers in a dedicated prayer room).

In the following sections the relevant case law will be examined. Prior to this analysis, there is brief discussion of the issues concerned from the perspective of the religious employee. As these issues are to some extent dependent on the

nature of the religion itself, this discussion will be structured with reference to different religious traditions.

## **Religious obligations requiring ‘time off’ – some examples by religion**

### *Judaism*

In Judaism there is a divinely ordained day of rest from work known as the Sabbath. This was first ordained in the creation narrative: having created the heavens and the earth in six days, God rested on the seventh and made this a holy day.<sup>2</sup> The obligation was made more specific in the form of the tenth commandment given to Moses:

Remember the Sabbath day, to keep it holy. Six days you shall labour and do all your work, but the seventh day is the Sabbath of the Lord your God. In it you shall do no work: you, nor your son, nor your daughter, nor your male servant, nor your female servant, nor your cattle, nor your stranger who is within your gates. For in six days the Lord made the heavens and the earth, the sea, and all that is in them, and rested the seventh day. Therefore the Lord blessed the Sabbath day and hallowed it.<sup>3</sup>

The Jewish Sabbath begins at sunset on Friday night (a time which varies greatly depending on the seasons) and it ends at nightfall on Saturday.<sup>4</sup> Keeping the Sabbath remains mandatory for observant Jews, and the rules of Sabbath observance are strict and most forms of working, both domestic and commercial, are forbidden.<sup>5</sup> In addition, Jews attend the synagogue for collective prayer on Friday nights and Saturday, and many also meet in the synagogue collectively on weekday evenings, when they may recite both obligatory afternoon and evening prayers at the same time.<sup>6</sup>

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<sup>2</sup> Genesis 2 v 3.

<sup>3</sup> Exodus 20 v 8-11 (NKJV); see also Deuteronomy 5 v 12-15.

<sup>4</sup> Y Green, ‘When does the day begin?’ (2008) 36 *Jewish Bible Quarterly* 81.

<sup>5</sup> See, for a discussion of the restrictions on Sabbath activities for observant Jews, Gavison and Davison, ‘Days of rest in multicultural societies’, 190-193

<sup>6</sup> G Robinson, *Essential Judaism* (Pocket Books 2000), 7-54.

## *Christianity*

After the death and resurrection of Jesus, the early Christians began to use the first day of the week as a day set aside for worship in community (sometimes known as ‘the Lord’s Day’) and that practice became established and continues to this day. How far the obligations imposed by the Jewish Sabbath apply to the Christian Sunday is a point of theological dispute. This has led to different positions emerging among Christians. One position is to view Sunday as the Christian Sabbath. Although this does not mean that all of the obligations incumbent upon Jews on the Sabbath apply, the fundamental principle that the Sabbath must be strictly observed as a day of rest from secular labour (unless, by concession, this labour is required to provide emergency services<sup>7</sup>) still applies to Christians.<sup>8</sup> Another position is to take a more relaxed view of the Christian Sunday and to see it as a New Testament innovation and therefore fundamentally different from the Jewish Sabbath – in fact, more of an opportunity for rest and spiritual activity rather than a day to be observed in a traditional Sabbatarian manner.<sup>9</sup> This distinction is important as it suggests that taking time off work on a Sunday is considered mandatory under the traditional Sabbatarian view, but not mandatory under the more flexible ‘New Testament’ view. However, although there are differences amongst Christians in the view taken of obligations towards Sabbath observance, the majority of practising Christians share an imperative to attend worship in congregation with others – this almost invariably takes place on a Sunday.

Certain Christian sects take different positions. Seventh Day Adventists, for example, reject the decision by the Christian Church to celebrate Sunday as the Lord’s Day and retain Saturday as their Sabbath, which is to be ‘observed’ as ‘the day of rest, worship and ministry’ in accordance with ‘God’s unchangeable

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<sup>7</sup> Jesus healed on the Sabbath, and spoke of the lawfulness of ‘saving life’ and ‘doing good’ on that day (Mark 3 v 4).

<sup>8</sup> See, for a contemporary version of this argument, I Campell, *On the first day of the week: God, the Christian and the Sabbath* (Day One Publications 2005).

<sup>9</sup> See for example, J Boice, *Foundations of the Christian Faith* (IVP 1986), 234.

law' from Friday evening until Saturday evening.<sup>10</sup> Jehovah's Witnesses, on the other hand, reject the entire concept of the Lord's Day although they do tend to meet on a Sunday, as well as mid-week; attendance at weekend and mid-week meetings is considered equally obligatory.<sup>11</sup>

### *Islam*

In Islam, the practice of the daily *Salah* of praying five short prayers (whilst kneeling towards Mecca) at different times of the day (of which between two and four may take place during normal working hours) is considered mandatory by some Muslim groups.<sup>12</sup> This will have a clear impact on the workplace as it will be necessary to briefly withdraw from workplace activities for the duration of the prayers. However, this requirement is not recognised as binding by all Muslims: some permit the afternoon and evening prayers to be said together at the same time;<sup>13</sup> whilst others omit to say the prayers at all.<sup>14</sup> Where these prayers are carried out there is no obligation to do so in company with others except on a Friday, where a congregational prayer, the *Jumu'ah*, is held on Friday lunchtimes (between 1 and 2 pm); for most Muslim groups it is mandatory to attend this at a mosque.<sup>15</sup> Indeed there is a specific injunction in the Quran with particular application to refraining from work in order to attend Friday prayers:

O you who believe, when the Salat is announced on Friday, you shall hasten to the commemoration of God, and drop all business. This is better for you, if you only knew. Once the prayer is completed, you may spread through the land to

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<sup>10</sup> Seventh Day Adventist Church, *Fundamental Beliefs*, see <<<http://www.adventist.org/beliefs/fundamental/index.html>>>, accessed 12 May 2012.

<sup>11</sup> A Holden, *Jehovah's Witnesses: Portrait of a Contemporary Religious Movement* (Routledge 2002).

<sup>12</sup> B Zaheer, 'Accommodating Minority Religions Under Title VII: How Muslims make the case for a new interpretation of section 701(J)' (2007) U. Ill. L. Rev. 497, 502.

<sup>13</sup> MCB, *Muslims in the Workplace*, 14.

<sup>14</sup> W Shadid and P van Koningsveld, *Religious freedom and the position of Islam in Western Europe* (Kok Pharos 1995), 101.

<sup>15</sup> MCB, *Muslims in the Workplace*, 14.

seek God's bounties, and continue to remember God frequently, that you may succeed.<sup>16</sup>

To facilitate the Salah prayers there is an argument that an employer, with sufficient resources (e.g. an appropriate room which is not used or used infrequently), should provide some basic facilities. The MCB guidance makes the following observation:

Employers are not required to make costly adjustments for religious observance at work. However, employees may request access to a place to pray, and if it is possible to provide a room without an unacceptable adverse impact on business or other staff, then employers may be found to be indirectly discriminating if they refuse such a request.<sup>17</sup>

The guidance goes on to specify that the room should be quiet and unadorned with posters, pictures or photographs. It also makes recommendations about the supply of facilities for the *wudhu* ritual of feet washing which often precedes prayer – this could, for example, involve providing ‘storage in the washroom areas for a plastic washing-up basin and a small jug.’<sup>18</sup>

There are some further requirements specifically affecting Muslims. It is for example suggested that Muslims may wish to take time off for lunch later than they might normally so do in order to break their fast at the permitted time during the Ramadan period of fasting.<sup>19</sup> There are also certain religious holidays where many Muslims are likely to request leave, including the three most important - *Eid-ul-Fitr*, *Eid-ul-Adha* and *Yawm Al-Ashura*. These annual holidays occur at different times each year according to the lunar calendar. Equally, Muslims are mandated to go on a pilgrimage to Mecca (the *Hajj*) at least once in their lifetime (and must accompany a widowed mother or sister).<sup>20</sup> This is estimated to require

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<sup>16</sup> *Quran* 62 v 9-10.

<sup>17</sup> MCB, *Muslims in the Workplace*, 15.

<sup>18</sup> *ibid.*, 16.

<sup>19</sup> *ibid.*, 16.

<sup>20</sup> Participation in pilgrimages is encouraged in other religious traditions (eg Roman Catholic and Orthodox Christianity and Hinduism).

an extended period of leave of between two and three weeks in duration.<sup>21</sup> The period where Muslims engage in the Hajj is fixed each year in accordance with the lunar calendar and so falls on different dates in the solar year.<sup>22</sup> It may be that particular circumstances arise when a Muslim employee has a pressing conviction that he should embark on the Hajj during work time; certainly, there may be a strong desire to do so, as Muslims are encouraged to perform the Hajj as soon as they have sufficient funds to do so.<sup>23</sup>

## The Case Law

Thus far, the religious basis of the desire for time off for religious observance and worship has been considered. In Chapter 4, consideration was given to the ECHR jurisprudence which chiefly concerns the issue of conflict between religious obligations outside of the workplace and work time. Attention will now turn to the relevant domestic case law. There is little authoritative case law, such that it is difficult to accurately assess the legal position in respect of this form of manifestation.<sup>24</sup> What is helpful to the analysis, however, is the thorough consideration given to the implications of Article 9 in *Copsey v Devon Clays* and how this case may be contrasted with very similar cases under the Religion and Belief Regulations 2003.

In *Copsey*, the claimant had been employed by Devon Clays since 1988, as a team leader in the sand processing plant. A shift system was in operation

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<sup>21</sup> MCB, *Muslims in the Workplace*, 17.

<sup>22</sup> Zaheer, 'Accommodating Minority Religions Under Title VII', 504.

<sup>23</sup> *ibid.*

<sup>24</sup> The first EAT judgment under discrimination law on the issue was given on 29 December 2012 in *Mba v Merton Council* where a Christian care home worker was required to work on a Sunday against her express wishes. The written judgment was unavailable at time of writing, although press reports suggest that the fact that not all Christians refuse to work on a Sunday weighed in the outcome of the judgment (which went against the claimant) – if so this represents an application of the necessity test to this form of manifestation and accords with the general analysis presented here that tribunals pay little regard to the Sabbatarian view of Sunday; see D Barrett, 'Christian loses battle over Sunday work', *The Sunday Telegraph* (London, 30 December 2012) 6.

Monday to Friday with frequent weekend overtime, particularly on Saturdays.<sup>25</sup> In late 1999, Devon Clays Limited won a new contract which substantially increased production in the sand processing plant. This led to a decision to extend the operating hours to seven day working, 24 hours per day, with a new shift system for all staff covering the whole period.<sup>26</sup> Copsey (and three other staff) objected to working on a Sunday and a special provision was temporarily made for him not to work on that day, with a corresponding reduction in pay.<sup>27</sup> However, some two years later, another increase in production was necessary in response to a further new order. A meeting was held with Copsey and he was required either to join the Sunday shift system or to accept a redundancy package. At this point he indicated that his opposition to Sunday working had a religious basis.<sup>28</sup> He was given the option, which he refused, of working in the resin coated sand plant where there would be a reduced requirement for Sunday shifts. Following the failure of further negotiations, including the possibility of an alternative lower-paid laboratory job which he was unwilling to accept, Copsey was dismissed (without a redundancy payment) on 31 July 2002.<sup>29</sup> He then lodged his claim at an employment tribunal. Copsey argued that his employer had been under an obligation to accommodate his religious objections, which it had failed to do, and he had been unfairly dismissed.

The tribunal found that Devon Clays had made some efforts to accommodate Copsey, including the offer of alternative positions and had approached his colleagues to discover how far they might be willing to take on disadvantageous additional Sunday shifts in the place of Copsey (but found that there was little support for his position). Equally, Copsey himself did not adopt an entirely inflexible stance. He had said he was willing to work on a Sunday in an

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<sup>25</sup> *Copsey* [10].

<sup>26</sup> *ibid.* [11].

<sup>27</sup> *ibid.* [12].

<sup>28</sup> *ibid.* [14].

<sup>29</sup> *ibid.* [15].

‘emergency’ although the judgment records that it was not possible to agree on what such an emergency might be.<sup>30</sup>

The tribunal determined that Copsey’s dismissal was not connected to his religious beliefs but was the direct result of his refusal to conform to a seven-day shift pattern. It found this dismissal to be fair under the category of ‘some other substantial reason’. Devon Clays had a sound business reason to require Copsey to work on Sundays, in response to ‘significant increases in production requirements’ which was more than a mere whim.<sup>31</sup> The EAT rejected Copsey’s appeal and, following this, he applied to the Court of Appeal.

The Court of Appeal gave a much more nuanced consideration of the possible impact of Article 9 ECHR on Copsey’s unfair dismissal claim. Mummery LJ observed that, in the absence of other authority, the ‘link between [Copsey’s] dismissal and his wish to manifest his religious beliefs [was] sufficiently material to bring the circumstances of the dismissal within the ambit of Article 9.’<sup>32</sup> Thus the issue would become one of justification under Article 9 (2). However, he applied the EComHR rulings in *Ahmad*, *Konttinen* and *Stedman*,<sup>33</sup> to determine that, on the basis of this line of authority, in Copsey’s ‘specific situation’<sup>34</sup> (in the workplace) there was no interference with his Article 9 rights: ‘[t]he Commission’s position on Article 9, as I understand it, is that, so far as working hours are concerned, an employer is entitled to keep the workplace secular. In such cases an employee is not in general entitled to complain that there has been a material interference with his Article 9 rights.’<sup>35</sup>

As Article 9 did not therefore apply in this case, there was thus no need to consider justification arguments, although Mummery stated that, as Devon Clays had ‘done everything that they could to accommodate Mr Copsey’s wish not to

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<sup>30</sup> *ibid.* [16].

<sup>31</sup> *ibid.* [8(5)].

<sup>32</sup> *ibid.* [30].

<sup>33</sup> See discussion in Chapter 4.

<sup>34</sup> *Copsey* [37].

<sup>35</sup> *ibid.* [38] (Mummery LJ).

work on Sundays', then, had there been any interference with Article 9, it would probably be justified.<sup>36</sup>

It will be recalled from the discussion in Chapter 4 that Rix LJ, in a partially dissenting opinion, took a more sceptical view of the consistency and application of the ECHR case law, however, he agreed with Mummery LJ that the employer had acted reasonably in its eventual decision to dismiss Copsey and had thus discharged its obligation to justify its interference with the claimant's Article 9 rights, if engaged.<sup>37</sup> In the process however Rix clearly articulated the need for an employer to demonstrate that it had sought to make reasonable accommodations in order to justify restrictions on the religious rights of its employees:

It seems to me that it is possible and necessary to contemplate that an employer who seeks to change an employee's working hours so as to prevent that employee from practising his sincere adherence to the requirements of his religion in the way of Sabbath observance may be acting unfairly if he makes no attempt to accommodate his employee's needs.<sup>38</sup>

The exact nature of the anticipated accommodation is naturally not articulated in full. However, there is a general implication that the obligation belongs to the employer to initiate, and a corresponding onus on the employee to respond constructively. However, in Lord Neuberger's opinion, there is a suggestion that the onus may be on the religious employee, when asked by his employer to work on a Sunday, 'to identify another worker, with his particular skills, who would be prepared to work in his place on a Sunday.'<sup>39</sup> It is submitted that this is

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<sup>36</sup> *ibid.* [41].

<sup>37</sup> Interestingly, Lord Neuberger took the view that the test of reasonableness required by law to demonstrate that a dismissal is fair under the Employment Rights Act 1996, provided equivalent protection for employees such as Copsey than would Article 9 if it could be applied to the workplace. As he put it: 'the provisions of the 1996 Act would have the same effect, in my view, with or without any impact from Article 9' (see *Copsey* [93]).

<sup>38</sup> *ibid.* [71] (Rix LJ).

<sup>39</sup> *ibid.* [88] (Neuberger LJ).

unsatisfactory. The burden should naturally be on the employer to seek alternative ways of meeting its objectives (as indeed occurred in *Copsey*), not the employee.

One of the first cases to test similar issues under the Religion and Belief regulations was *Williams-Drabble v Pathway Care Solutions Ltd and anor*<sup>40</sup>. The employment tribunal judgment in this case just predated the Court of Appeal decision in *Copsey* and is therefore particularly ripe for comparison. Article 9 arguments were not raised in *Williams-Drabble* – thus similar issues were examined under entirely different legal provisions.

The facts of the case were as follows. Williams-Drabble was a practising Christian. She made this clear when she applied to work for Pathway Care Solutions Ltd in 2003 and it was agreed at the subsequent interview that she would not be rostered to work shifts on Sundays which would prevent her from attending a church service which began at 5 pm. In 2004, Williams-Drabble was told that she would in fact be required to work a shift beginning at 3 pm on Sunday. Williams-Drabble refused. She was told that she had a choice - to work the Sunday shift; to ask another employee to exchange shifts with her; or to hand in her notice. She chose to resign, and lodged a claim at an employment tribunal for discrimination on the grounds of religion and belief.

The tribunal found that Williams-Drabble had indeed suffered indirect discrimination. Requiring her to work when she normally went to church on a Sunday imposed a provision, criterion or practice which had an adverse impact on Christians. The employer was unable to show that the changes to the work roster were a proportionate means of achieving a legitimate aim.

There is an issue in *Williams-Drabble* which was not fully explored by the employment tribunal but which was considered in *Copsey*. This is the question of how far the employer's responsibility to accommodate the religious employee in these circumstances extends. In *Williams-Drabble* it could be argued that the

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<sup>40</sup> (2005) ET Case No. 2601718/04.

employer had made some de-minimis attempts to accommodate the claimant by allowing her the option of finding a substitute for the Sunday shift if she possibly could and this would appear to be in line with Neuberger's *obiter dicta* in *Copsey*, but somewhat out of step with the implications of Rix LJ's comments about the obligations on the employer to make reasonable accommodation. It would have been helpful to hear an opinion in the context of a claim brought under discrimination law on whether or not putting the onus on the employee to accommodate herself could ever be sufficient to discharge an employer's justification defence for indirect discrimination.

The same rationale was applied, with the same result, in *Edge v Visual Security Services Limited*.<sup>41</sup> In this case, the claimant had been employed as a security officer by Visual Security Services Limited. Edge was a committed Christian and did not wish to work on a Sunday. It had been agreed at interview that he would not normally do so. Despite this, he found he was increasingly rostered to work that day. At length, he informed his employer by letter that he was no longer willing to do so. He was dismissed as a result. The employment tribunal found that the employer did not need to roster Edge to work on a Sunday – there was evidence that the work could have been completed without his involvement that day. As the Tribunal also found that Edge was disadvantaged on religious grounds by the requirement to work on a Sunday, he was successful in his claims for indirect discrimination and unfair dismissal. Interestingly, the tribunal made a rare reference to both underlying rationales for absence from work on a Sunday (observance and worship):

Sunday working would put people of the same religion as the claimant (Christians) at a particular disadvantage when compared with other persons because they would not be able to attend Church Services on Sunday, quite apart from the narrower, but perhaps equally important requirement, to observe Sunday as a day of rest.<sup>42</sup>

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<sup>41</sup> (2006) ET Case No. 1301365/06.

<sup>42</sup> *ibid.* [25].

In *Patrick v IH Sterile Services Ltd*,<sup>43</sup> the claimant, a Jehovah's Witness, was a trainee laboratory technician. On entering employment, he came to an arrangement with his employer that he would not be required to work on Sundays,<sup>44</sup> although his contract did not specify fixed hours of work. A few months later, due to market pressures, the staffing policy changed such that employees on flexible contracts (including Patrick) were expected to cover the weekend shifts.<sup>45</sup> Patrick objected 'that he was a Jehovah's Witness and was required to attend the Kingdom Hall for the purpose of worship and other duties to the congregation every Sunday.'<sup>46</sup> The judgment records that his manager held extensive discussions with Patrick to see if his position could be accommodated during which he apparently became 'hostile and aggressive'.<sup>47</sup> He was subsequently dismissed on the basis of an unsatisfactory probation period (there was also evidence of persistent unauthorised absence and lateness).<sup>48</sup> He then lodged his claim for religious discrimination with the employment tribunal.

The tribunal concluded that there had been no direct discrimination. All technicians were required to start working on a Sunday and therefore Patrick had been treated no differently from anyone else. In dealing with the indirect discrimination claim, the tribunal found that Patrick was disadvantaged by being compelled to work on a Sunday, but it concluded that the employer could justify its actions on the basis that it had shared out the obligation to work on Sundays equally across the workforce, irrespective of religious obligation. Without any reference to legal authorities, it observed: 'We do not think it would be appropriate to exempt someone who wishes to practice worship on a Sunday from the obligation to cover Sunday work provided the requirement to do so was shared out equally.'<sup>49</sup> This is a curious conclusion involving no apparent consideration of adverse impact – the very principle on which the law of indirect

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<sup>43</sup> (2011) ET Case No. 3300983/2011.

<sup>44</sup> *ibid.* [9].

<sup>45</sup> *ibid.* [10].

<sup>46</sup> *ibid.* [14].

<sup>47</sup> *ibid.* [23].

<sup>48</sup> *ibid.* [24].

<sup>49</sup> *ibid.* [33].

discrimination is based! It is evident that the correct application of the law requires the tribunal, having identified adverse impact, to move on to a proper consideration of proportionality. This it failed to do.

In *Cherfi v G4S Security Service Ltd*,<sup>50</sup> the claimant, a practising Muslim and a security guard, claimed, *inter alia*, that he had been indirectly discriminated against on the grounds of religion when his employer had required him to remain on site on Friday lunchtimes from 13 October 2008. This placed him under a particular disadvantage as a Muslim who wished to attend Friday prayers in congregation. Prior to that it had been his practice to attend Friday prayers at the Finsbury Park mosque, which usually required more than the standard one hour's lunch break as it was two bus rides away from his place of work.<sup>51</sup>

At a hearing before an employment tribunal, Cherfi was unsuccessful in his indirect discrimination claim. However, a claim for direct discrimination on the grounds of religion succeeded.<sup>52</sup> This was because the claimant had been singled out to be disciplined (in 2007) for taking an extended lunchbreak on Fridays when this was in fact common practice amongst the security guards<sup>53</sup> (although he was later given official permission to continue attending the mosque)<sup>54</sup>.

Cherfi appealed the indirect discrimination decision before the Employment Appeals Tribunal. The EAT agreed with the employment tribunal that Cherfi had been placed at a disadvantage as a practising Muslim by not permitting him to attend prayers in congregation (the first stage of his indirect discrimination claim),<sup>55</sup> albeit that it recognised a 'desire' rather than a religious mandate to manifest Islamic religion in this way.<sup>56</sup> However, moving on to the second stage, the EAT also endorsed the tribunal's findings that G4S had a 'legitimate aim' of

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<sup>50</sup> (2011) UKEAT/0379/10.

<sup>51</sup> *ibid.* [10].

<sup>52</sup> *ibid.* [2].

<sup>53</sup> *ibid.* [9].

<sup>54</sup> *ibid.* [12].

<sup>55</sup> *ibid.* [43].

<sup>56</sup> *ibid.*

meeting the operational requirements of a new client that security staff remained on its site for the full duration of operating hours (including paid lunchbreaks).<sup>57</sup> It also found that the tribunal had correctly balanced the competing claims and that it was proportionate to require Cherfi to remain on site during his Friday lunchbreak,<sup>58</sup> giving weight to both the impracticability of employing a temporary replacement for Cherfi during Friday lunchtime only; and Cherfi's rejection of an offer of an alternative contract with a pattern of working Monday to Thursday with some weekend working (Cherfi was not prepared to work on a Saturday or Sunday).<sup>59</sup>

In *Abdulle v River Island Clothing Company*,<sup>60</sup> a manager's refusal to allow a Muslim employee time off for Salah prayer during a particularly busy day for the retailer where no alternative cover was available was disputed.<sup>61</sup> The refusal was a one-off incident and involved a temporary manager who was unfamiliar with the particularly clothing store, where the claimant worked, and its staff. The employee concerned made a claim for religious discrimination. Her claim succeeded on the basis that the employer had not sought to justify its actions, nor did it have a formal store-wide policy for dealing with requests for religious accommodations of the kind Abdulle sought.<sup>62</sup> The tribunal was particularly critical that a large employer such as River Island had not developed guidelines to assist managers in making decisions in this area. Nevertheless, the tribunal made it clear that there were, in its view, limits to an employee's realistic expectation of an accommodation by his employer and particularly that an employer may be justified in varying any arrangement at short notice in response to unexpected events such as staff sickness or extreme weather conditions.<sup>63</sup>

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<sup>57</sup> *ibid.* [14].

<sup>58</sup> *ibid.* [45].

<sup>59</sup> *ibid.* [15].

<sup>60</sup> (2011) ET Case No. 2346023/2010.

<sup>61</sup> *ibid.* [26].

<sup>62</sup> *ibid.* [29].

<sup>63</sup> *ibid.* [30].

It is interesting to consider this in the light of the claimant's willingness in *Copsey* to support his employer by working on Sunday in 'emergency' situations. It may be that this emerges as a 'minimum' expectation of employees who are normally allowed time off for religious reasons. If so, employees who take a more flexible view of the timing of their religious commitments will find this less burdensome than those who believe that working at a particular time (e.g. the Sabbath) is expressly forbidden.

There is a tribunal judgment concerning time off for the Hajj, *Khan v G and J Spencer Group plc t/a NIC Hygiene Ltd.*<sup>64</sup> In this case, the claimant had received an unclear response to his request for extended leave (including an element of unpaid leave) to go on the pilgrimage. He had chosen to go anyway and on return he was dismissed for having taken unauthorised absence. The reasoning in this case did not extend to a discussion of how far the Hajj was mandatory and the possible implications of a conclusion on that point; however, the case was decided in favour of the claimant, due in large part to the ambiguity of the employer's response to the holiday request and the fact that there was some evidence that it was practicable to accommodate it.<sup>65</sup>

## **Summary and Discussion**

The purpose of the first half of this chapter has been to examine the approach taken by courts and tribunals to issues of negative manifestation in the workplace associated with requests for time off for religious activities which take place, in large part, outside the workplace.

It was noted in Chapter 4 that the privileged position which Sunday once enjoyed in England and Wales has been largely legislated away – Sunday is in large measure a working day particularly in the retail and hospitality sectors but also in

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<sup>64</sup> (2005) ET Case No. 1803250/04.

<sup>65</sup> There has also been an interesting claim by a Roman Catholic employee who chose to take unauthorised time off for a pilgrimage and was, in consequence, dismissed; this was held to be fair at tribunal partly due to the fact that pilgrimages are not considered mandatory for Roman Catholics: see *Moise v Strettons Limited* (2011) ET Case No. 3203326/09.

a growing number of industrial and service settings. At the same time, it appears that courts and tribunals have also lost sight of the original imperative of the legislation which pre-dated the liberalisation of Sunday trading - to guard the particular status of Sunday as a 'day of rest', the observance of which many Christians believe is mandatory, with certain exceptions for essential work. Instead of considering the obligation felt by some Christians to observe a day of rest, courts and tribunals have been more concerned with a narrower question of how far work commitments preclude access to attendance at church services. The imposition of any restrictions on employees' freedom to attend church services is sufficient to trigger the first stage of an indirect discrimination claim.<sup>66</sup> At the second stage, employers are therefore required to justify, to a greater or lesser degree, such restrictions. Thus, in terms of the ECHR conceptualisation of the importance of both 'observance' and 'worship' (in community), it would seem that the importance and scope of a key aspect of the 'observance' imperative has been significantly downplayed. Observance is of course an elastic term and could be framed as referring to religious activities such as ritual prayer which are not quite encapsulated by the alternative word 'worship'; however it also has a plainer meaning as respecting religious ordinances (such as the injunction not to work on the Sabbath). It is the latter aspect of observance which has been sidelined or simply ignored (with the exception of *Edge* where it was recognised to some degree).

In addition to Sunday services for Christians, there are a range of other examples of demands on the time of the religious employee (e.g. Friday prayers for Muslims). In such cases, it is for the employer to justify any restrictions which might be imposed on an employee's participation in such activities as a result of working time. Acceptable justification defences naturally revolve around the operational requirements of the employer. What remains slightly unclear is the extent to which employers are required actively to manage shift rotas in order to accommodate the religious employee. It may be inferred from *Copsey* (insofar as a tribunal may feel bound by relevant *obiter dicta* in that case) that an employer

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<sup>66</sup> Albeit that, if there is no actual 'obligation' not to work on Sundays this may weaken the strength of the claim; see Barrett, 'Christian loses battle over Sunday work'.

should, as a minimum, permit an employee to seek the co-operation of colleagues to make alternative arrangements. It is strongly arguable that the duty to accommodate (if such it be) goes further, to require that the employer is proactive in looking for ways to reorganise shifts to accommodate, where possible, the religious employee. This argument is strongest in situations where the employer has imposed a new requirement repudiating an existing arrangement with a particular employee.

### ***Negative Manifestation for Reasons of Conscientious Objection***<sup>67</sup>

Having considered the first aspect of negative manifestation in the workplace, the discussion will now turn to the second aspect – negative manifestation for reasons of ‘conscientious objection’. The concept of conscientious objection has its roots outside of the workplace and is of interest to political philosophers as representing a form of non-violent resistance to the requirements of law, for reasons of principle. A number of theorists deal with conscientious objection in parallel with the concept of ‘civil disobedience’, implying similarities between the two<sup>68</sup> whilst emphasising that there are distinctive differences.<sup>69</sup> Identifying those differences can help more clearly to identify the concept of conscientious objection and, for that reason, will be attempted briefly here.

‘Civil disobedience’ is a term originally coined by the American theorist Henry David Thoreau, in his 1848 essay of the same name, to describe his own actions, and the motivation behind them, in refusing to pay a tax to fund a war in Mexico and the enforcement of a law concerning fugitive slaves.<sup>70</sup> The term is given useful modern definition by Raz as ‘a politically motivated breach of law

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<sup>67</sup> The material in this section draws heavily on A Hambler, ‘Recognising a right to “conscientiously object”’.

<sup>68</sup> This is particularly true of Dworkin in *Taking Rights Seriously*.

<sup>69</sup> Raz devotes a separate chapter to each concept; see J Raz, *The Authority of Law* (Clarendon Press 1979).

<sup>70</sup> See H Thoreau, ‘Civil Disobedience,’ in H Bedau (ed), *Civil Disobedience in Focus* (Routledge 1991).

designed either to contribute directly to a change of law or of a public policy or to express one's protest against, and dissociation from, a law or a public policy.'<sup>71</sup> The resulting 'disobedience' to a particular law or laws thus represents a form of public political protest, which is often and necessarily highly visible, with the aim of gaining support from others and with the serious intention of changing a particular law (which may often be viewed as unjust and therefore morally illegitimate<sup>72</sup>). Civil disobedience often involves group protest, most often where that particular group interest is at stake (most famously the predominantly black civil rights protestors of the 1950s and 1960s in the USA).

Conscientious objection<sup>73</sup> on the other hand involves 'a breach of law for the reason that the agent is morally prohibited to obey it'.<sup>74</sup> In other words, an individual has a compelling reason to believe that he must not obey a particular law or carry out a particular legal obligation, and thus chooses not to do so, whatever the legal consequences may be. Conscientious objection is thus different from civil disobedience. As Rawls notes, conscientious objectors:

... do not seek out occasions for disobedience as a way to state their cause. Rather they bide their time hoping that the necessity to disobey will not arise. They are less optimistic than those undertaking civil disobedience and they may entertain no expectation of changing laws or policies.<sup>75</sup>

It is perhaps fair to suggest that, unlike those engaging in civil disobedience, conscientious objectors are not radical idealists. They do not necessarily wish to engage others in their objections, nor is the intention of their refusal to effect a change in the law or public policy. Rather, they want to be left alone to quietly follow the dictates of their own consciences, conflict with authorities only arising

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<sup>71</sup> Raz, *The Authority of Law*, 263.

<sup>72</sup> This aspect is emphasised by Dworkin, but is not, of course, a necessary precondition of civil disobedience; see Dworkin, *Taking Rights Seriously*.

<sup>73</sup> Or 'conscientious refusal' to use Rawls preferred term; see J Rawls, 'A Theory of Civil Disobedience', in R Dworkin (ed.), *The Philosophy of Law* (OUP 1977).

<sup>74</sup> Raz, *The Authority of Law*, 263.

<sup>75</sup> Rawls, 'A Theory of Civil Disobedience', 94.

if a law or obligation requires them to do something which violates those consciences. The nature of this violation of conscience is admirably articulated by Childress:

When a person appeals to his conscience or describes his act as conscientious, he makes a hypothetical and prospective claim. He claims that if he were to commit the act in question, he would violate his conscience. This violation would result not only in such unpleasant feelings as guilt and/or shame but also in a fundamental loss of integrity, wholeness, and harmony in the self.<sup>76</sup>

This definition underlines the deep significance to an individual's personal identity of conscience and why this should be taken very seriously in a liberal state, given the weight attached by liberals to personal autonomy (and its subset, moral autonomy)<sup>77</sup> and dignity. For religious employees, as it was argued in Chapter 2, this importance is magnified by the fact that their consciences are sharpened by the requirement of obedience to the revealed will of God which surely brings an additional and pressing dimension to this 'intrinsic integrity, wholeness and harmony' of conscience. Childress goes on to develop the notion of conscience as a form of sanction for the individual – it is thus a heavy burden to bear (rather than a whimsey to be indulged). He concludes that the guiding principle should be that conscientious objection is accommodated:

My argument, grounded in an understanding of conscience as a sanction, is that we should start with the presumptive liberty of conscience, which then forces the state to bear the burden of proof to show that its interests are compelling and can be realized through no other means than a denial of the exemption.<sup>78</sup>

Although Childress does not write specifically about a workplace context, his analysis provides a helpful reference point for the cases to be considered in this chapter which are concerned with situations where employees are faced with a dilemma when required to act in accordance with principles which offend

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<sup>76</sup> J Childress, 'Appeals to Conscience' (1979) *Ethics* 315, 318.

<sup>77</sup> See discussion in R Dahl, *On Democracy* (Yale University Press 1998).

<sup>78</sup> Childress, 'Appeals to Conscience', p 335.

conscience. Childress thus identifies one position which is to start with the assumption that primacy be given in the workplace to an individual's moral autonomy (unless there are pressing reasons against this). Litwak, considering (specifically) public servants, offers a slightly softer version which he calls 'a pluralistic model which attempts, within reasonable parameters, to respect the public servant's moral autonomy.'<sup>79</sup> At the alternative end of the spectrum, is what Litwak terms 'a dogmatic model involving absolute institutional conformity' when faced with such a moral dilemma.<sup>80</sup> Where this is required by an employer, individual moral autonomy is sacrificed to another imperative, and the significance of conscience and its requirements is ignored.

### **Conscientious Objection in Practice**

The actual term 'conscientious objector' was first used to describe opponents of compulsory vaccinations in the 1890s,<sup>81</sup> but the label has been historically associated most often with individual objections to being conscripted for military service, a phenomenon which can be traced back to antiquity.<sup>82</sup> The modern notion that an individual might, because of pacifist Christian convictions, be exempted from the military activities of training, fighting and killing, without penalty, was first given formal legal effect in 1673 in Rhode Island, New England.<sup>83</sup> The legislation also introduced a key principle that the objector should be willing to perform an alternative form of non-combatant service (such as that of watchman, or aid to those needing to flee from a place under military

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<sup>79</sup> E Litwak, 'Conscientious Objection in Public Service Ethics: A Proposed Procedure for Europe' (2005) 7 Eur JL 79, 85.

<sup>80</sup> *ibid.*

<sup>81</sup> C Moskoks and J Chambers, 'The Secularisation of Conscience' in C Moskoks and J Chambers (eds), *The New Conscientious Objection* (OUP 1993), 11.

<sup>82</sup> In Roman times, Jews were exempted from military service because of an unwillingness, for religious reasons, to swear the soldier's oath to the 'god-emperor'; the first known Christian conscientious objector was an African named Maximilian who refused to perform a military service and was executed - see Moskoks and Chambers, 'The Secularisation of Conscience', 9.

<sup>83</sup> See D Laycock, *Religious Liberty* (vol. 1, William B Eerdmans 2010), 723.

threat), in order to attest to the sincerity of the objection and avoid cynical claims to escape what was (and is) after all dangerous and unpleasant work.<sup>84</sup>

Conscientious objection to forced military service developed as a doctrine in the UK in the first half of the Twentieth Century during periods of mass-conscription during the two world wars and the compulsory national military service in the late 1940s through to the early 1960s. When mass conscription was introduced in 1916, it became apparent that there were a range of mostly Christian objectors, such as Quakers, on the ground of conscience. Some of these were ‘absolutists’ who objected to any form of co-operation with the military, directly or indirectly (by performing non-military duties); others were ‘alternativists’ who were willing to perform alternative civil employment; and others were ‘non-combatant conscientious objectors’, who were willing to perform non-fighting military roles.<sup>85</sup> As a result, the Conscription Acts of 1916, 1939 and 1948 permitted conscientious objectors to state their case before a tribunal and made provision for possible outcomes to meet each type of objection. Thus, conscientious objectors might be awarded either complete exemption from military service or conditional exemption (providing alternative civilian service was undertaken). Alternatively, they might be made available for call up to non-combatant duties, or, if considered to be insincere, combatant duties.<sup>86</sup>

Since the era of mass-conscription in the UK has ended, conscientious objection has become a less significant issue for an all-volunteer military.<sup>87</sup> There has been, however, one key development – the right to conscientiously object has

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<sup>84</sup> *ibid.*, 724.

<sup>85</sup> G Harries-Jenkins, ‘Britain: From Individual Conscience to Social Movement’ in Moskoks and Chambers, *The New Conscientious Objection*, 70–72.

<sup>86</sup> *ibid.*

<sup>87</sup> However, a number of European states still engage in conscription and, under the traditional interpretation of the ECHR (Art 4(3)(b)), there was no absolute right (relying for example on Art 9) to conscientiously object (see *Grandrath v Germany* (1965) Appl No. 2299/64, 23 April 1965). This was overturned in *Bayatyan v Armenia* [2011] Appl No. 23459/03 (7 July 2011)(GC) which set a very high standard of justification for member states not to offer a right of conscientious objection. De facto, the right to conscientiously object is now fully recognised under the ECHR.

been extended to those who have voluntarily accepted a fixed period military service, but who have subsequently developed a conscientious objection to this service (probably for religious reasons).<sup>88</sup> Selective conscientious objection (e.g. in opposition to the Iraq war) whilst continuing to serve, is not permitted, however<sup>89</sup> (although there is an argument that international standards require that it should be).<sup>90</sup> Therefore, conscientious objection has developed as a concept in the military, originally in response to the deeply-held pacifism of some, which in turn was often chiefly motivated by Christian convictions. There are some points to note from the military experience which may be useful to draw on in a discussion referenced to the workplace. It is interesting to note, for instance, the process involved in dealing with conscientious objectors – a detailed inquiry by a tribunal into the nature of, and sincerity of, the conscientious objection. Equally it should be noted that some alternative service was required of the conscientious objector, which would also help to attest to the sincerity of convictions.<sup>91</sup> Nevertheless, if the nature of the conscientious objection was such that this was impossible, an absolute exemption could be granted.

‘Conscientious objection’, a concept most developed when applied to the military, has also been applied, in modified form, in other situations, some of which have arisen, as Litwak notes, as a result of the liberalisation of Western society in the 1960s and the consequent emergence of new moral controversies over which society is often polarised, such as questions related to sexual and reproductive ethics.<sup>92</sup> There is however a clear caveat which is required when comparing this to the military situation - the employee is rather different from that of the military conscript. The latter is of course entering into a form of

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<sup>88</sup> MOD, *Guide on Religion and Belief in the MOD and Armed Forces* [41], 11.

<sup>89</sup> *Khan v Royal Air Force Summary Appeal Court* [2004] EWHC 2230 (Admin).

<sup>90</sup> United Nations Commission on Human Rights Resolution of 8 March 1995 (E/CN.4/RES/1995/83) concerning conscientious objection is ambiguous about selective conscientious objection, as the text of the resolution could be construed to include this: ‘persons performing military service should not be excluded from the right to have conscientious objections to military service.’

<sup>91</sup> See also discussion of ‘sincerity’ in Chapter 2.

<sup>92</sup> Litwak, ‘Conscientious Objection in Public Service Ethics’, p 80.

working under compulsion,<sup>93</sup> whereas the former is freely entering a contract of employment (albeit that this freedom is considerably limited by factors such as individual skills, domestic and geographical circumstances as well as the realistic availability of alternative work);<sup>94</sup> thus the right to conscientiously object is more likely to be considered within the context of a ‘specific situation’ and less likely to be absolute.<sup>95</sup>

Although there are various instances where employees might be required by their employers to act against conscience, some are relatively uncontroversial when it comes to public policy. There is specific provision for employees to make a public disclosure, in good faith, of information to an employer or ‘other responsible person’ *inter alia* if their employers require them, for example, to lie or to conceal information relating to: criminal offences; a failure to comply with legal obligations; miscarriages of justice; dangers to individuals arising from health and safety concerns; or environmental damage.<sup>96</sup> In such cases, provided certain conditions are met, they are protected in employment law from dismissal or other detriment by their employers.<sup>97</sup>

However, there are also situations where an individual might be asked by his employer to act against conscience where such a request is well within an employer’s normal lawful range of discretion. In recent years, there has been particular interest in two areas of employment where conscientious objection has been common. The first area concerns those healthcare workers and scientists with a religious objection to interfering with human life either to terminate it (via abortion or the issuing of the ‘morning-after pill’)<sup>98</sup> or to in some other way

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<sup>93</sup> Albeit one which is specifically exempted from the prohibition on forced labour under Art 4(3)(b) ECHR.

<sup>94</sup> See discussion in Chapter 3.

<sup>95</sup> See discussion of this term in Chapter 4.

<sup>96</sup> Employment Rights Act 1996, s 43B(1).

<sup>97</sup> In addition there may also be, in certain circumstances, a ‘public interest defence’ for employees when breaching confidence under common law; see *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

<sup>98</sup> See, for example, Fenton and Lomasky, ‘Dispensing with Liberty’.

manipulate it through stem cell or similar genetic research. In the United Kingdom, the right to object, at least for clinicians, in these areas of medical ethics has been enshrined in legislation, and there is little case law to discuss.<sup>99</sup>

The second area concerns objections to the effect of legislation promoting the rights and status of homosexuals and, in particular, same-sex couples.<sup>100</sup> Individuals who seek to conscientiously object in this second area are likely to be slightly further removed from the source of the objection than might be the case in healthcare, in the sense that it is the indirect rather than the direct result of their actions which offends conscience. They are not after all being required to act as the actual agent of the perceived moral harm as might be the doctor when carrying out an abortion. Whether this makes objectors less deserving of accommodation will be further considered later in this chapter. However, it may be noted at this point that there may be inspiration to be drawn from the ‘absolutist’ objectors to military service who were not prepared to engage in activities which even *indirectly* assisted war preparations. Their objections were still thought worthy of respect and potential accommodation.

Questions of religious-based conscience in the workplace do not of course inevitably overlap only with questions relating to sexual orientation. There are other potential points of conflict, for instance involving objections to the sale of certain products or the display of certain messages on religious grounds. Some Muslims, for example, might object to the handling of alcohol;<sup>101</sup> this objection has been taken sufficiently seriously by the supermarket, Sainsbury’s, that it now allows Muslim employees to ‘opt out’ of handling alcohol in the performance of

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<sup>99</sup> With at least one exception; see generally discussion in Chapter 4.

<sup>100</sup> As Parkinson notes there is now a declining public tolerance for those who do not fully accept same-sex relationships (hence the fact that conflict is likely), see P Parkinson, ‘Forum: Accommodating Religious Beliefs in a Secular Age’ (2011) 34 *UNSW Law Journal* 281.

<sup>101</sup> See, for example, J Charlton, ‘Muslim fork lift driver sues Tesco after handling booze’

*Personnel Today* (29 September 2008); copy at:

<<<http://www.personneltoday.com/articles/2008/09/29/47681/muslim-fork-lift-driver-sues-tesco-after-handling-booze.html>>>, accessed 20 July 2011.

their duties.<sup>102</sup> Equally, some Amritdhari Sikhs might object to touching meat or meat products.<sup>103</sup> In a further example, a Christian bus driver might object to driving a bus bearing an atheist slogan.<sup>104</sup>

Nevertheless, although there are fault lines for conscientious objection other than sexual orientation, the fact remains that the key cases concern this issue. There are no absolute rights in law to conscientiously object in this area (such as those applying with regard to the healthcare dilemma), nor is the label ‘conscientious objection’ recognised.<sup>105</sup> Those seeking exemptions therefore have been forced to rely on the theoretical protection for conscience (as a manifestation of religion)<sup>106</sup> under employment discrimination law.<sup>107</sup> Of the potential claims under discrimination law, indirect discrimination is the most likely to provide protections for religious expression, (including the ‘negative expression’ of conscience) as the claimant need only identify ‘a provision, criterion or practice’ (PCP) which disadvantages the members of a group to which he belongs (e.g. ‘traditional Christians’). Thus, the claimant can show that being required to act in a particular way represents a ‘barrier’ to himself and others with the same beliefs,

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<sup>102</sup> See Foggo and Thompson, ‘Muslim checkout staff get an alcohol opt-out clause’.

<sup>103</sup> See the facts of *Chatwal v Wandsworth BC* (2010) ET Case No. 2340819/09. In this case the claimant was unable to show that this belief was more than an individual conviction and so failed the test for indirect discrimination.

<sup>104</sup> Anon, ‘Bus Driver Refuses to Drive Atheist Bus’ *BBC News* (London, 16 January 2009); copy at <<<http://news.bbc.co.uk/1/hi/england/hampshire/7832647.stm>>>, accessed 20 April 2011. In a parallel case, a Christian bus driver refused to drive a bus bearing an Stonewall slogan; see N O’Doherty, ‘Passengers left stranded on bus after driver refuses to board because of gay rights advert on the side’ *Daily Mail* (London, 16 November 2012); copy at: <<<http://www.dailymail.co.uk/news/article-2233849/Passengers-left-stranded-bus-driver-refuses-board-gay-rights-advert-side.html>>>, accessed 1 December 2012.

<sup>105</sup> It is explicitly referred to in the Abortion Act.

<sup>106</sup> That conscientious objection (to performing a public service) constitutes a ‘manifestation’ of religion rather than conduct motivated by religion has been called into question in a submission to the Ladele case; see National Secular Society, *Submissions in the cases of Ewedia and Chaplin v United Kingdom and Ladele and MacFarlane v United Kingdom* (14 September 2011); copy at: <<<http://www.secularism.org.uk/uploads/nss-intervention-to-european-court-of-human-rights.pdf>>>, accessed 9 August 2012.

<sup>107</sup> See discussion in Chapter 4.

as it forces him to act in a way which his religious beliefs forbid – this disadvantages him relative to others who do not share those beliefs. Once this PCP has been identified, it is then for the respondent to show that applying it to the claimant represented ‘a proportionate means of achieving a legitimate aim’. In other words, the employer is required to shoulder the burden of justification.

Since 2003, there have been three particularly significant cases which generated some public debate: *McClintock*, *Ladele* and *MacFarlane*. Each of these cases involved an employee or public official ‘conscientiously objecting’ to an aspect of his or her role because of its relationship to promoting same-sex relationships. These cases will be examined in turn below, with particular attention being given to *Ladele*. This is for three reasons. First, this is the most authoritative case, having progressed to the Court of Appeal. Second, it is the only case where there was at least one judgment in favour of the religious claimant (at first instance), thus widening the scope for analysis. Third, it is arguably the most important case as the nature of the objection was clear-cut and the issues raised were therefore tackled head on, without the distracting lack of clarity in terms of the claimants’ intentions, which slightly muddy the waters in *McClintock* and *MacFarlane*.

### **McClintock v Department of Constitutional Affairs**

The first case was brought by Andrew McClintock who was a Justice of the Peace in Sheffield, South Yorkshire and a practising Christian. He served on the family bench and one of his duties was to place children for adoption. When he became aware in 2004 that, as a result of the Civil Partnership Bill, he might be required to place children for adoption with gay and lesbian couples he raised concerns by letter, requesting that he be excused from sitting in cases with a risk of needing to place a child with a same sex couple, due to the incompatibility, in his view, between this obligation and his obligations under the Children’s Act 1989 (to act in the best interests of children).<sup>108</sup> At a subsequent meeting, McClintock’s request was turned down; he was told that there could be no

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<sup>108</sup> *McClintock v Department of Constitutional Affairs* (2006) ET Case No. 2800834/06 [9].

general exemption from sitting and was reminded that he was bound by his judicial oath by which he had undertaken to adjudicate on any case which came before him.<sup>109</sup> Following this meeting, McClintock resigned from the Family Bench and began legal proceedings. He did so, primarily, on the basis that a refusal to accommodate his request amounted to discrimination on the grounds of religion and belief.

The role of the tribunal and the EAT was thus to determine whether or not McClintock had suffered direct and/or indirect discrimination on the basis of his religion or belief under the provisions of the 2003 Regulations. The initial employment tribunal concluded that there had been no direct discrimination, for two main reasons; firstly, that there had been no detriment or dismissal (which equates to ‘less favourable treatment’) since McClintock had resigned voluntarily and secondly because he had not made clear that his objection was related to his religious beliefs. It concluded also that McClintock’s objection failed the test of being considered to be a philosophical belief analogous to religious, the test being articulated as follows:

The test for determining whether views can properly be considered to fall into the category of a philosophical belief is whether they have sufficient cogency, seriousness, cohesion and importance and are worthy of respect in a democratic society.<sup>110</sup>

The tribunal also rejected his indirect discrimination claim, although with limited legal reasoning, such that this became the main point of appeal. The EAT however, upheld the tribunal judgment with particular emphasis on the fact that McClintock’s position was not explicitly based on religious or philosophical grounds and so fell at the first hurdle for any kind of discrimination claim. Even if this were not so, the EAT concluded that it was a proportionate means to achieve a legitimate aim (the employer’s defence in indirect discrimination claims) for the employer to insist that:

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<sup>109</sup> *ibid.* [12].

<sup>110</sup> *ibid.* [41].

magistrates must apply the law of the land as their oath requires, and cannot opt out of cases on the grounds that they may have to apply or give effect to laws to which they have a moral or other principled objection.<sup>111</sup>

The EAT, applying European Court of Human Rights jurisprudence, also rejected McClintock's attempt to invoke Article 9 ECHR on the basis that the right to manifest religious convictions does not apply 'where a party voluntarily places himself or herself in a position where a conflict might arise between his or her religious or philosophical beliefs and the duty imposed by an employment or office.'<sup>112</sup>

This case anticipates, in a number of significant ways, the more weighty judgment in *Ladele* to be considered in much more detail below. This analysis will be confined therefore to two key issues which arise from this case alone.

The first key issue was whether or not McClintock could reasonably claim to have suffered religious discrimination, given that his conscientious objections to making same-sex adoption orders were based on a form of public reason<sup>113</sup> and he did not invoke his religious beliefs until after his resignation. His counsel creatively attempted to overcome this problem by suggesting, based on the judgment in *Williamson v Secretary of State for Education and Employment* (where Lord Justice Rix opined that 'the deed does not have to express the belief in proclaiming it'),<sup>114</sup> that McClintock did not need to make an express link between his objection and his religious belief.<sup>115</sup> The EAT thought that this was an 'absurd' argument in this context, given the burden it would generally place

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<sup>111</sup> *McClintock* (EAT) [62].

<sup>112</sup> *ibid.* [61].

<sup>113</sup> See discussion in Chapter 3, above.

<sup>114</sup> [2003] QB 1300 [164].

<sup>115</sup> It is perhaps worth noting that the example given by Rix LJ to support this statement was the 'passive' example of a Muslim or Jew adhering to a particular dietary law without the 'need for request or explanation'. McClintock did make a request and the employer was entitled to an explanation; see *McClintock* (EAT) [46].

on the employer to second-guess the employee's true reasons for requests, especially if the employee has actively chosen to 'conceal' these.<sup>116</sup> From this it can be inferred that employees need to clearly state that their conscientious objections have a religious (or philosophical) basis, if they hope to pass the first stage for protection under discrimination law. This has been criticised, on the basis that there may be situations where the burden would not be too great for employers to infer that there might be an implicit religious objection,<sup>117</sup> particularly on an issue so sensitive that, as the EAT itself identified, a certain amount of confusion and even inconsistency might not be unexpected.<sup>118</sup>

The second key issue is how far a 'professional' oath, specifically here the judicial oath to act according to the law 'without fear or favour', trumps any possible right of conscientious objection. In *McClintock*'s case, his employer's belief that there was an over-riding public interest that he should abide by his judicial oath, and deal impartially with any and every case which might come before the family bench, was considered sufficient justification for the refusal to countenance an opt-out.<sup>119</sup> *McClintock* had after all voluntarily agreed to take the oath and apply the law in total. However, there is a caveat. As Zacharias observes, the lawyer (or indeed any public official) cannot fully foresee, when taking the oath, all the potential dilemmas which might arise during the course of employment.<sup>120</sup> In the case of the judge, he cannot anticipate exactly how the law over which he is required to preside may change and develop (how far, for example, it might move away from its original Judeo-Christian basis).

It may thus be that reliance on the judicial oath as a 'trump' is not enough. In this case for example, inquiries might, in addition, have been made into whether and how the Department of Constitutional Affairs had assessed exactly how the

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<sup>116</sup> *ibid.*

<sup>117</sup> See Hambler, 'A Private Matter?', 120.

<sup>118</sup> *McClintock* (EAT) [38].

<sup>119</sup> Although this was hypothetical only as Elias J had already determined that there could be no religious discrimination given the non-religious nature of *McClintock*'s arguments.

<sup>120</sup> F Zacharias, 'The Lawyer as Conscientious Objector' (2001-2002) 54 *Rutgers L Rev* 191.

public interest would be compromised by acceding to McClintock's request. However, no such evidence was thought to be required.<sup>121</sup>

### **Ladele v Islington Borough Council**

The second case was brought by Lilian Ladele, a committed Christian, who worked at the London Borough of Islington and became a Registrar of Births, Deaths and Marriages on 14 November 2002. When the Civil Partnerships Act came into force in December 2005, Ladele was required by her manager, the Superintendent Registrar, to be formally 'designated' a civil partnerships registrar. That all registrars of marriage should also be required to register civil partnerships was a decision taken locally under the discretion given to superintendent registrars by the Registrar General. In advance of this, Ladele had let it be known to her employer that she would find it difficult to conduct civil partnerships because of her religious beliefs:

A civil partnership is a marriage in all but name. Whether or not there are sexual relations it gives the couple who have entered into it the same rights and responsibilities as a married couple. Regardless of my feelings for the participants (and as a Christian this should only be love), I feel unable to directly facilitate the formation of a union that I sincerely believe is contrary to God's law.<sup>122</sup>

Under guidance offered by the Registrar General, Ladele was offered a limited compromise whereby she would only participate in civil partnership work involving the signing of a register (as opposed to officiating at a 'ceremony'), an offer she rejected. She was then threatened, by letter, with disciplinary action; in response, she wrote that that she was 'placed in a dilemma and had either to honour her faith or the demands of the council,' and asked to be treated sympathetically.<sup>123</sup>

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<sup>121</sup> *McClintock* EAT [51].

<sup>122</sup> See Ladele's witness statement, see *Ladele v Islington Borough Council* (2008) ET Case No. 2203694/2007 [7].

<sup>123</sup> *ibid.* [9].

Ladele did not receive a reply. However, from then on, the council turned a blind eye as she managed to avoid any civil partnerships work by changing shifts with colleagues. Nevertheless, there remained tensions, particularly involving two gay members of staff (identified by the Tribunal as ‘Dion’ and ‘Victoria’) which were articulated at a team meeting on 2 November 2006. The meeting was followed by a letter, written by Dion and Victoria, in which they complained that Ladele’s refusal to conduct Civil Partnerships was ‘homophobic’, and contrary to the Council’s ‘Dignity for All’ equality policy; they claimed that they themselves felt discriminated against by her actions. The Head of Democratic Services swiftly replied to this letter and subsequently engaged in informal talks with Dion and Victoria, explaining that he wished to take action against Ladele but could not do so until she became an employee of the council rather than a statutory officer (which in fact occurred on 1 December 2007<sup>124</sup>). This information was subsequently shared at a meeting of the LGBT forum.<sup>125</sup>

After some further informal (and unsuccessful) attempts to put pressure on Ladele to accept that its ‘Dignity for All’ policy required her to undertake civil partnerships, she was subjected to disciplinary proceedings. In response, Ladele lodged a claim with an employment tribunal for direct discrimination, indirect discrimination and harassment on the grounds of religion and belief.<sup>126</sup>

The employment tribunal upheld all of Ladele’s discrimination claims. It took a broad view of the scope of direct discrimination, and compared and contrasted the different approaches that Borough officials took in dealing with sexual orientation issues as opposed to religion and belief issues, drawing the conclusion that, in a number of instances, the Council would not have subjected a person who was protected under the Dignity for All policy due to their sexual orientation to the detriments which Ladele, protected under religion and belief, was subjected.

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<sup>124</sup> *ibid.* [21].

<sup>125</sup> *Ladele* (CA) [8].

<sup>126</sup> *ibid.* [17-18].

With regard to indirect discrimination, the tribunal identified that requiring all registrars to register civil partnerships amounted to a ‘provision, criterion or practice’ which put those holding ‘orthodox Christian beliefs’ at a disadvantage when compared to other people who did not share those beliefs. There was no dispute that Islington Borough Council had a legitimate aim in seeking to provide ‘an effective Civil Partnership arrangement service as an employer and public authority which is wholly committed to the promotion of equal opportunities and fighting discrimination.’<sup>127</sup> Rather, the issue turned on whether or not it was ‘proportionate’ to insist that Ladele be involved in providing that service. The tribunal noted crucially that Islington was able to provide the same ‘first class’ civil partnerships service without Ladele’s involvement. Thus, it concluded that:

The Respondent placed a greater value on the rights of the lesbian, gay, bisexual and transsexual community than it placed on the rights of Ms Ladele as one holding an orthodox Christian belief. The Respondent showed no respect for Ms Ladele’s rights. Their action in applying the first provision, criterion or practice was not a proportionate means of achieving a legitimate aim.<sup>128</sup>

In relation to Ladele’s harassment claim, the tribunal found that the complaints by gay members of staff that Ladele was victimising them because of her stance on civil partnerships was an act of harassment, as was the failure by management to take her view seriously, the breach of confidentiality, the disciplinary process and the failure to consider Ladele for temporary promotion.<sup>129</sup>

The Employment Appeals Tribunal overturned the tribunal’s findings. It distinguished an overall claim of direct discrimination, arising from the decision to designate Ladele as a Civil Partnerships Registrar, from specific detriments. With regard to the former, it concluded that Ladele had been treated no differently from how another (non-religious) employee would have been treated

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<sup>127</sup> *Ladele* (ET) [86].

<sup>128</sup> *ibid.* [87].

<sup>129</sup> *ibid.* [104].

for refusal to conduct civil partnerships and that ‘[i]t cannot constitute direct discrimination to treat all employees in precisely the same way.’<sup>130</sup>

On the specific detriments suffered by Ladele, the EAT took the view that although Ladele’s treatment was ‘unreasonable’, and thus in a sense she suffered a detriment, this detriment was not suffered for a ‘prohibited’ reason (i.e. her religion or belief) but rather because of her conduct in refusing to conduct civil partnerships.<sup>131</sup>

The EAT also applied the comparator principle much more narrowly than did the initial tribunal, and determined that an appropriate comparator for Ladele was not the gay members of staff (because they were not objecting to performing a civil partnership) but rather a ‘hypothetical’ registrar who refused to conduct civil partnerships because of ‘an antipathy to the concept of same-sex relationships’, but where this antipathy was based on something other than religion.<sup>132</sup> Again this allowed the EAT to conclude that, ‘although management was far more sympathetic to the concerns expressed by the two gay registrars than to the claimant’s religious views’, this did not constitute direct discrimination.<sup>133</sup>

The EAT then dealt briefly with the question of harassment. As the claim took the form of a series of detriments, the EAT applied its own logic in respect of direct discrimination and concluded that although Ladele suffered ‘unwanted conduct’ this was not on the grounds of religion and belief but rather on the grounds of her refusal to conduct Civil Partnerships.<sup>134</sup>

On the question of indirect discrimination, the EAT accepted that a requirement that all registrars should conduct civil partnerships did put Ladele at a particular

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<sup>130</sup> *ibid.* [53].

<sup>131</sup> *Islington London Borough Council v Ladele* [2008] UKEAT 0453/08, [2009] ICR 387 [63].

<sup>132</sup> *ibid.* [64].

<sup>133</sup> *ibid.* [67]. The Court of Appeal broadly agreed but determined that, with regard to one or two detriments, the tribunal might have identified the right comparators. It did not elaborate as it decided that nothing substantially turned on this point; see *Ladele (CA)* [39].

<sup>134</sup> *Ladele (EAT)* [91-94].

disadvantage, when compared to others, on the grounds of religion and belief. The question remained as to whether or not this represented ‘a proportionate means of achieving a legitimate aim’.<sup>135</sup> The EAT concluded that Islington Borough Council did indeed have a legitimate aim, and this was conceptualised as ‘providing the service on a non-discriminatory basis’. As the Court of Appeal later observed, this was a rather wider view of the legitimate aim of Islington Council than that assumed by the Tribunal which was simply the efficient provision of a service.<sup>136</sup> It also concluded that it was proportionate for Islington, if it so wished, to ‘require all registrars to perform the full range of services’ such that ‘the claimant could not pick and choose what duties she would perform depending on whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on the grounds of sexual orientation.’<sup>137</sup>

The EAT also considered the ECHR Article 9 jurisprudence in order to identify whether or not the approach it had taken was inconsistent with it. As in other cases, it concluded that there was no conflict – Article 9 having been construed to provide ‘very narrow protection indeed for employees’.<sup>138</sup> It did consider that Ladele’s strongest argument under the Article 9 jurisprudence was that she was not employed to carry out civil partnership duties, but that these duties had later been imposed upon her, and referred to Lord Rix’s dissenting decision in *Copsey*.<sup>139</sup> However, it ‘doubted’ whether this argument could succeed here as the duties of a registrar had been extended by Parliament and ‘the claimant was being required to carry out precisely the kind of tasks those in her situation do.’<sup>140</sup> It went on to declare that, notwithstanding the ‘doubt’, Ladele’s argument was ‘bound to fail’ for another reason and this was because she wished to be accommodated in refusing to carry out duties ‘because of hostility to giving

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<sup>135</sup> *ibid.* [95].

<sup>136</sup> *Ladele (CA)* [44].

<sup>137</sup> *Ladele (EAT)* [111].

<sup>138</sup> *ibid.* [119].

<sup>139</sup> See discussion in this chapter (above).

<sup>140</sup> *Ladele (EAT)* [123].

effect to the legal rights of same sex couples.’<sup>141</sup> The EAT concluded that ‘it necessarily follows that the manifestation of the belief must give way when it involves discriminating on grounds which Parliament has provided to be unlawful.’<sup>142</sup> In reaching its conclusion, the EAT did not discount, however, the possibility that Islington Borough Council might have taken a ‘pragmatic line’ and chosen not to designate Ladele as a civil partnerships registrar, and this might have been a desirable outcome.<sup>143</sup>

The Court of Appeal endorsed the decision of the EAT in all substantive respects, the thrust of its reasoning clear from the following paragraph:

Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele’s refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington’s Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington’s employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele’s refusal was causing offence to at least two of her gay colleagues; Ms Ladele’s objection was based on her view of marriage, which was not a core part of her religion; and Islington’s requirement in no way prevented her from worshipping as she wished.<sup>144</sup>

The Court of Appeal went further than the EAT in accepting the arguments of an Intervenor, *Liberty*, who contended that not only was Islington Borough Council at liberty to require that all its appropriately designated registrars perform civil partnerships duties, it was in fact *required* to do so by law, due to the effect of the Sexual Orientation Regulations 2007. Liberty argued, firstly, that a refusal to carry out civil partnerships by someone who is prepared to conduct marriages amounts to discrimination under those Regulations (which expressly state that a

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<sup>141</sup> *ibid.* [124].

<sup>142</sup> *ibid.* [127].

<sup>143</sup> *ibid.* [117].

<sup>144</sup> *Ladele* (CA) [52] (Neuberger LJ).

civil partnership is not materially different from a marriage<sup>145</sup>). Secondly, it argued that officiating at civil partnerships amounts to the provision to the public of services by a public authority exercising a function; however, under Regulation 8(2) public authorities are defined to include ‘any person who has functions of a public nature’ and so both Islington Borough Council and Ladele are public authorities ‘exercising a function’ and so to refuse to perform civil partnerships would be unlawful by either. Thirdly, it argued that under the regulations, the Borough would become liable for the unlawful act of an individual in refusing to perform civil partnerships.<sup>146</sup>

It is strongly arguable that this is the most significant religious discrimination employment judgment and it has generated considerable public interest not least in the perception that it is a case where religious liberty and sexual orientation protections ‘clash’ and how that clash is to be resolved. There are a number of significant points to note from the judgment, and the context which surrounds it, and these are set out below, according to theme.

#### *Belief/action distinctions*

At the EAT and then (still more explicitly) at the Court of Appeal, the distinction between Ladele’s religious beliefs and her actions was highlighted. The point was clearly and repeatedly made that Islington was not ‘discriminating’ against Ladele because of religion and belief, but rather because of her conduct. It thus explicitly endorsed the notion that belief and conduct can be separated.<sup>147</sup> Ladele was free to believe what she wished and to be free from discrimination on that basis. Interestingly, it can be inferred, from its approving comments about the registrars who objected and were not consequently disciplined, that she was free to verbally express this belief (at least insofar as making her objections and their basis known to colleagues), presumably in spite of any ‘offence’ this might cause

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<sup>145</sup> Sexual Orientation Regulations 2007, Reg 3(4).

<sup>146</sup> *Ladele* (CA) [68] (Neuberger LJ).

<sup>147</sup> Stychin comments that this same distinction, when applied in former times to homosexuality, has resulted in injustice; see C Stychin, ‘Faith in the the Future: Sexuality, Religion and the Public Sphere’ (2009) 29 *Oxford Journal of Legal Studies* 729.

to colleagues. What she was not able to do was act on her belief ('expressed' or otherwise).

The Court of Appeal reframed the analysis slightly to contend that Ladele's view of marriage 'was not a core part of her religion' as it was not concerned with her personal devotions ('worshipping as she wished'). It thus cast actions, which it was universally agreed were *motivated* by religious belief, as 'non-core' as opposed to 'core' activities which take place in private alone or in company with others. This is in fact a clear application using different terminology of the *forum internum/externum* dichotomy considered in Chapter 2.

### *The significance of 'choice'*

Both the Court of Appeal and the EAT clearly conceptualise religious expression as a matter of individual choice – as they put it, Ladele wanted to 'pick and choose' the duties she was willing to perform.<sup>148</sup> Clearly under this construction, and using this language, she is the protagonist, actively choosing to indulge her whims – there is no sense that she be regarded as responding to a divine *obligation* to act in conformity to the will of God (or the demands of her faith) which is how she herself characterised her situation. McCrudden, identifies this approach by the courts as a decision, typical of other recent judgments,<sup>149</sup> 'quite clearly to adopt an external viewpoint rather than a cognitively internal viewpoint',<sup>150</sup> and argues that judges should be encouraged to engage in efforts to understand religious issues from the internal perspective. In this case, adopting an internal perspective would involve a fuller appreciation of the demands of

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<sup>148</sup> *Ladele* (EAT) [100]. Similar sentiments were expressed by the the Saskatchewan Court of Appeal in Canada when it declared unconstitutional proposed amendments to state law to permit conscience objection by registrars to performing same-sex marriages – it suggested that registrars should not be entitled to 'directly shape the office's intersection with the public so as to make it conform to their personal religious beliefs'; see *Re Marriage Commissioners Appointed Under The Marriage Act* (2011) SKCA 3 [97] (Judge Richards).

<sup>149</sup> Such as *Ewieda v British Airways*; see discussion in Chapter 6.

<sup>150</sup> C McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 *Ecc LJ* 26, 32.

conscience as something beyond a simple matter of an arbitrary individual choice.

*'Discrimination'*

At the EAT and Court of Appeal stages, Ladele is plainly cast less as a 'conscientious objector' than as a 'discriminator', displaying 'hostility' to same-sex relationships. Her attitude is compared at one stage by Elias J to that of a gay registrar who objects to performing a marriage of two evangelical Christians, for reasons of personal animosity or prejudice.<sup>151</sup>

It was on the basis of such a construction of Ladele as a discriminator against gay people and in the light of the initial employment tribunal's supposed endorsement of such discrimination, that Terry Sanderson, President of the National Secular Society, wrote an opinion piece in the Guardian in which he argued that the logic of the tribunal judgment would permit firemen to refuse to rescue homosexuals from burning buildings or doctors to refuse to treat patients with HIV.<sup>152</sup>

However, this is a (deliberately mischievous?) mischaracterisation of both the tribunal decision and the nature of Ladele's objection. As has been argued, Ladele was not in fact actively seeking to 'discriminate' due to a hostility to same-sex couples *per se* but rather to the encouragement of what in her mind amounted to same-sex marriage, for her a grave violation of God's law. Her objection was not necessarily rooted in prejudice against homosexuals, as might be a fireman's objection to rescuing a gay man from a burning building, but could equally be characterised as a measured objection to being personally involved in what she perceived to be the *promotion* of homosexual activity (a very different motivation also from that of Elias J's hypothetical gay registrar).

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<sup>151</sup> *Ladele* (EAT) [113].

<sup>152</sup> T Sanderson, 'Paying to be discriminated against' *Guardian* (London, 11 July 2008); copy at <<<http://www.guardian.co.uk/commentisfree/2008/jul/11/gayrights.religion>>>, accessed 8 March 2011.

Indeed this latter point was made by Lord Carey, the former Archbishop of Canterbury, in a witness statement before Lord Laws in support of the claimant in *MacFarlane v Relate Avon Ltd*:<sup>153</sup>

The description of religious faith in relation to sexual ethics as '*discriminatory*' is crude; and illuminates a lack of sensitivity to religious belief. The Christian message of 'love' does not demean or disparage any individual (regardless of sexual orientation); the desire of the Christian is to limit self destructive conduct by those of any sexual orientation and ensure the eternal future of an individual with the Lord.<sup>154</sup>

This intervention prompted a degree of clarification on the issue by Lord Laws (presiding) who argued that 'discrimination' in the eyes of the law focuses on the effect of actions and is not linked to motive.<sup>155</sup> This point was recognised in *R (E) v JFS Governing Body*, where, although a school was found to have discriminated in its admission policies on the grounds of race, this did not mean 'that these policies are "racist" as that word is generally understood'.<sup>156</sup> Nevertheless, as Hart notes, 'discrimination' is a highly loaded term and even when used 'neutrally' in the courtroom it can have clear connotations of something disreputable.<sup>157</sup> As noted in *JFS*, the 'choice of words is important' and it is desirable for judges to exercise care, (perhaps more so than did Elias LJ in *Ladele*) in applying labels which, when used in common parlance, carry within them 'appalling accusation[s]'.<sup>158</sup>

Indeed some who oppose the accommodation of conscientious objection in circumstances such as those of *Ladele* have sought to characterise discriminatory

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<sup>153</sup> [2010] EWCA Civ 880, [2010] IRLR 872.

<sup>154</sup> *ibid.* [17].

<sup>155</sup> *ibid.* [18].

<sup>156</sup> [2009] UKSC 15, [2010] 2 AC 728 [9] (Lord Phillips).

<sup>157</sup> D Harte, 'Structures of Religious Pluralism in English Law' in N Doe and R Sandberg (eds), *Law and Religion: New Horizons* (Peeters 2010), 164-165; see also Russell Sandberg, 'Laws and religion: unravelling *MacFarlane v Relate Avon Limited*' 12 *Ecc LJ* (2010), 366.

<sup>158</sup> *JFS* [184] (Lord Hope).

conduct as ‘disreputable’ by means of drawing an unfortunate comparison between ‘discrimination’ against same-sex couples and ‘discrimination’ against mixed race couples. Would society allow a registrar to refuse to perform marriages due to objections based on race?<sup>159</sup> As the answer is plainly ‘no’, then the implication is that neither should society tolerate objections based on sexual orientation. This contention was dealt with in the oral submissions by counsel for Ladele in *Ladele v UK*, to the effect that objections based on sexual orientation are worthy of respect in a democratic society whereas objections based on race are not. It is thus a false comparison. This is because the majority position in the Christian Church (and indeed other faiths) is that homosexual relationships are sinful, whereas there is no such understanding in respect of mixed race marriages. It was argued, surely correctly, that the traditional teachings of the Christian Church (particularly the established one) must, *a priori*, be worthy of respect in a liberal and democratic society.<sup>160</sup>

Regardless of the apparent motive of Ladele, discriminatory or otherwise, there is a more significant argument against permitting conscientious objection which focusses on a possible detrimental effect on others, primarily service-users but also co-workers. With regard to the former, MacDougall argues that, if sufficient registrars (and other public servants) ‘conscientiously objected’ to providing services to gay and lesbian people, a situation might result in which ‘gays and lesbians could become citizen pariahs, with important governmental services being made difficult for them to obtain because of the religious (or “cultural”) views of others.’<sup>161</sup> It may be objected, however, that this is a very unlikely scenario as it would assume a very high proportion of government officials with such strong religious convictions that they would be prepared to take the difficult

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<sup>159</sup> See, for example, K Norrie, ‘Religion and Same-Sex Unions: The Scottish Government’s Consultation on Registration of Civil Partnerships and Same-Sex Marriage’ (2012) 16 *Edinburgh L. Rev.* 95, 95-99.

<sup>160</sup> See:

<<[http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/wbcastEN\\_media?id=20120904-1&lang=en&flow=high](http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/wbcastEN_media?id=20120904-1&lang=en&flow=high)>>, accessed 10 September 2012.

<sup>161</sup> B MacDougall, ‘Refusing to Officiate at Same-Sex Civil Marriages’ (2006) 69 *Saskatchewan Law Review* 351, 357.

path of conflict with their employer by registering an objection. Nevertheless, the point has some theoretical force, however unlikely in practice, if an absolute right to conscientious objection were afforded to registrars, irrespective of the practical implications of refusal for those seeking a civil partnership. It has rather less force, however, if a potential accommodation is highly practicable. Given the relatively small numbers of civil partnerships sought (equivalent to only 4.5% of all marriages in 2008, and in decline since),<sup>162</sup> it is likely that accommodation will be almost invariably practicable.

MacDougall, writing from a Canadian perspective, also considers a situation where a religious ‘veto’ is not absolute but exercisable only in circumstances where the ‘service’ can be provided by someone else. In other words, the service-user does not see a diminution in service. This is much closer to the claimant’s arguments in *Ladele*, accepted by the initial tribunal, that the Civil Partnerships service could be provided irrespective of Ladele’s own involvement, as other ‘willing’ registrars were available. However, MacDougall also rejects this:

Imagine the position of gay and lesbian persons who are told by a civil servant that that he or she does not have to serve such people, but will “do his or do her best” to find a replacement who has no such scruples. The civil servant will provide the service personally only if a replacement cannot be found and clearly against his or her better “judgment” (for such a person really is *judging* the situation).<sup>163</sup>

The problem with this analysis, if applied to England and Wales,<sup>164</sup> is that it assumes an extraordinary degree of disorganisation or blatant unprofessionalism on behalf of a given public authority. In reality, there is no justifiable reason why

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<sup>162</sup> This point is helpfully made by Parkinson, using figures supplied by the Office of National Statistics, see Parkinson, ‘Forum: Accommodating Religious Beliefs in a Secular Age’, 281.

<sup>163</sup> MacDougall, ‘Refusing to Officiate at Same-Sex Civil Marriages’, 357.

<sup>164</sup> It is acknowledged that the situation is different in Canada where individual marriage commissioners are directly approached by couples seeking marriage solemnisation. This point appears to have weighed heavily in the outcome of *Re. Marriage Commissioners*; see [38] and [41].

a service user should be aware of the existence of any ‘scruples’ internal to an organisation; he should see only the ‘external face’ of that organisation, and should expect to receive a professional service from a suitably qualified member of staff. It would seem that for MacDougall it is the mere *knowledge* that someone wishing to conscientiously object *might* be accommodated which offends. Vickers argues that a workplace application of Feinberg’s work, on assessing the harm caused by an offence balanced against the reasonableness of the conduct which causes the offence,<sup>165</sup> would lead to the conclusion that ‘bare knowledge’ of a practice apparently offensive to some should not be sufficient by itself to prohibit this practice.<sup>166</sup> Applied to *Ladele*, this would suggest that the bare knowledge offence to homosexuals of knowing (or suspecting) that a public official may not be engaging in Civil Partnerships registrations for reasons of religious conscience would be insufficient as a basis to require that official to engage in civil partnerships registrations. On balance, the demands of conscience weigh more heavily than the bare offence which might indirectly result.<sup>167</sup>

In *Ladele*, the only actual ‘offence’ (which itself might be reasonably characterised as ‘bare knowledge offence’) that is noted in the judgments as a result of Ladele’s actions is the offence apparently given to the gay and lesbian fellow registrars (i.e. those internal to the organisation). As noted above, the Court of Appeal put some stress on this as part of its justification in rejecting Ladele’s appeal. Here again, it may reasonably be argued that the right to be free from, essentially, an indirect source of offence (Ladele’s objections not being directed at, in this case, the gay registrars themselves) needs to be balanced against arguably the greater rights of Ladele to be free from an anguishing dilemma.

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<sup>165</sup> J Feinberg, *Offense to Others* (OUP 1985).

<sup>166</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, 64.

<sup>167</sup> See also B MacDougall et al, ‘Conscientious Objection to Creating Same-Sex Unions: An International Analysis’, (2012) 1 *Canadian Journal of Human Rights* 127. The authors concede, that in circumstances similar to those outlined here, that there is a strong argument that the registrar’s stance is ‘at most a kind of abstract, general discrimination, where there is arguably no concrete harm done’ (154).

*The role of goods and services discrimination law*

It was argued by *Liberty* that public officials, acting on behalf of the state, cannot ‘discriminate’ in ways that the state itself is not allowed to discriminate. This argument was accepted, albeit in a qualified way, by the Court of Appeal in *Ladele*.<sup>168</sup>

It may be that *Liberty*’s interpretation of the Sexual Orientation Regulations is correct albeit that it rests on quite a technical argument. If so, then some justification is required as to why the religious public servant should be denied any kind of protections under discrimination law, essentially at the first stage. Such an explanation may be located in terms of the actual role of the public servant, particularly regarding a matter of law which is thought to be entirely secular in character. In terms of officiating at Civil Partnerships, the religious official is simply carrying out the legal obligations of the state.<sup>169</sup> In theological terms, unlike the doctor performing an abortion, where individual culpability arises, the registrar is not intimately involved herself in the ‘sinful’ act, but rather as a third party – if ‘sin’ results, it is the civil partners themselves who are culpable. As MacDougall et al put it: ‘civil servants do not, by officiating at same-sex marriages, become themselves parties to same-sex sexual relationships or acts, i.e. they do not engage in homosexuality; they simply engage in a function that affords status’.<sup>170</sup> Under this analysis, the religious official has no need personally to engage her religious conscience. In non-theological terms, and as the MP Diane Abbot (who intervened in Parliament with a motion to reverse the effects of the initial tribunal judgment in *Ladele*)<sup>171</sup> put it: ‘[t]he whole point of civil partnerships is that they are legal contracts handed out by the state. They

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<sup>168</sup> As Vickers notes, there remains a degree of confusion as to how far the Court of Appeal endorsed this argument, see L Vickers, ‘Religious Discrimination in the Workplace: an emerging hierarchy?’ (2010) 12 *Ecc LJ* 280.

<sup>169</sup> See G Slapper, ‘Penalties in the Penumbra of the Criminal Law’ (2008) 72 *Journal of Criminal Law* 469.

<sup>170</sup> MacDougall et al, ‘Conscientious Objection to Creating Same-Sex Unions’, 157.

<sup>171</sup> Parliamentary Session 2007-2008, Early Day Motion 2039, 15 July 2008.

have nothing to do with religion and therefore the religious beliefs of a public servant carrying them out are irrelevant.’<sup>172</sup>

This argument has, in part, similarities with those arguments which seek to delineate the ‘civil’ character of civil partnerships from the (optional) religious character of marriages.<sup>173</sup> If the role of the public servant is conceptualised entirely as performing a religiously-neutral civil function then any individual objections to this are at best misplaced.<sup>174</sup>

There are however two objections to these arguments. Firstly, it is difficult to view civil partnerships merely in terms of the signing of a contract. There are also ceremonial aspects from which, according to the compromise mooted by Islington Council, Ladele was offered an opt-out. These ceremonial aspects are clearly intended to ‘celebrate’ the civil partnership,<sup>175</sup> and the registrar is fully involved in that celebration, albeit on behalf of the state.

Secondly, the distinction between acting on behalf of the state and acting in a private capacity may be far less clear to the religious public servant than it might be for example to Diane Abbott. By conducting a civil partnership, a registrar may feel just as involved personally in endorsing and promoting civil partnerships as might a doctor asked to perform an abortion. Whether or not she is correct in this view is immaterial. As is plain from the *Ladele* judgment, as elsewhere, it is the sincere belief of the individual religious employee which matters. If the religious employee sincerely believes something she is doing

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<sup>172</sup> H White, ‘Labour MP Attempts to Remove Religious Freedom of Conscience after Christian Marriage Registrar Vic’ *Lifesitenews.com* (5 August 2008); copy at: <<<http://www.lifesitenews.com/news/archive/ldn/2008/aug/08080503>>>, accessed 1 July 2011.

<sup>173</sup> See, for example, Lord Faulkner, ‘Church, state and civil partners’ (2007) 9 Ecc LJ 5.

<sup>174</sup> This was also the analysis of Judge Smith (in a minority opinion) in *Re. Marriage Commissioners* [141-143].

<sup>175</sup> Conspicuous state approval (‘celebration’) of gay relationships is considered essential to gay and lesbian equality by some writers, and thus by extension an important aspect of a civil partnership ceremony; see Galeotti, *Toleration as Recognition*.

offends her conscience, then this in itself should be sufficient to trigger the first stage of the available protections.

As it stands, if the *Liberty* position is correct, and the religious official is considered to be a public authority in his own right then a significant injustice arises. This is particularly true when there is no principled justification in law for identifying an individual as synonymous with the state (in terms of performing a ‘public function’). For the state, or the public authority, the requirement to carry out legal obligations in a non-discriminatory way is clear and unequivocal. The way in which it organises itself to do so, with the involvement of other staff (as in Islington) or without (as in other boroughs), is surely a very different question.<sup>176</sup>

#### *Employer sympathy and direct discrimination*

At both the EAT and the Court of Appeal it was acknowledged that Islington Borough Council had shown far more sympathy to the gay members of staff and, specifically, the grievance they raised, than they showed to Ladele, and the grievance she raised. This was clearly demonstrated by the failure to respond to Ladele’s grievance, and the almost instant response to the grievance by Dion and Victoria. However, the EAT and the Court of Appeal both argued that the Council was entitled to do this without engaging in direct discrimination. Elias J did this ingeniously by determining that the comparison was too broadly drawn – the grievances were not concerned with the same issue and so there was no evidential value in drawing attention to the Council’s differential treatment of them. Rubenstein is critical of this decision, noting ‘how narrowly the comparison is drawn’ (so as to suggest that a claim about discriminatory grievance handling can only be brought if the grievance is similar).<sup>177</sup> He attributes this to a judicial ‘zeal to avoid a finding of direct discrimination’ in *Ladele* and one of a series of judgments in discrimination cases where ‘a finding that like is not being compared with like has been used by the judges to avoid a

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<sup>176</sup> S Webster, ‘Misconceptions about the nature of religious belief’ (2010) 199 EOR 8.

<sup>177</sup> M Rubenstein, ‘In the Courts’ (2009) 186 EOR 29.

finding of direct discrimination where such a finding would conflict with the perceived merits of the case'.<sup>178</sup> In other words, the comparator test has been used by Elias J in such a way as to avoid the natural, but apparently objectionable, outcome of the correct application of discrimination law.

If this reading is correct, it suggests that the outcome of the direct discrimination case is particularly unfair in respect of Ladele. However, there is a wider point. It will be recalled that Elias J noted that 'the tribunal was far more sympathetic to the concerns expressed by two gay registrars than to the claimant's religious views'. However, he determined that the Council was entitled to do this and indeed to treat Ladele badly (e.g. by breaching her confidentiality) because this was due to her conduct (which happened to be motivated by her religion). The judgment expressly addresses and permits a practice which many (including the initial employment tribunal) would think contrary to the spirit of discrimination law – that an employer can 'pick and choose' which protected characteristics with which to show most sympathy. It may be submitted that such a situation 'in the light of ... mainstream thinking', which the Court of Appeal thought relevant,<sup>179</sup> is unlikely to favour the religious claimant.

#### *Application of the proportionality test*

The ease with which the EAT and the Court of Appeal accepted that Islington Borough Council could demonstrate that its treatment of Ladele was a proportionate means to achieve a legitimate aim, has caused some comment.<sup>180</sup> Vickers has helpfully compared the approach taken towards the same issue of justification in sex and race cases and found it to be more demanding of the employer, requiring it to show 'a real need' of the organisation. She notes that, although the Court of Appeal in *Ladele* identified the legitimacy of the aim of providing an equal service to all, it did not consider whether or not this aim reflected a 'real need' of the Council and concludes: '[i]n failing to consider the

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<sup>178</sup> *ibid.*

<sup>179</sup> *Ladele* (CA) [46] (Neuberger LJ).

<sup>180</sup> See, for example, Hambler, 'A No-Win Situation'; and Parkinson, 'Forum: Accommodating Religious Beliefs in a Secular Age'.

legitimacy of Islington's aim, the Court of Appeal seems to have subjected the Council to a low level of scrutiny, in comparison to the high standard usually required in discrimination cases.<sup>181</sup>

Vickers' analysis leads her to conclude that a hierarchy may be developing in discrimination law, where religion and belief is less robustly protected than might be other strands such as sex, race and sexual orientation.<sup>182</sup> If this analysis is correct, then it would allow employers to treat religion and belief as less worthy of respect than other characteristics and to be spared censure from acts which, had the protected ground been different, would have led to a successful discrimination claim.

### **McFarlane v Relate Avon Limited**

The third case was brought by Gary McFarlane, a Christian and former employee of Relate Avon Limited (Relate), a counselling service in the field of sexual and relationships therapy. McFarlane had been employed by Relate since August 2003 initially in the field of 'marital' and 'couples counselling'. In September 2006, McFarlane asked if he could undertake a diploma course in psycho-sexual therapy ('PST'). PST appeared to be much more directly involved in sexual issues within relationships including advising on sexual techniques. Such work was, as the EAT noted 'liable to give rise to a much more intractable conflict with the Claimant's religious beliefs.'<sup>183</sup> At this point McFarlane appears to have raised concerns, including a request that he should be exempted from working with same sex couples where specifically sexual issues would be involved.

In December 2007, the General Manager of Relate Avon, Mr Bennett, wrote to McFarlane and refused to agree to his request primarily on the basis that it was contrary to Relate Avon's equal opportunity policy. In his letter, Bennett also asked for written confirmation that McFarlane would continue to counsel same-sex couples in both relationships and PST work; failure to do this 'might' result

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<sup>181</sup> Vickers, 'Religious Discrimination in the Workplace: an emerging hierarchy?' 294.

<sup>182</sup> As advocated by McColgan; see McColgan, 'Class Wars'.

<sup>183</sup> *MacFarlane* [5].

in disciplinary action.<sup>184</sup> In his eventual reply, McFarlane stated that his only difficulty was in offering PST to same-sex couples and that his views were ‘evolving’; as the issue had not yet arisen, disciplinary action was premature. On the basis of this reply, Bennett initiated the disciplinary procedure, only aborting it after the initial meeting with McFarlane in which he stated that ‘if he were asked to do PST work with same-sex couples he would do so and that if any problems arose he would then raise them with his supervisor.’<sup>185</sup>

However, in a subsequent conversation with his supervisor, it appeared (to her) that McFarlane had returned to his earlier position on the issue of same-sex couples and PST. As a result, the disciplinary process was re-engaged and MacFarlane summarily dismissed on the basis that he could no longer be trusted to carry out his role in conformity to Relate’s equal opportunities policy and that this constituted gross misconduct.<sup>186</sup> McFarlane appealed unsuccessfully; consequently, he lodged a claim for unfair dismissal and religious discrimination with an employment tribunal.

The employment tribunal and, subsequently, the EAT dismissed all of MacFarlane’s claims. In the light of the *Ladele* judgment, the EAT in *MacFarlane* did not dwell on practical considerations and instead applied the issue of principle to indirect discrimination, as it saw ‘no real difference’ between the two situations:

The essence of Elias P’s analysis is that in a case where a body such as the Council has such an aim it may properly insist on all employees participating in the services in question, even if to do so is in conflict with their religious beliefs, because to do otherwise would be inconsistent with the principle which it espouses. If that is the case for a local authority, we can see no material distinction in the position of a body such as Relate.<sup>187</sup>

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<sup>184</sup> *ibid.* [6].

<sup>185</sup> *ibid.* [8].

<sup>186</sup> *ibid.* [10].

<sup>187</sup> *ibid.* [28] (Underhill J).

A claim for harassment was found by the tribunal to be of no merit and this conclusion was not disputed before the EAT. Permission to appeal, originally rejected by Elias J, was sought directly from the Court of Appeal. This application was heard by Lord Justice Laws who rejected the application in a reserved judgment.

In terms of the substantive legal issues, *MacFarlane* offers little innovation, following as it does the reasoning in *Ladele*. Unlike *Ladele*, *MacFarlane* was not able to identify any specific detriments, so his only realistic claim was for indirect discrimination, a claim which failed for the same reason as *Ladele*. Once again, the claim turned on whether or not it was a proportionate to require all employees to be committed to performing all aspects of the counselling service for all ‘service users’ without ‘discrimination’. Thus, once again, proportionality was not calibrated according to the practicability of making accommodations (although, unlike in *Ladele*, the practicability of accommodating the claimant was disputed by the employer), but rather according to this wider principle of non-discrimination by both employer and all employees alike. Human rights arguments were once again rejected for the same reasons as in *Ladele*. As *MacFarlane* was not a public servant, arguments akin to those advanced by *Liberty* as to how far the employer was *obliged* to require all employees to act according to these principles were not advanced.

There is one key area where the facts of the case depart significantly from those of *McClintock* and *Ladele*. In *MacFarlane*, the claimant was not subjected to a change in duties without his express consent; rather, it was as a result of a change in duties which he himself sought that the dilemma of conscience for him arose. In terms of the legal analysis, nothing turned on this point, yet it may be a significant issue if an alternative form of legal accommodation were mooted.<sup>188</sup>

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<sup>188</sup> Unlike *Ladele*, but in common with *McClintock*, there was also some ambiguity in the claimant’s behaviour; see discussion of this point in Chapter 2.

## Summary and Discussion

In the second part of this chapter, the ways in which employees have ‘negatively manifested’ their religious beliefs through ‘conscientious objection’ has been illustrated through an exploration of three prominent employment cases. The purpose of this concluding section is to identify the over-arching themes emerging from these cases and the commentary surrounding them, in terms of how the courts are developing their approach towards conscientious objection and to map this approach onto the models presented in Chapter 3. In the process, the situation will also be considered from the perspective of the conscientious objector, and what options remain to him following the precedents set by these cases.

As noted earlier, ‘conscientious objection’ is not a term applied by the law to refer to the examples of negative manifestation which have been considered in this chapter, nor is it so employed by judges. This is perhaps unfortunate as the term benefits from the positive associations with a principled and longstanding tradition with its roots in opposition to military service. There are also clear parallels between the workplace conscientious objectors and traditional conscientious objectors, which makes this a useful explanatory term to apply to the former. Both categories of conscientious objector tend to manifest their resistance to requirements placed on them by others reluctantly and discreetly; they generally do not seek to make wider political statements but reference the objection to themselves alone;<sup>189</sup> they show integrity by taking a stand in the face of the potential hostility of others, thus placing their consciences above what is expedient and risking some sacrifice for their beliefs (e.g. in the workplace, the loss of a position).

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<sup>189</sup> Albeit that those who fund some of the litigation in this area have been accused of so doing for political reasons; see Wynne-Jones, ‘I’ll defend faith’.

Whilst clearly not perceived in these positive terms, the negative manifestation of religion described in this chapter has been recognised by courts as having some value to the individual, but, crucially, as representing a ‘non-core’ aspect of his religious convictions. Thus ‘conscientious objection’ is regarded as a manifestation of religion, or a response motivated by religion, but not fundamental to the religion itself. This is in keeping with the ECHR jurisprudence, but was not a necessary innovation in the interpretation of discrimination law. One result of this has been to allow the courts to perceive any detriments suffered by the conscientious objector (such as dismissal) as resulting from his actions, irrespective of any beliefs underlying those actions. This has meant that direct discrimination for workplace conscientious objectors is extremely difficult to establish. It has also illustrated the preference of courts to examine events from ‘an external’ (or perhaps, more correctly, the employer’s) perspective only, and to discount the ‘internal perspective’ underlying the motivation of the conscientious objector. Thus, in cases such as these involving objections to some consequences of sexual orientation rights, the conscientious objector can be construed, as noted above, as a ‘discriminator’ not an objector on the grounds of conscience. It is the actions (discrimination) not the motives (religious obligation) that matter to the courts, however important the religious obligation may be and however trivial the result of the discrimination (in *Ladele*, there was no negative result except some offence to other staff).

Discrimination law has of course two major protections (direct and indirect discrimination) and these cases show that ‘conscientious objection’ (although not recognised as such) is given some status for protection, *prima facie*, as a ‘manifestation of religion’ triggers the first stage of the test for indirect discrimination. However, at the second stage, the claims of conscientious objection are easily defeated by an employer’s justification defence which appears to receive less rigorous judicial scrutiny than is the case in race or sex discrimination claims. Whether this is a general conclusion is as yet unclear, as the high profile cases, in particular the three discussed in this chapter, all concern another protected characteristic. If the central objection does not derive from sexual orientation but from, say, an objection to handling alcohol, then it may be that the bar would be set higher for the employer in terms of the required

justification defence. This is as yet unknown as no such cases have been publicised at first instance or reached the EAT. Interestingly, and perhaps concerningly, it may be that as a result of a ‘policy’ decision by the courts to lower the justification bar in order to prevent ‘discrimination’ on the grounds of sexual orientation, there may be a negative precedent set for religious conscientious objection claims on other grounds.

On a slightly more positive note, *Ladele* in particular gives grounds to assume that, although manifestation of religion may not be protected, religious identity might be. In Chapter 2, a taxonomy of religious expression was presented, using which it is possible to distinguish between religious belief in private and different degrees of expression, of which one is identity with certain beliefs. Strictly speaking, whereas *Ladele* is entitled, through the protection of the *forum internum*, to hold religious beliefs in private, alone or in company with others, it is less clear whether or not the *forum internum* would extend to protect her beliefs if they were articulated in some form in the workplace. Through raising objections to registering civil partnerships, *Ladele* was necessarily identifying herself with a religious belief that homosexuality is sinful. As noted in Chapter 4, this in itself might be grounds to trigger harassment claims by gay and lesbian staff. Indeed, the internal lawyer at Islington Borough Council considered that even the polite articulation of her position by letter to management was an act of gross misconduct in itself. This case, whilst not definitive on this issue, strongly suggests that articulation of an objection in support of religious ‘identity’ should receive a measure of protection, particularly if the need to make clear one’s religious identity has been prompted or provoked by the actions of the employer.

## ***Conclusion***

This chapter has examined negative expression of religion in the workplace and has identified two distinct rationales for individuals to seek to ‘opt out’ of work at specific times or for specific reasons. In terms of the law, the two rationales are treated quite differently, the second raising more complications than the first, although some similarities can be identified.

In Chapter 3 a range of responses towards workplace religious expression by a liberal state were set out. In this concluding section consideration will be given to how the discussion in this chapter, themed according to the two rationales considered, might relate to these models.

### **Time Off**

This particular form of manifestation is relatively inconspicuous, with the exception of situations where on-site facilities are specifically provided (of which the chief example is a prayer room for Muslim staff). In the cases considered in this chapter, the provision of prayer facilities has not been the focus of a workplace dispute and so the analysis cannot extend to consider this issue. Of the cases considered, there is no real evidence to support the contention that the state might attempt to exclude this form of negative manifestation of religion from the workplace (Model I). There is some limited evidence of protection for this form of negative manifestation (Model V), evidenced by those tribunal cases which have been successful, albeit that there is also evidence that tribunals will often be satisfied that an employer has justified any restrictions on such manifestation. Indeed it may be that the successful cases form the exception rather than the rule. Equally, it is apparent from the majority judgment in *Copsey* that protection is more limited than it might be due to the application of the ‘specific situation rule’ to negative manifestation. This weakens any duty on the employer to ‘reasonably accommodate’ (and thus protect) this form of religious expression.

As both Christian as well as Muslim claimants have been successful, then there is no evidence that Model VI (favouring minority religions) could be said to apply. In respect of Model II (support for a preferred historical religion) there is no evidence of any special regard being paid to Sunday as a Christian day of rest. The historic position of Sunday in the Christian calendar is not at all a point of reference for courts and tribunals; instead Sunday is seen merely as a day on which church services are likely to take place.

Finally, the extent to which there is evidence in support of a *laissez-faire* approach (Model III) is debatable. Lord Mummery’s contention in *Copsey* that

an employer is entitled to keep his workplace secular can only be said to apply in respect of Article 9 (and was of course disputed by Lord Rix). The employment discrimination law provisions have certainly led to a restriction on this total freedom of action by employers. However, this restriction is not necessarily as great as it could be. Employers are still able relatively easily to justify varying contracts to the detriment of an employee's desire to negatively manifest his religion. It appears also, although this is not yet definitive, that employers may not need to go to the trouble of proactively seeking to accommodate employees who might be adversely affected by changes to work rotas, etc – instead they may need merely to permit such employees to attempt to arrange the necessary 'accommodations' themselves. In short, despite equality law, employers appear to enjoy a large measure of freedom of action in respect of the issues raised by negative manifestation of religion in the workplace.

### **Conscientious Objection**

In applying the six models to conscientious objection, the analysis in this chapter provides a degree of support, perhaps paradoxically, for both Model I (exclusion) and Model III (*laissez-faire*).

There is a repeated theme in the cases that it is for the employer to determine whether or not to accommodate the request for an 'opt-out' on the grounds of conscientious objection. The judgments, as has been seen, allow this decision to be made by the employer with less justification than might be the case under other grounds of discrimination. The tendency has been to accept the employer's proportionality defence with limited question, once a 'legitimate aim' has been established. Thus far, there is support from these cases for a *laissez-faire* approach by the courts. However, it remains to a degree unresolved as to how far, in the case of sexual orientation for example, an employer is truly free to act as it wishes in accommodating religious conscientious objection, and how far law requires it to refuse requests to conscientiously object. The compromise position proposed by the Court of Appeal in *Ladele*, that once she had been designated a Civil Partnerships registrar, the employer lost its discretion to accept an 'opt out'

request, but not before,<sup>190</sup> is rather unsatisfactory and, on this point at least, there remains a degree of confusion as to the extent of employer autonomy.

In terms of the exclusion of religion from the workplace, *Relate*, and Lord Carey's intervention in that case, imply a growing perception that religion receives insufficient protection, if not hostility, by the courts. This perception is perhaps an exaggeration. Nevertheless, it is clear from these cases that the courts, whilst expressing some vague sympathy for the religious claimant, make limited attempt to engage with the religious nature of the conscientious objection and prefer to frame the issues in terms of the actual conduct of the religious claimant in seeking not to carry out all of his or her duties. In taking an indulgent view towards the employer justification, the courts have created a situation where employers, who could easily accommodate the objections of religious employees, are permitted to dismiss them instead. This is particularly marked in these cases as another protected right, associated with sexual orientation, is also in play. It would seem clear that when religious-motivated expression is seen in some way to undermine other rights (and consequently 'discriminate') then it is more likely to be required to give way.

The precedents set by these cases leave the religious employee with a conscientious objection in an uncomfortable place. She can rely only on the hope that her employer will respond to moral suasion, or individual pressure, and agree to allow her the option of conscientious objection, knowing that the law is unlikely to provide a means of enforcing this request.<sup>191</sup> When faced with an employer, like *Islington Council*, which is not prepared to yield, there remains the less than enticing options of acquiescence, or to get out of the role (either through resignation or dismissal).<sup>192</sup> It is submitted that this is a deeply

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<sup>190</sup> *Ladele (CA)* [74].

<sup>191</sup> As Parkinson suggests, the accommodating employer could 'characterise the issue as one of aptitude and suitability to perform a service which forms a very small part of the workload of the organisation and where those services could readily be performed by many others'; see Parkinson, 'Forum: Accommodating Religious Beliefs in a Secular Age', 294.

<sup>192</sup> Sandberg also notes how little legal protection is offered to religious employees in such cases; see R Sandberg, 'The Right to Discriminate?' (2011) 13 *Ecc LJ* 157.

unsatisfactory state of affairs. There is a great sacrifice involved for the individual – either of conscience and self-respect, or of a valued role and consequent income. There is also a negative effect on society in general as a number public offices and roles become closed to religious people, further marginalising religious ‘voices’ and undermining the very ‘diversity’ which, in *Ladele*, was afforded so much weight as an over-riding policy goal.<sup>193</sup>

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<sup>193</sup> This paragraph largely replicates the conclusion to Hambler, ‘A No-Win Situation’.

## Chapter 6: Passive Manifestation

### *Introduction*

This chapter is concerned with ‘passive manifestation’ in the workplace. This term is intended to be inclusive of the various ways in which employees might seek to express their religious beliefs visually. This might involve:

- i. distinct forms of dress (including head coverings);
- ii. the visible wearing of religious symbols, or symbols with religious significance to the individual;
- iii. the decoration of individual workspaces with religious symbols and artefacts; or
- iv. particular styles of personal grooming (such as the display of facial hair).

These forms of expression are visible in the workplace and clearly identify individuals as holding religious beliefs, even if the nature of those beliefs, or the conviction with which they are held, is not made clear. In this sense the form of manifestation can be said to be ‘passive’; it indicates the presence of religious convictions but does not specifically articulate them, unlike ‘active manifestation’ which will be considered in the following chapter. It has been suggested, based on US jurisprudence, that there is such a thing as ‘symbolic speech’.<sup>1</sup> The use of this term at least implies congruence between speech and symbol, at least in terms of their effect on others. It is submitted that this is not necessarily an aid to the analysis of religious passive manifestation. ‘Speech’ and ‘symbol’ are different in important respects as media for conveying meaning to others – appealing to different senses and in distinctive ways. There are

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<sup>1</sup> See the brief discussion in L Hin-Yan, ‘The Meaning of Religious Symbols after the Grand Chamber ruling in *Lautsi v Italy*’ (2011) 6 *Religion and Human Rights* 253, 255-256.

potentially exceptions if the form of symbolism has words attached<sup>2</sup> or, albeit less obviously, a graphic image.<sup>3</sup> However, it could be argued that in such cases, the form of manifestation, because it is articulated, is better classified as ‘active’ or a hybrid of ‘passive’ and ‘active’.

The term ‘passive’ is employed in this chapter with reference to the religious content of the symbol, dress or grooming. It may be that an item of religious dress interferes with an activity which is central to an individual’s job.<sup>4</sup> In such cases it is difficult to describe the symbol as *functionally* passive because of the way in which it actively interferes with work. However, for the purposes of the analysis here, it remains passive as a form of religious expression simply because it does not explicitly verbalise religious convictions.

There are, in broad terms, four views which may be taken of passive manifestation. The first is to view it as of relatively little importance. Renteln argues that this flows from an Anglo-Saxon worldview which gives priority to verbal communication and thus underplays the importance of symbols, and particularly religious symbols, to minority faiths.<sup>5</sup> Under this analysis, there are two possible consequences. One is that the issue would be relatively uncontested and religious people would be free to dress and groom themselves as they wish. The second is that the right of someone to dress and groom and otherwise display symbols would be seen as of lesser significance in comparison to any conflicting rights (e.g., from an employer’s perspective, the desire to present a particular image to customers) and would be expected to give way. In Renteln’s view, the

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<sup>2</sup> See *Boychuck v Symons* [1977] IRLR 395, where an employee unsuccessfully challenged the fairness of her dismissal when she refused to take off a lapel badge displaying the slogan ‘Lesbians Ignite’.

<sup>3</sup> In a US case, for example, an employee unsuccessfully contested the requirement that she remove a lapel badge carrying an explicit image of an aborted foetus; see *Wilson v US West Communications*, 58 F.3d 1337 (8<sup>th</sup> Cir. 1995). The claimant was a Roman Catholic and wore the badge to indicate her hostility, motivated by her religious beliefs, to abortion.

<sup>4</sup> See, for example, *Azmi v Kirklees Metropolitan Borough Council* (2007) EAT 0009/07, discussed below.

<sup>5</sup> Renteln, ‘Visual Religious Symbols and the Law’.

latter is the most likely outcome. Both, though, derive from the notion that symbolism is of relatively little significance. In terms of the models presented in Chapter 3, this view is most likely to fit with a *laissez-faire* approach – the issue being of little importance there is no need to seek to constrain by law the discretion of employers through legal means.

The second view would be to recognise that, like other forms of manifestation, passive manifestation has some significance for the religious individual, particularly members of minority religions, and thus some efforts should be made through the courts to restrain employer discretion in support of passive manifestation. This view would be most congruent with the ‘protection’ model, particularly the protection for minority faiths in Chapter 3. The assumption, as with the first view, is likely to be that religious symbolism is broadly neutral in its effect on others – its importance is best understood relative to the individual concerned. Thus any constraints would require strong justification.

A third view would be that passive manifestation should not be constrained when it reflects not just a religious belief but it also reflects national identity (or heritage). In the UK and Western Europe, this is most likely to apply to Christian symbolism. This view is synonymous with the ‘support for a preferred historic religion’ model in Chapter 3.

There is however a fourth view which is that religious symbolism is capable of influencing the behaviour or thinking of others and so represents a challenge to Western culture. It is thus of potentially great significance (and can only really be described as ‘passive’ in the sense that this term can be taken, for analytical purposes, to mean ‘non-verbal’). This view is partly premised on the contention that symbolic display is, at best, ‘an “ostensible” intrusion of religious identities’ into the public square or, worse, ‘an illegitimate act of propaganda and an aggressive act of proselytism.’<sup>6</sup> Proselytism, in turn, may create unhealthy pressure on some, particularly those most susceptible to pressure, to conform to a

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<sup>6</sup> C Laborde, *Critical Republicanism: the Hijab controversy and political philosophy* (OUP 2008), 53.

particular expression of religion. This is particularly noted in the case of the headscarf-*hijab* where it is also argued, girls are most prone to be put under pressure by others to dress in a particular way.<sup>7</sup> A second and linked contention is that such pressure, particularly if exerted by men, amounts to sex discrimination as women are isolated and restricted by their seclusion within the veil and more easily controlled and subordinated as a result.<sup>8</sup> Thus, religious symbolism can promote discrimination. Thirdly, religious symbolism can be viewed as ‘subversive’ and a threat to public order. This is the contention of secular France, and is summarised by Danchin (who finds it wanting):

According to this argument, the wearing of religious symbols is seen as being linked to an increased risk of threats and violence, whether because of intolerance and xenophobia directed towards an unpopular religious minority, or because of a perceived threat of the rise of religious fundamentalism directed towards the democratic values and institutions of the state.<sup>9</sup>

In this context, the Islamic headscarf in particular is frequently viewed as a political as much as a religious symbol;<sup>10</sup> one capable of inciting violence by those who oppose what it represents, and also representing the deliberate rejection of the existing democratic political arrangements. Such assertions are controversial. For example, it could be argued that the state should focus on protecting individuals from a hostile reaction to the wearing of a headscarf rather than seeking to curtail the freedom to do so. Nevertheless, such arguments do provide a direct rationale for those seeking to restrict the symbolic manifestation of religion in certain public places, for example, in schools, in universities and in courtrooms. This approach would correspond most clearly to Model I

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<sup>7</sup> K Bennoune, ‘Secularism and human rights: A contextual analysis of headscarves, religious expression and women’s equality under international law’ (2007) 45 *Columbian Journal of Transnational Law* 367.

<sup>8</sup> See discussion in A Wing and M Smith, ‘Critical Race Feminism Lifts the Veil: Muslim Women, France, and the Headscarf Ban’ (2005-2006) 39 *U.C. Davis L. Rev.* 743, 768-769.

<sup>9</sup> P Danchin, ‘Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law’ (2008) 33 *Yale Journal of International Law* 1, 6.

<sup>10</sup> McGoldrick, *Human Rights and Religion*, 274.

(exclusion), presented in Chapter 3. Such restrictions will have an effect on ‘workers’, such as teachers and lecturers (as well as other actors such as pupils and students). It may also provide an indirect rationale for restrictions on employees in other occupations.

As passive manifestation may affect a range of public situations beyond the workplace in a way that the other forms of manifestation thus far considered do not, there is a range of case law of direct and indirect relevance, much of it from outside the workplace. Such case law is useful as it can illuminate some of the ways in which the law grapples with the challenges of passive manifestation more generally and from a human rights perspective particularly. It has already been noted that principles from ECHR jurisprudence have been applied to domestic discrimination law,<sup>11</sup> and that domestic law must be interpreted in line with the principles of the Human Rights Act 1998. It is therefore analytically helpful to identify the evolution of ECHR principles, both at a European and a UK level, in relation to passive manifestation, with a view to subsequently assessing how far these principles have been adopted in workplace cases, chiefly under domestic discrimination law. These principles have developed largely, but not uniquely, within an educational context, but as McGoldrick notes ‘can be read more widely’.<sup>12</sup>

In this chapter, therefore, this wider case law will be examined prior to a more focussed consideration of the specific workplace case law under the 2003 Regulations and the Equality Act 2010: firstly, Article 9 ECHR case law will be considered and, secondly, employment cases with a relevance to passive manifestation will be explored. Principles and key issues from these cases will then be employed as part of the analysis of some recent passive manifestation employment judgments in England and Wales.

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<sup>11</sup> For example the forum internum/externum distinction.

<sup>12</sup> McGoldrick, *Human Rights and Religion*, 131.

## *Article 9 Case Law*

Much of the case law at a European level has been concerned with the right of Muslim women to wear the headscarf-*hijab* (or indeed other forms of Islamic dress such as the *niqab*, *jilbab* or *burka*). However, there has been a handful of cases brought Sikhs, such as *X v United Kingdom*,<sup>13</sup> where the ECtHR found against a Sikh who had been required to wear a motorcycle helmet, despite having to take off his turban, on the grounds of the legitimate demands of UK health and safety laws.

The reason there is a relatively extensive case law in this area is that certain states, which are signatories to the ECHR, seek, as a matter of policy, to constrain religious expression in the public square in order to promote secularism.<sup>14</sup> A good example of this is France where all but discreet signs and symbols of religion have been banned in state schools since March 2004.<sup>15</sup> The general consensus has been that Muslim women who wish to wear the headscarf have been disproportionately affected by this, hence the designation, ‘L’Affaire du Foulard’ which has come to be associated with it.<sup>16</sup> It is notable certainly that the law does not appear to unduly affect Christians, for example, who are free to wear ‘discreet’ crosses. The French approach, insofar as it has been tested before

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<sup>13</sup> (1978) 14 DR 234.

<sup>14</sup> Although there are many versions of secularism; see, for a recent discussion, relevant to this context: I Leigh and R Ahdar, ‘Post-Secularism and the European Court of Human Rights (or how God never really went away)’ (2012) 75 MLR 1065.

<sup>15</sup> See, for a nuanced critique of the French approach to the headscarf, Laborde, *Critical Republicanism*.

<sup>16</sup> This term in fact pre-dates the Stasi commission and was first applied following intense media interest in a school dispute in 1989 over the right of three Muslim girls to wear headscarves in class in contravention of a school-wide ban; see: N Moruzzi, ‘A Problem with Headscarves: Contemporary Complexities of Political and Social Identity’ (1994) 4 *Political Theory* 658.

the ECtHR, has been accepted as falling within a national margin of appreciation.<sup>17</sup>

In Muslim-majority Turkey, under its equally secular constitution, there exists a much more wide-ranging ban on the wearing of religious dress or symbols in all state institutions.<sup>18</sup> Other States (such as Denmark,<sup>19</sup> Belgium<sup>20</sup> and France<sup>21</sup>) restrict the most overt visual manifestations of religious belief. As with the *Affaire du Foulard*, the effect of such provisions has tended to be most negative for Muslim women, and for this reason many of the challenges under the ECHR have been lodged by Muslims.

Such applications have enjoyed little success for two main reasons. First, the ECtHR allows a wide margin of appreciation in this area for member states. This position is most clearly articulated in *Leyla Sahin v Turkey*,<sup>22</sup> where, in a Chamber judgment, the Court rejected an Article 9 application from a medical student in Istanbul who had been denied access to lectures and an examination because she refused to remove her headscarf in contravention of a regulation forbidding the wearing of the headscarf whilst engaged in academic study at the university. The Court agreed with the applicant that her Article 9(1) right to manifest her religion had been interfered with:

The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties

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<sup>17</sup> See for example *Dogru v France*, Appl No. 27058/05 and *Kervanci v France*, Appl No. 31645/04, 4 December 2008, the facts of which pre-dated *Stasi* and related to school headscarf bans during physical education lessons.

<sup>18</sup> Evans, *Freedom of Religion under the European Convention on Human Rights*.

<sup>19</sup> Vickers, *Religious Freedom, Religious Discrimination and the Workplace*

<sup>20</sup> B Waterfield, 'Belgium could be first country to ban the burka' *The Daily Telegraph* (London, 31 March 2010); copy at:

<<<http://www.telegraph.co.uk/news/worldnews/europe/belgium/7541430/Belgium-could-be-first-country-to-ban-the-burka.html>>>, accessed 25 July 2011.

<sup>21</sup> For a critical discussion of the French legal approach, see M Hunter-Henin, 'Why the French Don't Like the *Burqa*: *Laïcité*, National Identity and Religious Freedom' (2012) 61 ICLQ 613.

<sup>22</sup> Appl No. 44774/98 (SC), 29 June 2004.

imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.<sup>23</sup>

However, in determining whether or not this interference could be justified as 'necessary in a democratic society' (under the provisions of Article 9(2)), the Court determined that it could be, on the basis that, in Turkey, the headscarf could rightly be perceived as having political as well as religious significance as well as a malign effect on those who choose not to wear it (although the judgment does not spell out the apparent nature of this effect); thus two imperatives were in play - the protection of the 'rights and freedoms of others' and the 'maintenance of public order' – both of which justified restrictions which it was proportionate for the university, which had acted sensitively, to apply in this case. In the process, the Court set out clearly the principle of deference on such questions to the decisions taken by nation states:

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance . . . . In such cases, it is necessary to have regard to the fair balance that must be struck between the various interests at stake: the rights and freedoms of others, avoiding civil unrest, the demands of public order and pluralism.<sup>24</sup>

It thus dismissed the application. This judgment was upheld on appeal before the Grand Chamber.<sup>25</sup>

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<sup>23</sup> *ibid.* [71].

<sup>24</sup> *ibid.* [100].

<sup>25</sup> *Leyla Sahin v Turkey*, Appl No. 44774/98 (GC), 10 November 2005.

Secondly, the Court (at least pre-2011) has not been particularly supportive of the right to display religious symbols, particularly the headscarf-*hijab*.<sup>26</sup> In *Dahlab v Switzerland*,<sup>27</sup> a primary school teacher was forbidden from wearing a headscarf-*hijab* in the classroom because it contravened the principle of religious neutrality imposed by law on the Swiss school system. The Swiss Federal Court upheld the interdiction on the basis that the wearing of the headscarf constituted ‘a “powerful” religious symbol – that is to say, a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion.’<sup>28</sup> In consequence of her status as a primary school teacher and role model for her pupils, the wearing of this powerful symbol by Dahlab ‘imposed’ Islam upon them, thus potentially interfering with both their religious beliefs and those of their parents. In upholding the school’s decision in this way, the Swiss Federal Court nevertheless noted the dilemma which this would create for Dahlab: ‘... prohibiting the appellant from wearing a headscarf forces her to make a difficult choice between disregarding what she considers to be an important precept laid down by her religion and running the risk of no longer being able to teach in State schools.’<sup>29</sup>

In dismissing Dahlab’s subsequent application, the ECtHR made the following observations:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. ... In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of

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<sup>26</sup> Hambler, ‘A Private Matter’.

<sup>27</sup> Appl No. 42393/98, 15 February 2001.

<sup>28</sup> *ibid.* 2-3.

<sup>29</sup> *ibid.* 8.

tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>30</sup>

The Court determined that to ban the wearing of the *hijab*-headscarf was within the margin of appreciation of Switzerland.

The effect of both of these approaches in the rulings of the ECtHR has been that '[a]ll the cases have accepted that restrictions may be imposed on the wearing of Islamic dress in public institutions. Though the justifications vary in detail, all generally revolve around the concept of 'protection of the rights and freedoms of others'.'<sup>31</sup>

How far these principles might apply to Christian symbolism was, *prima facie*, explored in *Lautsi and Ors v Italy*.<sup>32</sup> This case was lodged by a Mrs S Lautsi, a parent who objected that the prominent display of a crucifix on the wall in each of her sons' classrooms. Under domestic law, the display of such crucifixes is mandatory in Italy and so the challenge had widespread ramifications.

The school governors voted to retain the crucifixes and, in 2002, Mrs Lautsi began the first of a series of legal challenges in the Italian courts on the grounds, *inter alia*, that the practice undermined the principle of secularism. Her case was unsuccessful, the courts taking the view that:

- i. the crucifix was a symbol of Christianity in general rather than of Catholicism alone, so that it served as a point of reference for other creeds;
- ii. the crucifix was a historical and cultural symbol of identity for the Italian people; and

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<sup>30</sup> *ibid.* 13.

<sup>31</sup> Addison, *Religious Discrimination and Hatred Law*, 23.

<sup>32</sup> Appl No. 30814/06 (GC), 18th March 2011.

- iii. the crucifix symbolised secular Western values which had originally emerged from Christianity.

Mrs Lautsi (along with her two sons) then lodged her case with the ECtHR, on the basis that the public display of the crucifix in her sons' school was contrary to her right to ensure that their education was in conformity with her religious and philosophical convictions, under Article 2 of Protocol No. 1. The presence of the crucifix also breached her freedom of religion, as protected by Article 9 of the Convention. Furthermore, relying on Article 14, all three of them, not being Catholics, had suffered discrimination in their treatment in comparison to Roman Catholic parents and their children.

In its Chamber judgment in November 2009, the ECtHR upheld the claims.<sup>33</sup> Against a backdrop of public outrage in Italy,<sup>34</sup> the Italian government's request for a grand chamber hearing was granted, and this took place in June 2010. On this occasion, the Court overturned its earlier judgment.<sup>35</sup> It took the view that the state could not be held to be seeking to indoctrinate pupils in one particular religion merely through the display of a 'passive symbol'.<sup>36</sup> Being passive, such a symbol 'cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities'.<sup>37</sup> Equally, there was no evidence to show that the display of the crucifixes had encouraged proselytism by teaching staff. Thus, there was no interference with the applicants' rights under the ECHR and, as there was no indoctrination, it was within Italy's margin of appreciation to continue to require the display of crucifixes in state schools.

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<sup>33</sup> *Lautsi v Italy* Appl No. 30814/06 (SC), 3 November 2009.

<sup>34</sup> D McGoldrick, 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom?' (2011) 11 *Human Rights Law Review* 451.

<sup>35</sup> *Lautsi* (GC).

<sup>36</sup> It thus rejected the argument which had been accepted in the Chamber judgment that the state had, in a sense, 'personally endorsed' the symbol.

<sup>37</sup> *Lautsi* (GC) [72].

One of the concurring opinions, in the same vein as the domestic Italian courts, stressed the importance of the crucifix as ‘heritage’ for the Italian people:

A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity.... A European court should not be called upon to bankrupt centuries of European tradition. No court, certainly not this Court, should rob the Italians of part of their cultural personality.<sup>38</sup>

It should be noted in passing that this judgment is, at first blush, somewhat at variance with *Dahlab* and it is now unclear as to how far a prominent religious symbol will be regarded by the ECtHR as ‘essentially passive’ (as in *Lautsi*) or as having ‘powerful external’ force, capable of a proselytising effect (as in *Dahlab*). For some commentators, the variance is due to the limited reasoning offered by the Court in *Dahlab* as to how the symbol in question could reasonably be said to coerce others, in comparison to the more nuanced judgment of essentially similar issues in *Lautsi* which led to a different and better judgment.<sup>39</sup> For others, the differential treatment evident in the cases is regrettable evidence of ‘double standards’ depending on the nature of the religious symbol.<sup>40</sup> Either or both contentions may be correct, but it is also

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<sup>38</sup> Judge Bonello ([1.1] of his concurring opinion). There were however dissenting opinions, including that of Judge Malinverni who observed ([5] of the dissenting opinion): ‘[N]egative freedom of religion ... extends to symbols expressing a belief or a religion. That negative right deserves special protection if it is the State which displays a religious symbol and dissenters are placed in a situation from which they cannot extract themselves.’

<sup>39</sup> See for example Leigh and Ahdar, ‘Post-Secularism and the European Court of Human Rights’.

<sup>40</sup> See for example P Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*’ (2011) 13 Ecc LJ 287; and S Mancini and M Rosenfeld, ‘Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols In the Public Sphere’, September 2010, *Benjamin N. Cardozo School of Law Working Paper* No. 309; copy at:

instructive to note some differences between the cases, relevant to this thesis. Firstly, in *Lautsi*, the presence of the crucifix was historic and prescribed by the state thus blurring the meaning between the original religious symbolism and the role of the symbol as affirming identity or heritage (providing a clear fit with Model II under the typology proposed in Chapter 3).<sup>41</sup> Secondly, and more significantly, the symbol was ‘passive’ in the sense that it was detached from the schoolteacher in *Lautsi*, and thus there was not the same sense of personal endorsement seen by the conscious decision of the teacher in *Dahlab* to physically wear the headscarf, in a sense ‘activating’ the religious symbol.<sup>42</sup> With these two observations in mind, *Dahlab* would appear to remain the most relevant ECtHR judgment in respect of individual symbolic manifestation, particularly with regard to the headscarf.

This would certainly appear to be the view of the domestic courts in the UK. In *R (Shabina Begum) v Headteacher and Governors of Denbigh High School*,<sup>43</sup> for example, the approach taken in *Dahlab* was quite clearly adopted. This case involved an application under the Human Rights Act 1998 by a schoolgirl forbidden from wearing a *jilbab* during school hours. The school argued that if

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<<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1684382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684382)>>, accessed 30 June 2012.

<sup>41</sup> There is a strong argument that reducing Christian symbols to ‘heritage’ robs them of their religious value to Christians and so does them no service; see Mancini and Rosenfeld, ‘Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols In the Public Sphere’. See also, on this point, Leigh and Ahdar, ‘Post-Secularism and the European Court of Human Rights’, 1074-1075.

<sup>42</sup> G Andreescu, and L Andreescu, ‘Taking Back Lautsi: Towards a ‘Theory of Neutralisation’?’ (2011) 6 *Religion and Human Rights* 207. McGoldrick is critical of the Grand Chamber’s decision in *Lautsi* to compare and contrast the nature of different religious symbols; see McGoldrick, ‘Religion in the European Public Square and in European Public Life’, 489. As he notes, ‘Islamic headscarves, worn by a minority, may be powerful external symbols that challenge neutrality. However, Christian crucifixes, a symbol of the majority religion, are somehow merely passive and do not challenge neutrality.’ He argues that it would have been less contentious for the court to note the complexity of assessing the significance of religious symbols and to have left it to the national courts to make a determination within the scope of the margin of appreciation.

<sup>43</sup> [2006] UKHL 15.

Begum was allowed to attend classes wearing the *jilbab*, this might put pressure on other pupils to adopt similar strict variants of Islamic dress. Begum, with her brother, successfully sought a judicial review of the school's decision, on the grounds that Begum's right to manifest her religion (Article 9 ECHR) and her right to education (Article 2(1) of the first protocol) had been violated. Although successful in the Court of Appeal, the House of Lords determined that since there were other schools which allowed her to wear the *jilbab* there was no interference with Begum's right to manifest her belief in practice or observance. The Lords also concluded that, had there been an interference with Begum's Article 9 rights, such an interference would be justified because the school in formulating its uniform policy possessed a degree of discretion comparable to 'a margin of appreciation'.<sup>44</sup>

To summarise, these cases are not employment cases *per se*, although they do provide some guidance in respect of some public places such as the classroom which are also workplaces. These cases suggest that Article 9 rights can be legitimately restricted at the discretion of the state insofar as passive manifestation is concerned if the member state is concerned about the possible pressure exerted on others through this manifestation, and particularly if the form of manifestation is seen as promoting sex discrimination. It is clear that the headscarf is the manifestation which is most clearly identifiable in these terms. However, the narrowness of the context is also worthy of note – it is confined to educational institutions where the 'susceptible' young people are considered to be at risk of coercion through passive manifestation.<sup>45</sup> Nevertheless, within that context, a generally negative view of the headscarf is permitted, even encouraged by the ECtHR, and arguments which might be deployed to restrict its use by teachers are provided.

Also from the case law, it may be noted that states can legitimately restrict passive religious manifestation when there are practical reasons for so doing, such as those associated with health and safety obligations. Finally, the cases also

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<sup>44</sup> *ibid.* [84] (Lord Hoffman).

<sup>45</sup> See also the discussion in Chapter 7 of *Larissis and others v Greece* (1999) 27 EHRR 329.

provide arguments in favour of the display of religious symbolism if this symbolism can be linked to national identity, under a heritage model (Model II).

### ***The workplace in England and Wales: pre-2003 developments***

Having considered the (primarily) human rights jurisprudence on passive manifestation from outside the employment sphere, attention will now turn to the workplace, and particularly the case law preceding the 2003 Religion and Belief Regulations. This provides some insights into how courts have sought to balance employee freedom of expression in terms of dress and grooming with employer discretion, and how these rights are triangulated with discrimination law.

Prior to the 2003 Regulations, the extent to which employers have discretion to control the dress and personal grooming of employees ‘to convey a message to their employees and customers’<sup>46</sup> had already been established in principle in *Schmidt v Austicks Bookshops*,<sup>47</sup> a sex discrimination case brought by Mrs Schmidt who had been dismissed by her employer because she refused to comply with a new dress code forbidding female members of staff who came into contact with the public from wearing trousers. The EAT determined that she had not been discriminated against because the employer had also imposed different but equivalent restrictions on male staff.<sup>48</sup> It also stated as obiter ‘that an employer is entitled to a large measure of discretion in controlling the image of his establishment, including the appearance of staff, and especially so when, as a result of their duties, they come into contact with the public.’<sup>49</sup> This suggests that a right of self-expression, through dress and grooming, does potentially exist, but is likely to be subordinate to employer discretion, especially its discretion regarding the presentation of a particular uniform image to the public.

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<sup>46</sup> G Pitt, ‘Dress Codes and Freedom of Expression’ (1997) 1 *European Human Rights Law Review* 55.

<sup>47</sup> [1977] IRLR 360 (EAT).

<sup>48</sup> A decision later reinforced in *Smith v Safeway* [1996] IRLR 456, and later in *Department for Work and Pensions v Thompson* [2004] IRLR 348, where the lawfulness of ‘equal but different treatment’ between the sexes in the matter of imposing dress codes was affirmed.

<sup>49</sup> *Schmidt* [10].

Other cases, pursued under the Race Relations Act 1976, involve a more explicit link to the manifestation of religious belief. Both *Singh v Rowntree Mackintosh*<sup>50</sup> and *Panesar v Nestle*<sup>51</sup> involved Sikhs who were rejected at recruitment stage for work at chocolate factories on the grounds of hygiene. For religious reasons, the respective claimants refused to accept a requirement to wear their hair short or shave off their beards. In *Singh v Lyons Maid Ltd*,<sup>52</sup> a Sikh worker was dismissed from his job in an ice cream factory, after a personal revival of religious conviction led to him refusing any longer to adhere to a rule preventing him from wearing his hair uncut (for reasons of hygiene). In *Singh v British Rail Engineering*<sup>53</sup> a Sikh employee refused to put on a hard hat in order to meet health and safety obligations, and was consequently dismissed. In each of these cases, the respective claimant lost his case, illustrating the extent to which the EAT was prepared to accept, relatively unquestioningly, both hygiene and health and safety as justifying indirect race discrimination against Sikhs.<sup>54</sup>

In *Kingston & Richmond RHA v Kaur*<sup>55</sup> a decision of a Regional Health Authority to enforce the wearing of a dress as part of the uniform of female nurses was held by the EAT not to discriminate on the grounds of race. The applicant, a Sikh, was prepared to comply on condition that she could, for religious and cultural reasons, cover her legs by the wearing of trousers in addition to the dress. Nevertheless, despite the claimant's willingness to compromise, the EAT held that the employer had a compelling reason to insist that she comply rigidly with the uniform in order that the trust should present a consistent image to the public.

In summary, prior to 2003, employment tribunals broadly followed the first of the three positions considered in the introduction in affording little importance to

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<sup>50</sup> [1979] IRLR 199 (EAT Sc).

<sup>51</sup> [1980] ICR 60, (EAT), 64 (CA).

<sup>52</sup> [1975] IRLR 328.

<sup>53</sup> [1986] ICR 22 (EAT).

<sup>54</sup> Hambler, 'A Private Matter?' 122.

<sup>55</sup> [1981] IRLR 337 (EAT).

the right of ‘passive manifestation’. Admittedly, they did accord some small weight to an individual’s right to self-expression through dress and grooming.<sup>56</sup> However, this ‘right’ to self-expression, even when informed by race and culture, was easily defeated when employers provided a *prima facie* justification for restricting dress and grooming, particularly when based around the concepts of hygiene or health and safety. These are of course important considerations and fairly easy to invoke as a ‘trump’, but may not, in fact, withstand proper scrutiny (if attempted).<sup>57</sup>

### ***The workplace in England and Wales: post-2003 developments***

Having considered the developing principles of Article 9 ECHR jurisprudence, as well as the limited employment case law, it is now possible to focus specifically on employment case law, since the implementation of the 2003 Religion and Belief Regulations, concerning the right to ‘passively manifest’ religious convictions in the workplace. Amongst the case law, since 2003, there have been two particularly high-profile reported cases as well as a small number of unreported cases which nevertheless attracted media attention.

The first of the significant reported judgments is *Azmi v Kirklees Metropolitan Borough Council*.<sup>58</sup> In this case, a Muslim bi-lingual support worker in a primary school refused to remove her *niqab* full face veil when working with children. The case thus has similarities to *Dahlab*. However, unlike *Dahlab*, the employer’s rationale for imposing restrictions on the wearing of the veil was entirely unrelated to concerns about sex discrimination, or the possible proselytising effect on vulnerable children. Instead, the school’s objection was on

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<sup>56</sup> Whilst these cases remain the key precedents, there is some evidence from unreported cases that employment tribunals gradually afforded more weight to passive manifestation subsequently – see Anon, ‘Enforcing dress and appearance codes’ (2005) 148 EOR 0-3.

<sup>57</sup> For example, in *Watkins-Singh*, health and safety justifications for a blanket ban on the wearing of the Kara were swiftly dismissed by Judge Silber who noted that the wearer would remove the bangle in the circumstances (in this case, PE lessons) where health and safety might be a genuine concern.

<sup>58</sup> (2007) EAT 0009/07.

the entirely practical ground that the children Azmi was instructing would experience greater difficulty in understanding her through her veil than without it.

Azmi had indicated that she was willing to remove her veil if the school accommodated her in classes where there would be no contact with male teachers. The school rejected this potential accommodation as impractical; Azmi continued to wear the veil and, after a number of meetings and a period of stress-related sick leave, she was suspended. She subsequently lodged a complaint under all the available heads of discrimination on the grounds of religion and belief with the employment tribunal. The tribunal ruled there had been no unlawful discrimination, though procedural shortcomings in the way her grievance was handled by the school did lead to an award of compensation for victimisation. Azmi appealed.

On the issue of direct discrimination, the EAT agreed with the tribunal that the way the school treated Azmi should be compared with the way it would have treated a woman who (whether a Muslim or not) wears a face covering for a reason other than religious belief. It concluded that, given the importance for the children's education of non-verbal communication, anyone whose face and mouth were covered would also have been suspended. Therefore, Azmi had not been treated any less favourably than anyone else would have been in those circumstances.

On the indirect discrimination point, the tribunal accepted that the school had applied a practice that put people of Azmi's religion or belief at a disadvantage. However, it decided there was no discrimination, because the adoption of that practice was justified as a proportionate means of achieving a legitimate aim. In reaching its conclusion, considerable weight had been given by the tribunal to the 'stringent' efforts made by the employer to investigate the feasibility of alternative ways for accommodating Azmi's wishes.<sup>59</sup> It should be noted that if employers do not present evidence to support their contention that there is a risk

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<sup>59</sup> *ibid.* [73].

of an adverse impact on their organisations if an employee wears a headscarf, they are likely to lose tribunal cases. This appears to have been the reason why a hairdresser, who wished to wear a headscarf, won her case after rejection in a job interview.<sup>60</sup> Overall, this is suggestive of a movement away from the acceptance at a more superficial level of employers' justifications on restrictions (prior to 2003) and thus a shift from position 1 (presented in the introduction) to position 2.

Although Azmi's behaviour had been inconsistent, in that she presented herself in a headscarf but unveiled at interview, and at her initial training course, this inconsistency, although noted, was not presented as evidence of insincerity and it was common ground that her desire to wear the full face veil was due to a genuine belief that this was a religious requirement. However, a key issue in the case was how far this represented a religious belief itself or a manifestation of a religious belief. This was premised on the contention that a 'manifestation' of religious belief could only be protected under indirect discrimination provisions and could not be protected under direct discrimination. The EAT helpfully dismissed this argument, and stated that a manifestation of religious belief could be protected under direct discrimination, particularly if what would otherwise be the relevant provision, criteria or practice (e.g. the requirement not to be veiled) was not 'apparently neutral' but rather it might be thought to represent a deliberate attempt to disadvantage a religious employee (in this case, a Muslim woman). In such cases, although it is a manifestation of religious belief rather than the belief itself which is in contention, it may still amount to direct discrimination. It concluded that it could therefore see 'no reason for there to be any *a priori* position that a "manifestation" of a religious belief always has to be dealt with as indirect discrimination.'<sup>61</sup>

It has been critically noted that some prominent Government ministers, including the then Prime Minister, Tony Blair, made a number of public comments as the case was being heard, on the necessity that Muslims should better integrate into

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<sup>60</sup> *Noah v Desrosiers t/a Wedge* (2008) ET Case No. 2201867/07.

<sup>61</sup> *Azmi* [76].

UK society, and the implicit undesirability of the *niqab* in classrooms.<sup>62</sup> Nevertheless, it is instructive that this linking of *Azmi* to these wider concerns in public discourse (which are aligned with position 4 in the introduction) was not considered by the court which focussed strictly on applying the principles of discrimination law.

The second of the two high-profile cases was *Eweida v British Airways*,<sup>63</sup> where the right of an employee to wear Christian symbolism in the face of an employer's hostility was explored. Miss Eweida was a practising Christian who worked part-time as a member of check-in staff for British Airways. In 2004, British Airways introduced a new uniform policy for customer-facing roles, which prohibited the wearing of any visible jewellery around the neck. However, exceptions were made for religious symbols which were a mandatory requirement of a religion and could not easily be concealed beneath the uniform. On this basis, Muslim women were permitted to wear the *hijab*-headscarf, Sikh men were allowed to wear turbans and Jewish men were permitted to wear the skull-cap.

During the period 20 May to 20 September 2006, Miss Eweida attended work on at least three occasions with the cross visible. She concealed it when asked to do so.<sup>64</sup> However, on 20 September, she refused to conceal the cross, and, having also refused an offer of alternative work involving no public contact, was suspended without pay. On 1 February 2007, British Airways, under pressure from hostile media coverage, amended its uniform policy to allow staff to display a religious symbol with the uniform. Two days later Eweida returned to work.

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<sup>62</sup> M Ssenyonjo, 'The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases' (2007) 6 *Chinese Journal of International Law* 653.

<sup>63</sup> [2010] EWCA Civ 80, [2010] IRLR 322.

<sup>64</sup> It was not suggested by British Airways, nor should it be assumed, that to permit the wearing of a 'concealed' cross represented any form of recognition of the importance of the symbol to the individual concerned. Rather, when jewellery (of any kind) was worn but concealed it was of little interest to the company, and so outside the parameters of the policy, as it was the outward image of customer-facing staff which the company was seeking to regulate.

She also filed a claim with the Employment Tribunal that she had been subjected to direct discrimination, indirect discrimination and harassment contrary to the Equality (Religion or Belief) Regulations 2003, and that British Airways had made an unlawful deduction of wages during her period of unpaid suspension.

The claim was unsuccessful at the initial tribunal and thereafter at both the EAT and Court of Appeal. In addressing Eweida's claim, the Court of Appeal followed the EAT in identifying two key issues which were crucial to the case. The first of these issues concerned how far the cross could be considered to be a mandatory requirement of her religious belief. The second concerned how far the doctrine of indirect discrimination might protect a single individual as Eweida was alone amongst BA employees in her insistence on wearing a visible cross.<sup>65</sup> It is clear from the written judgment that the EAT recognised that Eweida's desire to wear a visible cross was 'characteristic' of her faith and thus should be accorded more value than people who might wear a cross for 'cosmetic reasons'<sup>66</sup> but that it was not a 'mandatory' aspect of her religious beliefs. The Court of Appeal concurred with the latter conclusion, noting that '[n]either Ms Eweida nor any witness on her behalf suggested that the visible wearing of a cross was more than a personal preference on her part. There was no suggestion that her religious belief, however profound, called for it.'<sup>67</sup> As the wearing of a cross is not mandatory for Christians thus, in forbidding the practice under a wider uniform policy, there was no detriment against Christians.

On the second point, the EAT had concluded that as Eweida's preference for wearing a cross as a religious manifestation was an individual one (which follows in part from the fact it was not 'mandatory'), it could not be within the scope of indirect discrimination which required evidence of 'group disadvantage'. Although it did recognise that such an individual preference is protected under the 'religion and belief' category, this protection was restricted

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<sup>65</sup> Pitt argues that the 'group' test should be construed to include people beyond a particular workplace – this would have aided Eweida's claim; see Pitt, 'Keeping the Faith'.

<sup>66</sup> *Eweida v British Airways* [2009] IRLR 78, [38].

<sup>67</sup> *Eweida (CA)* [37].

to direct discrimination only, where there is no minimum number of adherents required to trigger the available protections. This decision was criticised by some commentators, such as Vickers, who wrote:

Although undoubtedly the traditional view is that indirect discrimination addresses group disadvantage rather than individual disadvantage, this may be inappropriate in the context of discrimination on grounds of religion and belief, where such belief can be very personalised.<sup>68</sup>

Vickers suggested that there was a case for interpreting the Religion and Belief Regulations to include individual beliefs within the scope of indirect discrimination:

Although the wording clearly suggests that a group must be disadvantaged, the inclusion of the conditional ('would apply'; 'would put') means that it can, technically, apply to provisions that disadvantage an individual applicant and that would also put persons of the same view, were there to be any, at a disadvantage. Indeed, the parent directive is worded solely in the conditional ('where an apparently neutral provision ... would put persons of a particular religion or belief ... at a particular disadvantage ...'), leading some to suggest that it may cover individual disadvantage.<sup>69</sup>

Aware perhaps of such criticisms, the Court of Appeal addressed the issue head on and concluded, surely definitively, that the requirement for group disadvantage in order to find indirect discrimination remained:

But there is in my judgment no indication that the Directive intended either that solitary disadvantage should be sufficient – the use of the plural ("persons") makes such a reading highly problematical – or that any requirement of plural disadvantage must be dropped. I see no reason, therefore to depart from the natural meaning of Reg. 3. That meaning ... is that some identifiable section of

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<sup>68</sup> Vickers, 'Indirect discrimination and individual belief', 198.

<sup>69</sup> *ibid.*, 199.

a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares.<sup>70</sup>

Hatzis offers a sophisticated (but not entirely convincing) critique on this point, based on his view (which is similar to Vickers') that the concept of indirect discrimination can be read more broadly to offer protections to the 'solitary believer'.<sup>71</sup> He contends that although the primary objective of the law is to provide distributive (group) justice, courts are not precluded from providing an individual remedy.<sup>72</sup> In its submission to the ECtHR in *Eweida and Chaplin v United Kingdom*, the EHRC argues that a correct application of the relevant law is for the courts to establish a hypothetical comparator group by considering the beliefs of other people of the same religious faith but not necessarily in the same workforce.<sup>73</sup> Such a 'hypothetical comparator' would of course have enabled Eweida to meet the plural disadvantage threshold.

Significantly, the initial tribunal in *Eweida* did consider the potential outcome of the claim had indirect discrimination law been engaged and concluded that the employer would not have been able to show that applying its policy to the claimant was 'proportionate' as the interests involved had not been properly balanced.<sup>74</sup> Thus, Eweida's indirect discrimination claim would have succeeded.<sup>75</sup>

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<sup>70</sup> *Eweida* (CA) [15] (Sedley LJ).

<sup>71</sup> N Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74 MLR 287.

<sup>72</sup> *ibid.* 304.

<sup>73</sup> Equality and Human Rights Commission, *Submission in Eweida v United Kingdom* (September 2011) [27].

<sup>74</sup> *Eweida v British Airways* (2008) ET Case No. 2702689/06 [33.9].

<sup>75</sup> However, some doubt may be cast on whether or not this decision would have withstood appeal, as Sedley LJ raised questions over this finding (see *Eweida* (CA) [37]), although Carnwath LJ indicated he would have accepted it [42].

During the appeals, there were various interventions from senior church figures, concerned at the *Eweida* ruling, including this observation from the Archbishop of York, explaining the importance to Christians of wearing a cross:

For me, the cross is important because it reminds me that God keeps his promises. Wearing a cross carries with it not only a symbol of our hopes but also a responsibility to act and to live as Christians. This symbol does not point only upwards but also outwards, it reminds us of our duties not only to God but also to one another ...<sup>76</sup>

The purpose of this intervention was perhaps to provide a basis in Christian theology for the wearing of a visible cross. It does not, however, provide a basis for arguing that the wearing of a cross (whether or not it is visible to others) is in any sense ‘mandatory’ for Christians which, as has been seen, the courts set as the key test to trigger any protections for *Eweida*.

It was noted in Chapter 4 that the necessity test is well established in human rights jurisprudence (albeit that, as discussed, there has been a degree of inconsistency, very recently, in its application by the courts). However, it is instructive to note in passing that an alternative test has more recently emerged in race discrimination law in the area of passive manifestation but in an educational context. In *Sarika Watkins-Singh v Aberdare Girls’ High School*,<sup>77</sup> Sarika Watkins-Singh, who was an observant Sikh, challenged a decision made in 2007 by her school which prevented her from wearing a *Kara* bracelet on the grounds, *inter alia*, of indirect racial discrimination. The ban was initially justified, as part of a blanket prohibition on jewellery for reasons of health and safety. The school had also investigated whether or not the wearing of a Sikh *Kara* was a requirement of Watkins-Singh’s religion. Having taken advice, it suggested that she could carry it instead.

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<sup>76</sup> Anon, ‘Archbishop attacks BA cross rules’, *BBC News* (London, 21 November 2006); copy at: <<[http://news.bbc.co.uk/1/hi/england/north\\_yorkshire/6166746.stm](http://news.bbc.co.uk/1/hi/england/north_yorkshire/6166746.stm)>>, accessed 14 July 2011.

<sup>77</sup> [2008] EWHC 1865 (Admin).

Mr Justice Silber (presiding) upheld the complaint on the basis that the school could not show as a justification for indirect discrimination that it was proportionate to deny the claimant the right to wear the *Kara*. Significantly, he concluded that the wearing of the *Kara* was of ‘exceptional importance’ to the claimant:

I believe that there would be a “*a particular disadvantage*” or “*detriment*” if a pupil is forbidden from wearing an item when (a) that person genuinely believed for reasonable grounds that wearing this item was a matter of *exceptional* importance to his or her racial identity or his or her religious belief and (b) the wearing of this item can be shown objectively to be of *exceptional* importance to his or her religion or race, even if the wearing of the article is not an actual requirement of that person’s religion or race.<sup>78</sup>

It is interesting to note that Silber J rejected the requirement that a practice should be mandatory in a given religion for full protection to apply, but rather substituted his own test of ‘exceptional importance’ of the practice to an individual’s religion. This is attested to by the sincere opinion of the individual concerned and also through some form of objective authentication.

Returning to the workplace, *Eweida* was followed by a similar employment tribunal case which received considerable publicity, involving a nurse, Shirley Chaplin, who took her employer, the Royal Devon and Exeter NHS Foundation Trust, to an employment tribunal for religious discrimination having been told to remove (or conceal) a crucifix which she wore around her neck, despite having done so for 30 years as a nurse.<sup>79</sup>

Chaplin argued that wearing a visible cross was ‘an outward manifestation of her deeply held religious conviction.’<sup>80</sup> Her employer argued that the move was not specifically about the crucifix, but about health and safety concerns. Some

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<sup>78</sup> *ibid.* [56B] (Silber J).

<sup>79</sup> *Chaplin v Royal Devon and Exeter NHS Foundation Trust* (2010) ET Case No. 1702886/2009.

<sup>80</sup> *ibid.* [14].

religious items, however, could be exempted from the rule, such as Muslim headscarves because, suitably styled, they did not pose a health and safety risk.<sup>81</sup> The tribunal followed *Eweida* and dismissed the case on the basis that indirect discrimination could not apply as the provision, criterion or practice in question affected the beliefs of one person rather than ‘persons’ as the legislation requires. This was partly a consequence of the fact that the wearing of the cross was not considered mandatory for Christians; therefore the tribunal began from a position that it represented an individual expression of religious belief. However in *Chaplin* this decision was somewhat more problematic and led to the dissent of one of the wing members of the tribunal. This was because a second nurse in the trust, Mrs Babcock, also wore a visible cross for religious reasons, casting doubt on how far Chaplin’s belief could be said to be an individual one. However, when Mrs Babcock was asked to remove her cross and chain, she did so without objection in order to ‘avoid confrontation’.<sup>82</sup> The tribunal, by majority, inferred from this that only Chaplin suffered a ‘particular’ disadvantage; Mrs Babcock, with her apparently weaker conviction to wear a visible cross, suffered only ‘slight’ disadvantage.<sup>83</sup> Thus was the tribunal able to exclude Mrs Babcock from the formula (of more than one person) which it conceded would invoke the first stage of an indirect discrimination claim.<sup>84</sup>

To summarise, in the post-2003 case law, protections for the passive manifestation of religion are most likely to arise under the doctrine of indirect discrimination. Any protections under direct discrimination are only likely to arise if the employer is suspected of wilfully introducing a ‘provision, criterion or practice’ for which there is so little justification that the logical assumption can only be that the intention was to deliberately discriminate against the religious employees affected.<sup>85</sup>

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<sup>81</sup> *ibid.* [16].

<sup>82</sup> *ibid.* [15].

<sup>83</sup> *ibid.* [27].

<sup>84</sup> *ibid.* [28].

<sup>85</sup> Interestingly, there has been at least one successful direct discrimination claim relating to the headscarf – however, it was pursued by a female Muslim employee who was pressurised by her

Under the indirect discrimination protections, employers are required to provide a clear justification for restrictions on an employee's right to manifest their religion through visual/symbolic means under the formula of demonstrating that any restrictions are 'a proportionate means of achieving a legitimate aim.'<sup>86</sup> However, this justification is likely only to be required when a particular manifestation is considered to be 'mandatory' to the religious belief invoked or when there is a 'group' of employees disadvantaged or potentially disadvantaged by the restriction. This means that expressions of religious belief considered to be 'individual' (such as wearing a cross) are not protected.

### ***Conclusion***

It is clear from the claims considered in this chapter, and their dogged pursuit through the court hierarchy, that some individuals have a strong desire to manifest their religious beliefs in the workplace, as elsewhere, through some form of passive manifestation. Such passive manifestation may represent an external sign of allegiance to a particular religion (as for example in *Watkins-Singh*) which the individual may feel under varying degrees of obligation to express, or it may represent a personal decision to publicly testify to a religious faith (as in *Eweida*).

It is equally clear that employers often wish to regulate such passive manifestation. In the consideration of the relevant case law presented in this chapter, a number of justifications have been offered for restrictions. Some of these are *prima facie* neutral about the symbol itself, for example restrictions based on health and safety (as in *Singh v British Rail Engineering*), or hygiene concerns (as in *Panesar v Nestle*), or where the manifestation plainly interferes

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Muslim manager (within a mixed workplace) to wear a headscarf; see *Khan v Ghafour t/a Go Go Real Estate* (2009) ET Case No. 1809595/09.

<sup>86</sup> A further example of this was the respondent's success in justifying preventing an Amritdhari Sikh prison officer from wearing a *Kirpan* whilst dealing with prisoners (due to the potential risks involved in carrying something which might be stolen by prisoners and used as a weapon) ; see *Dhinsa v SERCO* (2011) ET Case No. 1315002/2009.

with a specific work role on a practical level (as in *Azmi*). Other justifications involve a judgement on the lack of congruence between particular symbols (such as jewellery in *Eweida*) and the corporate image of the organisation. Finally, some justifications involve an unfavourable value judgement about the meaning attached to the symbol itself (as in *Dahlab*). It is also worthy of note that in some cases (e.g. *Chaplin*), there are suspicions, at least on behalf of the claimant, that a neutral explanation for a restriction masks the true reason which is related to hostility towards the symbol itself and its meaning.

The form of regulation of passive manifestation by an employer varies and it is a reasonable assumption that there will be a direct correlation between this and the justification for the regulation. For example, the restrictions in *Azmi* applied only during the process of teaching, where the wearing of the *niqab* was identified as a problem, and not at other times during the course of employment. In *Dahlab*, the restrictions applied when the teacher was visible to her pupils (i.e. all times when they might be negatively influenced by her headscarf). In *Eweida*, the restrictions applied whilst engaged in customer-facing roles (hence the offer to the claimant of alternative ‘back office’ work).

Recent cases shed light on how the law is developing in response to the resultant clashes when employers attempt to regulate passive manifestation for the reasons and in the ways discussed. These will be considered here with reference to the models presented in Chapter 3. In broad terms, the courts have moved away from a *laissez-faire* approach of broadly accepting employer’s justifications on restrictions with limited inquiry (as in the original claims brought under race). Exactly what they have moved towards may be less clear. ECHR jurisprudence provides a justification for the adoption of an exclusionary approach, at least in certain circumstances, based on the perceived negative implications for others of the display of certain symbols or dress, chiefly the headscarf. Thus far at least, such arguments have not been entertained in the EAT or beyond where the focus has been on practical justifications by employers for restrictions. This is particularly striking in the *Azmi* case where arguments might have been employed, but were not, analogous to those in *Dahlab* about the proselytising effect on schoolgirls of wearing the full face veil. Similarly, the recent decision

by the ECtHR in *Lautsi*, and the perceived distinction between discreet symbols and more overt symbols, recently affirmed in the domestic case of *Watkins-Singh*, would provide arguments in favour of supporting the passive manifestation of Christianity as the ‘preferred historic religion’ either for reasons connected to national heritage and identity or because the symbolism is typically more discreet than for most other religions. However, no such arguments have been employed in the tribunals.

There does, however, appear to have been movement towards Model V (protection), albeit in a qualified way, through the requirement that employers provide clear evidence that any restrictions on passive manifestation fully satisfy the test, under the doctrine of indirect discrimination, that they represent ‘a proportionate means of achieving a legitimate aim’. The failure to provide such evidence is why, for example, the rejected prospective hairdresser who wished to wear a headscarf won her case. However, it would seem from the case law to date that ‘protection’ is in fact selective. This is due to the fact that tribunals have imported into discrimination law one key doctrine from ECHR case law – the ‘necessity test’.<sup>87</sup> Thus, for a *prima facie* case of indirect discrimination to be argued, the claimant must show that a particular form of manifestation is ‘mandatory’ to the religious belief invoked. Alternatively, he or she must be able to identify an actual group of people with similar requirement for passive manifestation so that to deny this would result in group disadvantage. However, as demonstrated in *Eweida*, the group test, as interpreted in that case, will be very difficult to satisfy if the practice is not considered, at least by some, to be mandatory. The result of this reasoning is, as Hambler notes, to favour minority religions, given ‘the greater likelihood of convincing a court of the necessity of certain forms of visual manifestation to adherents of these particular faiths’.<sup>88</sup> Seen in this light, it can be argued that in relation to passive manifestation, the law has become most congruent with Model IV (protection for minority religions) presented in Chapter 3.

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<sup>87</sup> See *Arrowsmith*, and discussion in Chapter 4.

<sup>88</sup> See Hambler, ‘A Private Matter?’, 125; see also the analysis in *Clearing the Ground*, 15.

This position is clearly unsatisfactory. Of the reasons why religious employees might want to visually manifest their religious convictions, the application of the necessity test cuts away immediately any protection which might otherwise be available for those who feel strongly that they should publicly testify to their religious faith or a commitment motivated by their faith, even if their religion does not require this more generally. This has potential to create considerable unfairness for some religious employees, above all Christians, particularly when, as in *Eweida*, employers would otherwise have considerable difficulties in demonstrating the proportionality of dress and grooming restrictions, and the religious employee would have a good chance of succeeding in her claim.

In order to address this problem there may be some inspiration to be drawn from Judge Silber's test of 'exceptional importance', although clearly not as he formulated it (as he explicitly excluded the Christian cross from the potential limits of protection). 'Exceptional importance' is not as strict as the necessity test and it may take greater account of other significant factors, such as religious tradition and individual religious experience (identified by Audi and discussed in Chapter 2), rather than simply applying the stark question of whether or not a practice is 'mandatory' to a religious belief. A movement in this direction would also extend protection beyond minority religions only towards the model of protection for religion generally (albeit qualified when employers have a genuine legitimate aim for restrictions and can provide a high standard of evidence that it is proportionate to apply them to the detriment of a particular religious individual). Ultimately, this would surely be the most satisfactory overall role for the law in this area.

## Chapter 7: Active Manifestation

### *Introduction*

The term ‘active manifestation’ employed in this chapter is a potentially wide-ranging one intended to capture the different ways in which an individual might proactively articulate his religious convictions to others. The ‘strength’ with which these convictions are articulated has potential to vary greatly, both from individual to individual and from situation to situation. For example, a weaker form of articulation might involve an individual invoking God’s blessing when serving a customer, or offering to pray for a patient. Stronger forms might include speech ‘in the prophetic tradition’ to point out and rebuke the sin or immorality of a co-worker;<sup>1</sup> or making strong moral statements concerning, for example, abortion or homosexuality; or explaining religious doctrine, or personal religious experience, to a co-worker with a view to making a conversion of that individual (commonly known as proselytism).<sup>2</sup>

Active manifestation differs from negative manifestation which is essentially reactive to the demands of an employer. An individual who finds that her religious convictions are compromised by either the timing or the nature of some of the work which she is required to do is essentially seeking an individual ‘opt-out’ which may have an effect on co-workers (e.g. by altering a shift rota to accommodate the objection) but such effect will be indirect. Active manifestation

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<sup>1</sup> C Evans, ‘Religious Speech that Undermines Gender Equality’ in Hare and Weinstein, *Extreme Speech and Democracy*, 366.

<sup>2</sup> One writer specifically delineates between mild and strong forms of ‘active manifestation’ for analytical purposes, although he adopts the questionable terminology of ‘passive harassment’ and ‘proselytization’. The former is said to be ‘indirect and does not occur in a targeted manner’ which distinguishes it from the other form which is presumably direct and targeted. See J Schopf, ‘Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment’ (1997-1998) 31 *Columb JL & Soc Probs* 39, 45.

will usually be proactive,<sup>3</sup> with the individual directly and explicitly engaging his religious convictions vis-à-vis others. Active manifestation will often arise as a direct result of an individual's sincerely held belief that he or she is required by the doctrines of his or her faith 'to communicate religious faith to others, even if – in fact, perhaps precisely because – those truths disturb and unsettle those who hear them'.<sup>4</sup> For example, many Christians believe that Jesus' final words before the Ascension contain an ongoing mandate for all Christians to witness to, and to attempt to convert, non-Christians:

Go therefore and make disciples of all the nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all things that I have commanded you; and lo, I am with you always, even to the end of the age.<sup>5</sup>

Active manifestation also differs from passive manifestation in that the display of religious convictions in visual form certainly has the potential to make an impact on others. However, this impact is essentially generalised in character, the symbols or grooming bearing a witness to groups of people in general (such as colleagues and clients) – particular individuals are not specifically addressed<sup>6</sup> as they would tend to be when religious convictions are articulated verbally; equally, the impact of the symbol may be muted by its continued presence, whereas verbal articulation will tend to be briefer, more occasional and therefore of more immediate impact on others. As noted in the discussion in Chapter 4, active manifestation has the potential to be considered a form of harassment of those other actors in the workplace (such as co-workers) for whom being exposed to proselytism and other forms of active manifestation may create (or be claimed to create) a hostile environment. That said, if active manifestation is to

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<sup>3</sup> Although if the individual has been questioned about his beliefs by a colleague and responds, this could be reasonably characterised as, at least initially, reactive.

<sup>4</sup> T Berg, 'Religious speech in the workplace: harassment or protected speech?' (1998-1999) 22 Harv JL & Pub Pol'y 959, 964.

<sup>5</sup> Matthew 28 v 19-20 (NJKV). It should be noted that Muslims are confronted by a similar scriptural injunction to preach and debate with non-Muslims in order to make converts (*Quran* 16 v 125).

<sup>6</sup> Although certain 'groups' may be disproportionately affected, e.g. Muslim schoolgirls when a school teacher wears a headscarf (see discussion in Chapter 6).

be considered a form of harassment then it is helpful to apply a distinction between *animus* and *non-animus* harassment.<sup>7</sup> As the religious employee might be most fairly characterised as acting in the perceived best interests of others (rather than out of malign intent), then active manifestation conforms to the non-animus category. Although a benign (or ‘non-animus’) motivation does not mean that employees are necessarily protected from the disciplinary consequences of harassment, it is clearly a factor which weighs in the judicial process in the US and has resulted in some judgments in favour of religious employees.<sup>8</sup> This is surely right as there are two interests to consider – the freedom for some to be free from apparent ‘harassment’ on religious grounds, but also the freedom for others to follow the dictates of their conscience. As a result, as Berg observes, ‘[a]lthough these proselytizing activities may offend others in the workplace, bans on such activities impose a serious burden on religious freedom and should be subject to exacting legal standards.’<sup>9</sup>

The purpose of this chapter is to explore active manifestation in the workplace, and how the courts approach it, using the reference points, firstly, of the European Court of Human Rights jurisprudence, and secondly, workplace cases under religion and belief discrimination law (some of which have been settled out of court). The workplace cases will be divided into three categories: (i) proselytism; (ii) an offer to pray for others; and (iii) religious statements which are condemnatory of homosexuality. This is not to suggest that other examples of active manifestation might be added, but the key cases (or publicised *cause-célèbres*) relate to these issues.

### ***ECHR Jurisprudence***

The ECtHR has considered the legality of religious proselytism *per se*. A very significant case was *Kokkinakis v Greece*,<sup>10</sup> which involved a challenge to a

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<sup>7</sup> See Kaminer, ‘When religious expression creates a hostile work environment’.

<sup>8</sup> *ibid.*

<sup>9</sup> Berg, ‘Religious speech in the workplace’, 964.

<sup>10</sup> (1993) 17 EHRR 397.

Greek law which prevented proselytism in most circumstances, particularly in relation to the vulnerable, or where ‘inducements’ were offered. The case was brought by Mr Kokkinakis, who, alongside his wife, was a Jehovah's Witness. They had both visited the home of an orthodox Christian and Mr Kokkinakis had persuaded her to allow them in. During the course of a subsequent discussion he had tried to convert her. Mr and Mrs Kokkinakis were duly convicted of proselytism (Mrs Kokkinakis being acquitted on appeal). Mr Kokkinakis claimed before the ECtHR, *inter alia*, that his Article 9 freedoms had been violated by Greece.

Although the Greek law in question did not outlaw all forms of proselytism, the ECtHR helpfully addressed the question of whether or not proselytism itself could be considered to be legitimate and determined that it could:

First of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church.<sup>11</sup>

This is an important statement as it upholds the legitimacy of ‘bearing witness’ to others as an essential Christian duty at both a corporate and an individual level. The Court also explicitly concluded that ‘bearing witness’ can be considered a manifestation of religion and therefore falls under the protections of Article 9.<sup>12</sup> In so doing, it also argued that the act of witnessing to others was also justifiable on the basis that persuasion might be a necessary catalyst for an individual to exercise his freedom to change his religious beliefs (another fundamental freedom under Article 9 ECHR):

According to Article 9 (art. 9), freedom to manifest one’s religion is not only exercisable in community with others, “in public” and within the circle of those whose faith one shares, but can also be asserted “alone” and “in private”;

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<sup>11</sup> *ibid.* [48].

<sup>12</sup> *ibid.* [31].

furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9 (art. 9), would be likely to remain a dead letter.<sup>13</sup>

Thus, according to the Court's reasoning, the right to 'bear witness' (or engage in 'true evangelism') is both a manifestation of an individual believer's religion and also necessary to non-believers and other-believers because, without it, the Article 9 rights of the latter groups (allowing the opportunity to change religion) would not be fully exercisable.

The actual aim of the disputed Greek law was however upheld. Seeking to restrain 'improper proselytism', in order to 'protect the rights and freedoms of others', was considered by the ECtHR to be an appropriate purpose for national governments.<sup>14</sup> In this case, however, the Greek courts had failed to specify in what way Mr Kokkinakis had behaved 'improperly' and neither did the facts support that finding.

Therefore, the ECtHR has categorised proselytism in two ways – 'proper' and 'improper' respectively, and only the first category enjoys full protection as a manifestation of religion.<sup>15</sup> The Court did give some guidance on what might constitute improper proselytism:

The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.<sup>16</sup>

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<sup>13</sup> *ibid.* [31].

<sup>14</sup> *ibid.* [44].

<sup>15</sup> Hambler, 'A Private Matter?' 127.

<sup>16</sup> *Kokkinakis* [48].

This guidance is useful to a certain extent – it suggests that proselytism will be improper when it involves bribing or pressurising people in vulnerable situations. However, as it is couched in generalised terms, it can rightly be criticised as leaving ‘too much room for a repressive interpretation’ and more precise and specific definition by the Court would have been helpful.<sup>17</sup> However, this is no easy task.<sup>18</sup>

Another and subsequent case again involving a challenge to the same Greek law, *Larissis and others v Greece*,<sup>19</sup> directly relates to employment, albeit to the very specific employment context of the military. In this case a group of Airforce Officers, who were Pentecostal Christians, were convicted of seeking to convert to the Christian faith some amongst the junior ranks who were under their command, by repeatedly inviting them to church and by initiating discussions on religious matters. They applied to the Court on the basis of an interference with Article 9.

The Court agreed with the applicants that that their convictions for proselytism amounted to interferences with the exercise of their rights to manifest their religion but it found that such interference was justified. Although there was no ‘evidence that the applicants used threats or inducements’,<sup>20</sup> the Court nevertheless considered that the activities of the officers involved improper proselytism. In so determining, it focussed on the imbalance of power between the officers and the airmen in the context of ‘military life’:

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<sup>17</sup> *ibid.* (partially dissenting opinion of Judge Pettiti).

<sup>18</sup> For an attempt to provide more specific guidelines see T Stahnke, ‘Proselytism and the Freedom to Change Religion in International Human Rights Law’ (1999) *BYUL Rev.* 252. The author argues that ‘whether an act of proselytism is improperly coercive will depend upon the characteristic of the source, the characteristics of the target, the place where the act takes place and the nature of the target itself. ... The location of an act, or a particular relationship between source and target can introduce an element of coercion to an act that might not be coercive in other circumstances’ (343).

<sup>19</sup> (1999) 27 EHRR 329.

<sup>20</sup> *ibid.* [52].

In this respect, the Court notes that the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.<sup>21</sup>

As Evans put it: '[s]uch cases raise complex issues of competing rights, where it is not clear why one set of rights should take precedence over another.'<sup>22</sup> In this case the sense of obligation to promote Christian beliefs felt by the Pentecostal officers, irrespective of the military environment, was clearly subordinated by a national government to the rights of non-religious (or other-religious) airmen to be free of proselytism. It could also be argued that other rights of the airmen had been infringed as, by the Court's own reasoning in *Kokkinakis*, an absence of proselytism may have a negative impact on the right to change religion.

The decision in this case is clearly intended to have an application to the military environment only, with its 'hierarchical structures' and given the nature of the power differentials between officers and other ranks. However, it is difficult to accept the implication that the civilian world is entirely different. In most employment contexts, for example, hierarchy and power differentials exist and may affect relationships between employees of different levels of seniority, albeit not necessarily to the same degree as in military organisations. It might, for example, be 'difficult', in the words of the Court, for a junior employee 'to rebuff the approaches' of a manager 'or withdraw from a conversation initiated by him.' Indeed, the significance of organisational hierarchy in claims for religious harassment (because of unwelcome proselytism) has been recognised in the civilian workplace in the USA. For example, in *Chalmers v Tulon Co*,<sup>23</sup> a court stated that an employee's supervisory position heightened the possibility

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<sup>21</sup> *ibid.* [51].

<sup>22</sup> Evans, *Freedom of Religion under the European Convention on Human Rights*, 164.

<sup>23</sup> 101 F.3d 1012, 1021 (4th Cir. 1996).

that her religious speech could create a hostile work environment for more junior employees. There remains therefore a question as to how far the reasoning in *Kokkinakis* might in fact be applicable beyond the military employment context into a civilian employment context as this has yet to be tested.

## ***Employment Discrimination Cases***

### **Proselytism**

Case law in the UK concerning this form of manifestation is at an early stage. There is only one relevant case which has gone beyond the initial tribunal level - *Chondol v Liverpool City Council*.<sup>24</sup> In this case, a social worker contested the decision of his employer to dismiss him on the basis, *inter alia*, that he inappropriately promoted his religious beliefs to 'service users'. This charge related to two instances: in the first, Chondol apparently gave a Bible to a service user; in the second, he appeared to have engaged in a conversation with a different service user in which, according to a subsequent complaint, 'he was talking about God and church and crap like that'.<sup>25</sup> These incidents took place in 2006.

Chondol was dismissed, following a disciplinary investigation, on 24 May 2007.<sup>26</sup> He subsequently brought proceedings before an employment tribunal for unfair dismissal and religious discrimination. The tribunal rejected his claims and the Employment Appeals Tribunal upheld that finding.

The EAT found that Chondol was 'aware that the Council prohibited the overt promotion by social workers in the course of their work of any religious beliefs that they might hold.'<sup>27</sup> It also appeared to be common ground between the parties that this restriction amounted to a reasonable management instruction. Thus, Chondol did not dispute that his employer was entitled to discipline him

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<sup>24</sup> (2009) EAT/0298/08.

<sup>25</sup> *Chondol v Liverpool City Council* (2009) EAT/0298/08 [9].

<sup>26</sup> *ibid.* [1].

<sup>27</sup> *ibid.* [8].

for sharing his religious views with clients. Chondol's defence, in respect of the first incident, was that he had provided a Bible in response to a specific request; and that, regarding the second incident, he had simply asked the question as to whether or not the service-user believed in God or went to church.<sup>28</sup> The employment tribunal (endorsed by the EAT) clearly found this explanation insufficient and determined that he was fairly dismissed for 'improperly foisting [his beliefs] on service users' rather than for holding those beliefs himself.<sup>29</sup>

The rationale for the prohibition on 'promoting' religious belief is found in Chondol's dismissal letter:

[W]hile undoubtedly religious beliefs can potentially be an important factor in an individual's life, this is not the case for everyone. A social worker acting in a professional capacity should not be placing an emphasis on religious beliefs that is out of proportion to a consideration of the many other factors that impinge on an individual's wellbeing. An over emphasis on religion could cause distress to service users who are already in a fragile mental state.<sup>30</sup>

No internal policy document was presented as an exhibit in support of this stance; neither was any reference made to the social workers' professional code of practice.<sup>31</sup> This latter document, in its current form, does not in fact offer any specific guidance on religious expression, and provides rather generalised guidelines only to the effect that a social worker 'must protect the rights and promote the interests of service users and carers', which, *inter alia*, involves '[r]especting diversity and different cultures and values'.<sup>32</sup>

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<sup>28</sup> *ibid.* [10].

<sup>29</sup> *ibid.* [23].

<sup>30</sup> *ibid.* [16].

<sup>31</sup> For the current version of the code, see: General Social Care Council, *Codes of Practice for Social Care Workers*, 2010; copy at: <<  
<http://www.gsc.org.uk/cmsFiles/CodesofPracticeforSocialCareWorkers.pdf>>>, accessed 2 May 2012.

<sup>32</sup> *ibid.*, 6.

It is interesting that the position adopted in the dismissal letter was never challenged. Not only would the letter itself appear to be an example of policy-making on the hoof (and thus procedurally unfair, particularly in a situation involving a conduct dismissal), the content of the letter may be considered objectionable as it requires that social workers suppress any sense of obligation to share their faith with those they meet, even by apparently ‘light touch’ means (such as offering to give someone a Bible). It is seemingly taken as a given in this case that sharing religious beliefs, even in tactful and sensitive ways, is liable to cause ‘distress’ to others and impinge on their rights to avoid religious discourse.

Another case, which was not subject to an appeal hearing, concerned an ex-employee of the Young Men’s Christian Association, Monaghan, who had been dismissed from his job as a temporary manager for proselytism, having ignored an instruction from his manager ‘that he should not try to convert people to the Christian faith’ as he ‘did not want the people who the respondent served being subjected to attempts to convert them.’ He claimed, *inter alia*, direct discrimination on the grounds of religion and belief.<sup>33</sup> As this was a direct discrimination claim, the tribunal considered the issue of a comparator and found that the manager’s attitude would have been the same regardless of an employee’s religious beliefs. As a result, Monaghan had not been discriminated against because he was a Christian *per se* as his manager would have taken the same action had he attempted to convert people to other religions. As the tribunal put it: ‘[t]he grounds were not the religion or belief of the claimant, but the fact that he was trying to convert people which was against the principles of the respondent.’<sup>34</sup> Monaghan therefore lost his direct discrimination claim.

*Monaghan* and *Chondol* involved claims for direct religious discrimination and these were given short shrift for the reasons noted. With hindsight, it is surprising that the claimants did not also bring claims for indirect discrimination which would have required the employer to demonstrate the proportionality of imposing a requirement which had an adverse impact on Christians.

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<sup>33</sup> *Monaghan v Leicester Young Men’s Christian Association* (2004) ET Case No. 1901830/04.

<sup>34</sup> *ibid.* [28].

Both direct and indirect discrimination claims were, however, brought in similar circumstances in *Amachree v Wandsworth Borough Council*. In this case, a homelessness housing officer, Duke Amachree, brought a complaint of discrimination and unfair dismissal following the termination of his job at Wandsworth Borough Council. A disciplinary investigation leading to his eventual dismissal, followed from a complaint by a ‘service user’ in January 2009, who was seeking housing advice, and was interviewed by Amachree. The tribunal referred to her as ‘Ms X’.<sup>35</sup> During the course of the interview, Ms X revealed that she had a chronic illness and needed to live near a hospital as a result. According to the complaint by Ms X, Amachree then ‘proceeded to give [her] a half hour lecture on the fact that there was no such thing as incurable illness, doctors should never be trusted, that [her] problem was that [she] did not have God or faith in [her] life and so was ill as a result.’<sup>36</sup> This left her feeling ‘shocked’ and ‘upset’.<sup>37</sup> Amachree’s own account was softer in tone but not materially different in substance, except that his recollection was of a much shorter conversation.<sup>38</sup>

The Council took the view that this alleged conversation was a serious offence under the relevant disciplinary code such that Amachree might be summarily dismissed, and suspended him pending investigation.<sup>39</sup> It was however later pointed out before the employment tribunal that there was no actual written policy or guidance about raising religious (or any other) issues with service users,<sup>40</sup> and indeed no guidance of this kind was produced in evidence by the respondent. This is arguably an important point which was worthy of greater consideration by the tribunal than it received. As Berg points out, where employers have no clear over-arching ‘content-neutral’ policy concerning employee speech, then ‘a danger exists than the employer’s restriction of speech will be selective’ (i.e. more likely to be punitive in the case of religious speech

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<sup>35</sup> *ibid.* [12].

<sup>36</sup> *ibid.* [13].

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.* [14].

<sup>39</sup> *ibid.* [15].

<sup>40</sup> *ibid.* [31(1)].

than other forms of speech).<sup>41</sup> This argument might have been put (and considered) more strongly than was the case. Equally, it could be argued that the absence of clear employee guidelines should substantially increase the burden on the employer to show that gross misconduct was a reasonable finding on investigation, as the employee was patently not engaging in activity which was expressly forbidden.

Amachree was supported by the Christian Legal Centre<sup>42</sup> who provided a solicitor to accompany him to his internal disciplinary hearings. During the course of one of these hearings, the solicitor asked two pertinent questions, designed to probe the extent of the application of the apparent policy: firstly, would there be a problem manifesting a belief ‘physically’ (giving the example of a turban)?; and, secondly, would it be acceptable to say ‘God bless’ as a valedictory greeting? No response to the first question is recorded in the judgment, but the response to the second was that it would not be appropriate.<sup>43</sup>

Following this meeting, and with Amachree’s consent, the Christian Legal Centre issued a somewhat inflammatory press release, headed: ‘London Homelessness Prevention Officer told “say God bless” and we’ll sack you.’<sup>44</sup> The press release itself contained information about Ms X, including the fact she was homeless and had a chronic health condition. Further newspaper articles, for which Amachree was thought to have been a key source, provided more information about the woman’s age, health condition and occupation to the point where she could be identified by at least one person who knew her father.<sup>45</sup> What this meant for Amachree, still at this

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<sup>41</sup> Berg, ‘Religious speech in the workplace’, 982.

<sup>42</sup> *Case Summaries*, Christian Legal Centre, October 2011, 28; copy at: <<<http://www.christianconcern.com/sites/default/files/docs/ChristianLegalCentre-Case-Summaries.pdf>>>, accessed 20 February 2012.

<sup>43</sup> *Amachree* [18].

<sup>44</sup> *ibid.* [19]. The press release is found in full at: <<<http://www.christianconcern.com/press-release/clc-case-say-god-bless-and-well-sack-you>>>, accessed 20 February 2012.

<sup>45</sup> *ibid.* [19]. The judgment records that officials at the council were also quoted anonymously in newspaper articles and gave comments which could be construed as biased against Amachree: see for example, E Andrews, ‘Council worker suspended for talking to terminally ill client about God’, *Daily Mail* (London, 30 March 2009); copy at: <<<http://www.dailymail.co.uk/news/article->

stage an employee, was that the employer had a much more powerful case for his dismissal, this time on the grounds of breach of the confidentiality which a service user was entitled to expect.<sup>46</sup>

At length, Amachree was dismissed on two counts of gross misconduct: the original incident itself, and the subsequent breach of Ms X's confidentiality.<sup>47</sup> At the employment tribunal, Amachree claimed direct and indirect discrimination and unfair dismissal. The direct discrimination claim was unsuccessful on the familiar grounds that the employer had not penalised Amachree because of his religious beliefs but because of his actions. This was of course predictable in the light of preceding cases, particularly *Chondol*. The claim for indirect discrimination was however made imaginatively, including the submission that for the Council to instigate a policy prohibiting religious discussion amounted to a provision, criterion or practice (PCP) which had an adverse impact on Christians, putting them at a particular disadvantage compared to people of other religious faiths, agnostics or atheists. The rationale for this contention was that Christians are uniquely required, by virtue of their faith, to 'live out' their religious beliefs 'in both word and deed'.<sup>48</sup>

This argument was dismissed by the tribunal on the basis that other religions required a similar commitment by followers live their lives in conformity to religious teachings. This is of course a reasonable conclusion and with hindsight it is perhaps regrettable that the claimant's case that he was obliged to 'live out' his faith was constructed so widely, rather than focussing on a more specific Christian obligation to 'bear witness' verbally to others. It should be noted however, that the tribunal did consider this possibility, although not asked to do so, and opined that a narrower rule preventing proselytism would also adversely affect other religions in the same way.<sup>49</sup> This point is of course contentious, but the relevant arguments were not raised. This is a pity because there is an argument that Christians, for whom there are no mandatory

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[1165633/Council-worker-suspended-talking-terminally-ill-client-God.html](#)>>, accessed 20 February 2012.

<sup>46</sup> *Amachree* [24].

<sup>47</sup> *ibid.* [30].

<sup>48</sup> *ibid.* [47].

<sup>49</sup> *ibid.* [168].

religious dress or grooming requirements, receive no benefit from religious accommodations by employers which allow for these aspects only.<sup>50</sup> Instead, they may feel mandated to articulate their beliefs to others verbally. Although the rules were not expressly set out in policy terms in this case, it is apparent from the responses to questions by the Christian Legal Centre solicitor that Wandsworth Borough Council's emergent policy prevented verbal rather than visual expression. This suggests that the policy could indeed be construed as having a differential adverse impact on Christians vis-à-vis people of other faiths, contrary to the reasoning of the tribunal. However, this would only meet the first part of the test for indirect discrimination. The second is of course the employer's justification. In this case, the tribunal argued that Wandsworth would in any event be able to justify its position as a proportionate means of achieving a legitimate aim. As it stated:

Further, if there were any evidence of disparate impact, it was the tribunal's assessment that ... a practice of not allowing the discussion of irrelevant matters at interviews was legitimate – namely to ensure that a professional, focused, efficient and cost-effective service was delivered to members of the public – and that this was achieved by the proportionate means of preventing staff from straying off the relevant subject matter.<sup>51</sup>

The claim for unfair dismissal also failed, but this was chiefly a result of the breach of confidentiality, the tribunal expressing doubts as to whether or not to dismiss Amachree on the sole basis of his remarks to Ms X would meet the test of reasonableness.<sup>52</sup> This is a highly significant point, suggesting that if discrimination law cannot provide protection to individuals dismissed for verbally articulating their religious convictions, there remains the possibility that the unfair dismissal protections of the Employment Rights Act might.<sup>53</sup> If this were to be adopted as a standard by a higher court, it would also suggest that employers may be limited in

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<sup>50</sup> See discussion in Chapter 6. This point was also made in oral argument in *Eweida v UK*.

<sup>51</sup> *Amachree v Wandsworth BC* [168].

<sup>52</sup> *ibid.* [136].

<sup>53</sup> Although, as it will be recalled from *Copsey*, Article 9 ECHR is still not engaged in the event of a dismissal; thus, any protection derives from the Employment Rights Act 1996 (Part X) alone (see Chapter 5).

how far they can go in reacting to verbal religious expression, even in situations involving clients. It may be, for example, that a warning is considered to be more proportionate than a summary dismissal.<sup>54</sup> It is also rather salutatory to note that Amachree was, with hindsight, poorly advised by the Christian Legal Centre in the decision to put the case in the media spotlight,<sup>55</sup> presumably with the intention of putting pressure on Wandsworth Borough Council to drop their disciplinary proceedings – a tactic which backfired to the extent of providing a basis for his dismissal which the tribunal considered to be well within the employer’s band of reasonable responses.<sup>56</sup>

As noted in Chapter 4, professional employment is governed by regulation as well as employment law, and the case of Dr Richard Scott involved the alleged contravention of the latter, established by the General Medical Council.<sup>57</sup> Scott was one of six Christian partners in Bethesda Medical Centre, a general medical practice in Kent. The Christian character of the practice, and its bearing on the service patients are likely to receive, is clear from its stated aims:

The six partners are all practising Christians from a variety of churches and their faith guides the way in which they view their work and responsibilities to the patients and employees. The Partners feel that the offer of talking to you on spiritual matters is of great benefit. If you do not wish this, that is your right and will not affect your

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<sup>54</sup> This point was also made by a bank nurse who felt his employer had over-reacted by ending his contract, rather than merely offering him corrective advice, as a result of a brief training simulation where he advised ‘patients’ to pray; see A Alderson, ‘Nurse loses job after urging patients to find God during a training course’, *The Daily Telegraph* (London, 23 May 2009); copy at: << <http://www.telegraph.co.uk/news/religion/5373122/Nurse-loses-job-after-urging-patients-to-find-God-during-a-training-course.html>>>, accessed 21 February 2012.

<sup>55</sup> Although the tribunal was satisfied that Amachree was fully culpable with regard to this decision; see *Amachree* [139].

<sup>56</sup> Per the test established in *BHS Stores v Burchell* [1980] ICR303.

<sup>57</sup> The GMC is empowered to issue guidance on ‘conduct, performance and ethics’, and to investigate complaints of non-compliance, under the Medical Act 1983, s 35.

medical care. Please tell the doctor (or drop a note to the Practice Manager) if you do not wish to speak on matters of faith.<sup>58</sup>

These aims were publicised on the practice website.

In 2011 a complaint to the General Medical Council that he was ‘pushing religion’ was brought against Dr Scott by the mother of a 24 year old patient (but on his behalf). Dr Scott had reportedly told the patient that ‘[he] had something to offer [the patient] which would cure him for good and that this was his one and only hope in recovery’ and that ‘his own religion could not offer him any protection and that no other religion in the world could offer [the patient] what Jesus could offer him’.<sup>59</sup> Following an investigatory hearing, Dr Scott was given a formal warning for failing to meet the standards expected of a doctor, having ‘sought to impose [his] own beliefs on [his] patient [and] thereby caused the patient distress through insensitive expression of [ ] religious beliefs.’<sup>60</sup>

The case is interesting in two ways. The first is the conclusion reached by the GMC, that Dr Scott was in breach of professional guidelines by discussing his religious beliefs with his patient. The relevant section in the GMC’s binding guidance on good practice relating to a doctor’s religion and belief states that: ‘You must not express to your patients your personal beliefs, including political, religious or moral beliefs, in ways that exploit their vulnerability or that are likely to cause them distress.’<sup>61</sup> Supplementary guidance offers slightly more detail:

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<sup>58</sup> Bethesda Medical Centre, ‘Our Ethos’, at << [http://www.bethesdamc.co.uk/about\\_us.html](http://www.bethesdamc.co.uk/about_us.html)>>, accessed 27 February 2012.

<sup>59</sup> General Medical Council, Minutes of Investigation Committee (Oral) hearing in the case of Dr Richard Scott, 11-14 June 2012; copy at: << <http://www.gmc-uk.org/static/documents/content/Scott.pdf>>>, accessed 17 September 2012. The precise phrasing was a matter of dispute.

<sup>60</sup> *ibid.*

<sup>61</sup> General Medical Council, *Good Medical Practice: Maintaining trust in the profession* (13 November 2006), s 33; copy at: << [http://www.gmc-uk.org/guidance/good\\_medical\\_practice.asp](http://www.gmc-uk.org/guidance/good_medical_practice.asp)>>, accessed 27 February 2012.

You should not normally discuss your personal beliefs with patients unless those beliefs are directly relevant to the patient's care. You must not impose your beliefs on patients, or cause distress by the inappropriate or insensitive expression of religious, political or other beliefs or views. Equally, you must not put pressure on patients to discuss or justify their beliefs (or the absence of them).<sup>62</sup>

The problem in this case is one of interpretation. The guidelines are clearly not rigid; if they were, there would be an explicit prohibition on discussions involving a medical practitioner's religious beliefs. Instead, the guidelines appear to allow scope for such discussions. Indeed the guidelines were broadly welcomed by the Christian Medical Fellowship, at the time of drafting, on the basis that there was an implicit recognition in the guidelines that expressing religious beliefs can be considered legitimate:

We support the view ... that doctors should not 'impose' their beliefs, and likewise that there should not be 'inappropriate...expression' of them. But the use of the word 'inappropriate' means that there must be possible [sic] an expression of beliefs which is 'appropriate'. We are glad the GMC recognises this.<sup>63</sup>

Whilst the restrictions on doctors expressing their beliefs are not definitive, they clearly revolve around concepts such as the apparent vulnerability of patients; the sensitivity with which a doctor expresses her beliefs; and the relevance of these beliefs to patient care. The latter is particularly problematic as a Christian doctor might see what she believes to be Christian truths as highly relevant to an individual patient's health and well-being (perhaps particularly mental health) in a way that others might not. This would appear, *prima facie*, to leave a large degree of discretion to individual practitioners. Dr Scott's interpretation of his actions was that they were within the margins afforded to him by the guidance, and he would appear to have a reasonable basis for this belief; the GMC apparently differed.

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<sup>62</sup> General Medical Council, *Personal Beliefs and Medical Practice* (March 2008), s 19; copy at: <<[http://www.gmc-uk.org/guidance/ethical\\_guidance/personal\\_beliefs.asp](http://www.gmc-uk.org/guidance/ethical_guidance/personal_beliefs.asp)>>, accessed 27 February 2012.

<sup>63</sup> Christian Medical Fellowship, *An online submission from the Christian Medical Fellowship to Personal Beliefs and Medical Practice – GMC Consultation* (25 September 2007); copy at: <<<http://www.cmf.org.uk/publicpolicy/submissions/?id=47>>>, accessed 2 May 2012.

The second issue follows from the first. The interpretation of the relevant guidance by the GMC in Dr Scott's case was certainly a restrictive one to the point where it seems difficult to envisage how the Bethesda Medical Centre would be able to continue to act upon its aim of talking to patients about spiritual matters (unless the patients choose to 'opt out' of this). Among the religious liberty issues at stake here is the notional right of individuals to group together into islands of exclusivity – here, for Christian doctors to work together to provide what they regard as a Christian medical service to the community. This right, in its fullest form, is significantly curtailed if they are prevented from articulating their Christian beliefs, and the value of these, to patients.

### **An offer to pray**

The Scott case relates to a form of proselytism, a proactive sharing of religious convictions with patients. As discussed in the introduction, there are other forms of active manifestation in the workplace. Employees may, for example, wish to invoke God's blessing when dealing with others,<sup>64</sup> or they may wish to pray for others. How far making an offer to pray for someone during the course of employment leads to the risk of disciplinary action was illustrated in the case of a Christian nurse, Caroline Petrie, who was suspended from her work as a community bank nurse at North Somerset Primary Care Trust following complaints that she had offered to pray for an elderly patient after visiting her home. She was suspended pending investigation for misconduct by the Trust on the basis that she had failed to meet her obligations in respect of equality and diversity under the Nursing and Midwifery Council (NMC) code.<sup>65</sup> This was apparently the second incident in which Petrie had been accused of transgressing the code – a year earlier she had been reprimanded for handing a prayer card to a patient.<sup>66</sup> The NMC code is much briefer than the GMC equivalent. There

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<sup>64</sup> For example, in a US case, two employees sued their employer following their dismissals for saying 'Praise the Lord' and 'God bless you' to customers; see *Banks v Service America Corp.*, 952 F. Supp. 703 (D. Kan. 1996).

<sup>65</sup> A Alderson, 'Nurse is suspended for offering to pray for a patient', *The Sunday Telegraph* (London, 31 January 2009) 5.

<sup>66</sup> *ibid.*

are two relevant sections. The first states that the nurse ‘must demonstrate a personal and professional commitment to equality and diversity’.<sup>67</sup> Quite what is meant by ‘equality and diversity’ is left unexplained. Perhaps more problematically still, whatever it means, nurses are apparently required to demonstrate both a ‘personal’ and a ‘professional’ commitment to it. Whilst the latter might be unsurprising, representing the public attitude of the nurse, the former is more troubling as it appears to transgress into the *forum internum* – the private and personal beliefs and convictions of an individual. It is submitted that this is likely to contravene the ECHR.<sup>68</sup> The second relevant section states that the nurse must not use his or her ‘professional status to promote causes that are not related to health’.<sup>69</sup> In its plain meaning, this certainly may be interpreted as preventing straightforward ‘proselytism’ (i.e. seeking to convert others to a religious belief). Such a prohibition seems in keeping also with the spirit of rather poorly written guidelines intended to have general effect amongst NHS employees (albeit that they confusingly conflate together proselytism, religious discussions and religiously motivated comments about sexual orientation):

Members of some religions, including Mormons, Jehovah’s Witnesses, evangelical Christians and Muslims, are expected to preach and to try to convert other people. In a workplace environment this can cause many problems, as non-religious people and those from other religions or beliefs could feel harassed and intimidated by this behaviour. This is especially the case when particular views on matters such as sexual orientation, gender and single parents are aired in a workplace environment, potentially causing great offence to other workers or indeed patients or visitors who are within hearing. To avoid misunderstandings and complaints on this issue, it should be made clear to everyone from the first day of training and/or employment, and regularly restated, that such behaviour, notwithstanding religious beliefs, could be construed as harassment under the disciplinary and grievance procedures.<sup>70</sup>

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<sup>67</sup> Nursing and Midwifery Council, *The code: Standards of conduct, performance and ethics for nurses and midwives* (1 May 2008), s 48; copy at: <<<http://www.nmc-uk.org/Nurses-and-midwives/The-code/The-code-in-full/#reputation>>>, accessed 27 February 2012.

<sup>68</sup> See discussion in Chapter 4.

<sup>69</sup> *ibid.*, s 59.

<sup>70</sup> Department of Health, *Religion or belief: A practical guide for the NHS* (Department of Health, January 2009), 22; copy at:

However, it is difficult to see how Petrie's offer of prayer, by comparison to proselytism a relatively unobtrusive expression of religious belief, can be said to fall within the definitions of either 'promotion' of her beliefs (under the NMC guidelines), or of proselytism (under the wider NHS guidelines), except by a very broad and creative construction by her managers.

Petrie's case was taken up by the Christian Legal Centre and given widespread publicity.<sup>71</sup> At length, Petrie was reinstated by the Trust which issued a statement that it now recognised that '[i]t is acceptable to offer spiritual support as part of care when the patient asks for it.'<sup>72</sup> This represented some movement away from absolute hostility to verbal religious expression, but was still too restrictive for Petrie, and by extension others with similar beliefs. As Petrie reportedly said, 'I cannot divide my faith from my nursing care'.<sup>73</sup>

However, although Petrie herself was unwilling to separate her work from her religious convictions, some recent research into the 'identities' of student nursing staff with religious convictions suggests that many others, perhaps particularly those being inducted into the NHS culture, have felt forced into implementing just such a divide between their professional and private selves. The authors of the research concluded:

The participants in our research adopted two modes of presenting themselves. In the hospital, they put on a front which was professionally acceptable by concealing the religious beliefs that they perceived as a possible cause of conflicts between values. Where there was the possibility of conflict, particularly in the practice setting, the students adopted a 'conventional' nursing identity, being careful about whether and

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<<[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digitalasset/dh\\_093132.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_093132.pdf)>>, accessed 27 February 2012.

<sup>71</sup> See <<http://www.christianconcern.com/cases/caroline-petrie>>, accessed 27 February 2012. On this occasion personal details about the patient who complained were not made public.

<sup>72</sup> Caroline Gammell, 'Nurse Caroline Petrie: I will continue praying for patients' *The Daily Telegraph* (London, 7 February 2009); copy at: <<<http://www.telegraph.co.uk/news/religion/4537452/Nurse-Caroline-Petrie-I-will-continue-praying-for-patients.html>>>, accessed 27 February 2012.

<sup>73</sup> *ibid.*

how they presented their beliefs. However ... the students were able to return to their 'true' identity as religious people when they joined fellow believers in their Sunday congregations."<sup>74</sup>

It may be that a combination of specific policy, and also the 'chilling effect' of cases like that involving Caroline Petrie, have resulted in a reluctance by some religious employees to make their faith convictions known in workplaces like the NHS.

### **Active expression and sexual orientation**

As noted in the NHS guidelines, it is recognised that some employees may 'actively manifest' their religious beliefs by expressing a critical view of aspects of some people's lifestyles or conduct. This may be directed specifically to other actors in the workplace (for example by sending letters to fellow employees pointing out particular sins they were thought to be committing).<sup>75</sup> Alternatively, it may be generalised, but might offend particular groups of people (such as supporters of abortion).<sup>76</sup> Most interest in public discourse has been where religious views are expressed which are critical of homosexuality. Such views are almost invariably labelled 'homophobic' and, outside the workplace sphere, even mildly critical views have triggered police investigations in response to complaints of 'homophobic hate speech'.<sup>77</sup> Within the

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<sup>74</sup> S Timmons and A Narayanasamy, 'How do Religious People Navigate a Secular Organisation? Religious Nursing Students in the British National Health Service' (2011) 26 *Journal of Contemporary Religion* 451, 462.

<sup>75</sup> Per the facts of the US case, *Chalmers v Tulon Company*, 101 F.3d 1012 (4<sup>th</sup> Cir. 1996).

<sup>76</sup> For example, a Roman Catholic health worker was reportedly suspended from Central North West London Mental Health Trust for handing out a booklet critical of abortion to colleagues working in family planning roles; see T Ross, 'Defiant Christian health worker refuses to stop handing out anti-abortion book' *The Daily Telegraph* (London, 22 December 2010); copy at: <<<http://www.telegraph.co.uk/news/uknews/8220299/Defiant-Christian-health-worker-refuses-to-stop-handing-out-anti-abortion-book.html>>>, accessed 6 March 2012.

<sup>77</sup> For example, the writer Lynette Burrows was questioned by police (investigating a reported 'homophobic incident') after she said on a radio programme that gay men might not be suitable to adopt children; see S Pook, 'Police warn author over gay comments' *The Daily Telegraph* (London, 10 December 2005) 2.

workplace itself, workers are protected from harassment under the protected characteristic of sexual orientation.<sup>78</sup> However, the right to be critical of homosexual behaviour is also an aspect of religious expression and as such is likely to fall within the notional protections for the protected characteristic of religion and belief. In consequence, there are competing rights at play.<sup>79</sup> It would appear from the cases which follow in this section that a likely outcome is that sexual orientation rights are generally to be preferred over religious expression and thus ‘homophobic speech’ is likely to be forbidden in most workplaces (e.g. the NHS), certainly those with discrimination or harassment policies in place. Quite how ‘homophobic speech’ is defined, and with what enthusiasm it is punished, are of course different questions.

In an early case under the 2003 Religion and Belief Regulations, *Apelogun Gabriels*, who had worked for the London Borough of Lambeth,<sup>80</sup> claimed that his dismissal for distributing ‘homophobic material’ to co-workers was unfair.<sup>81</sup> He also claimed, *inter alia*, direct and indirect religious discrimination. Gabriels was a lay preacher and he also organised prayer meetings for Christian staff which were held (by permission) on council premises. During one such prayer meeting, Gabriels presented a hand-out to participants which contained verses which he had selected from the Bible which were critical of homosexual activity. The hand-outs were also shared with a small number of co-workers who were not members of the prayer group and were seen by some other staff members who, finding them offensive on the grounds of sexual orientation made an official complaint. Following this complaint, Gabriels was subject to the disciplinary process and was, at length, dismissed for reasons of gross misconduct.

It is unsurprising that Gabriels was disciplined, given that he allowed material which was offensive on the grounds of sexual orientation to be promulgated, quite unnecessarily, outside of the prayer group forum. Nevertheless, the decision to dismiss him may have been unduly harsh. The material he circulated was not targeted

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<sup>78</sup> As discussed in Chapter 4.

<sup>79</sup> See Leigh, ‘Homophobic Speech’.

<sup>80</sup> *Apelogun Gabriels v London Borough of Lambeth* (2006) ET Case No. 2301976/05.

<sup>81</sup> *ibid.* [3].

against particular co-workers and, although apparently rather careless, it was not suggested that he deliberately handed the material to people who he expected to be offended by it.

Whilst both the employer and, subsequently, the tribunal took seriously the right of gay and lesbian staff to be free from harassment, both appeared to take the competing claim - the right of a Christian employee to quote Bible verses – rather less seriously, to the extent that this right barely weighed at all in the decision making process. Indeed the tribunal appeared to have difficulty with the Bible itself, commenting, ‘the Tribunal considered the wording of the selected extracts from the Bible involved to be uncompromising and strongly condemnatory of homosexual conduct.’<sup>82</sup> It is submitted that this is a concerning observation by the employment tribunal. As Hambler comments:

As it is not easy to find references to homosexuality within the plain meaning of the Bible which are not in some way ‘uncompromising and strongly condemnatory’ it is difficult quite to see what the tribunal was driving at here except unwisely to do what in effect the Court of Appeal in *Amicus v. Secretary of State for Trade and Industry* refused to do and seek to exclude ‘homophobic verses’ of the Bible from acceptable discourse.<sup>83</sup>

It may be that tribunals should more sensitive to Lord Walker’s guidance that ‘in matters of human rights, the court should not show liberal tolerance only to tolerant liberals’,<sup>84</sup> and appreciate that religious views (for example, about homosexuality), which many people consider to be beyond the pale, find a basis in a legitimate understanding of sacred texts. This is not to suggest that religious employees should have *carte blanche* to air these views whenever they wish in the workplace.

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<sup>82</sup> *ibid.* [9].

<sup>83</sup> Hambler, ‘A Private Matter’, 131. The tribunal did not go as far as some courts have gone in condemning the quotation of Biblical texts which are condemnatory of homosexuality; see for example Judge Barclay’s observation that ‘the Biblical passage which suggest that if a man lies with a man they must be put to death exposes homosexuals to hatred’ in the Canadian case, *Owens v Saskatchewan (Human Rights Commission)* (2002) SKQB 506 (CanLII) [21].

<sup>84</sup> *Williamson* [60].

However, the mere fact that these views are expressed should not tilt the outcome of a disciplinary investigation or a tribunal hearing before other factors are taken into consideration. There is a strong hint of this in the *Apelogun Gabriels* decision.<sup>85</sup>

Whereas in *Apelogun Gabriels* it was clear that the ‘active manifestation’ took place within the workplace and in work time, the boundaries between work time and an employee’s ‘own time’ may not always be immediately evident. For example, a shift worker in a care home, David Booker, was reportedly suspended in 2009 after a co-worker complained about his Christian views on homosexual clergy and same-sex marriages which had come to light during a ‘wide-ranging conversation’ between the two workers during a night shift.<sup>86</sup> How far such a conversation can be said to have been a work conversation and how far a private one is not entirely clear-cut, taking place as it did in a work environment but voluntarily between two people during a period well outside of normal working hours, and where the work itself clearly did not require concentrated attention.<sup>87</sup> As a result, suspension (with the possibility of dismissal) might be considered a somewhat heavy-handed response by the employer.

A further example illustrative of the apparent grey area between private and public conduct is the High Court action brought by Adrian Smith, a housing manager and committed Christian, who worked for Trafford Housing Trust and

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<sup>85</sup> Arguably this was also the case in *Haye v Lewisham BC* (2010), ET Case No. 2301852/2009, where the claimant had been dismissed for e-mailing, from a work computer, the Rev Sharon Ferguson, the Chief Executive of the Lesbian and Gay Christian Movement, to accuse the recipient of being enslaved to an evil sexual spirit and urged her to repent or go to Hell [6]. There were some ambiguities around the conduct of the claimant, particularly the extent to which she believed that her email, sent through an anonymous ‘gateway’ could be traced back to her employer. Nevertheless, the employer chose to dismiss her for gross misconduct rather than impose a lesser sanction.

<sup>86</sup> A Alderson, ‘Charity worker suspended over ‘religious debate’ with work colleague’, *The Daily Telegraph* (London, 11 April 2009), copy at: <<  
<http://www.telegraph.co.uk/news/religion/5140133/Charity-worker-suspended-over-religious-debate-with-work-colleague.html>>>, accessed 21 February 2012.

<sup>87</sup> For further discussion of the private/public divide in the workplace, see Mantouvalou, ‘Human Rights and Unfair Dismissal’; see also discussion in Chapter 2 above.

who was demoted with a 40% reduction in pay as a disciplinary sanction.<sup>88</sup> This was because he had made comments on his Facebook site mildly critical of the prospect that same-sex marriages might be conducted in church. The Trust argued, *inter alia*, that posting such comments on Facebook had the potential to prejudice the reputation of the Trust and breached the staff code of conduct (by promoting religious views to colleagues and customers);<sup>89</sup> and that this amounted to gross misconduct.<sup>90</sup>

Significantly, Briggs J., who found that Mr Smith had been wrongfully dismissed, determined that, although on his Facebook page Mr Smith had listed his occupation as a manager at the Trafford Housing Trust, no reasonable reader would thereby conclude that his postings were made on the Trust's behalf.<sup>91</sup> He also considered that there was no realistic damage to the reputation of the Trust by association with the comments, given that they were made by an employee in a private capacity, outside working hours and in a moderate way.<sup>92</sup>

Briggs J. also dealt with the issue of to what extent the Trust could legitimately claim that its code of conduct applied beyond the workplace to govern the opinions expressed on Smith's own Facebook page and accessible to colleagues, concluding that it did not:

... it was his colleagues' choice, rather than his, to become his friends, and that it was the mere happenstance of their having become aware of him at work that led them to do so. [Smith] was in principle free to express his religious and

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<sup>88</sup> *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).

<sup>89</sup> *ibid.* [38].

<sup>90</sup> *ibid.* [41]. For a critical account of employers' surveillance of employee social networking spaces and the consequent violation of privacy that this may entail, see: L Clark and S Roberts, 'Employer's Use of Social Networking Sites: A Socially Irresponsible Practice' (2010) 95 *Journal of Business Ethics* 507. The legal issues are considered in A Broughton et al, *Workplaces and Social Networking: The Implications for Employment Relations* (ACAS Research Paper 11/11, 2010).

<sup>91</sup> *Smith* [57].

<sup>92</sup> *ibid.* [63].

political views on his Facebook, provided he acted lawfully, and it was for the recipients to choose whether or not to receive them.<sup>93</sup>

He also opined that an employer's prohibition on the promotion of religious views could only apply within the workplace because of the clear 'potential to interfere with the employee's rights of freedom of expression and belief' if the employer attempted to apply it to an employee's non-work activities.<sup>94</sup> He did acknowledge some (presumably rare) exceptions to this rule, such as the sending of an email from home targeted at work colleagues.<sup>95</sup>

Although the facts of this case arguably made the decision clear-cut, the judgment is nonetheless welcome for making it clear that an employer cannot normally fetter an employee's religious expression outside of the workplace, with a particular emphasis on the private use of social media. Whether or not an employer would be acting reasonably if it attempted to fetter 'moderate' religious expression (like that of Smith) *within* the workplace remains however an issue to be properly tested in a court or tribunal in the future (although the analysis in the *Smith* judgment gives a hint that perhaps it would not be).

## ***Conclusion***

### **Specific issues arising**

In this chapter, a range of examples of 'active manifestation' have been considered, and how both employers and tribunals have responded. In this section, some general, and tentative, observations will be made on the basis of these examples.

The first point to note is the apparently hostile reaction by some employers to active manifestation. In one sense this is not surprising, given the legal framework in place. As Berg notes with reference to the US (but with equal applicability to the UK):

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<sup>93</sup> *ibid* [78] (Briggs J).

<sup>94</sup> *ibid.* [72] (Briggs J).

<sup>95</sup> *ibid.* [73].

Remember that religious speech is, at least potentially, singled out for special limitation in the workplace by the very existence of anti-harassment rules. ... Without the duty to accommodate weighing in the balance, the law arguably creates incentives for employers to restrict religious speech.<sup>96</sup>

As there is no specific duty to accommodate (except that very weak version which can be inferred from the first stage of the test for indirect discrimination),<sup>97</sup> it is perhaps unsurprising that many employers have taken a hostile stance which is in this sense the easiest option. However, such a policy may be short-sighted for other reasons as it entails a failure to recognise the malign effects on employee morale of using workplace regulation to outlaw religious speech in total.<sup>98</sup>

The second point to note from evidence considered in this chapter is that some employers appear not only to be hostile to active religious expression but seem to over-react when faced with examples of it. This is particularly evident in the various decisions to dismiss staff often for a one-off incident. Although tribunals have been reluctant to find dismissals in such circumstances unfair, it is noteworthy that in *Amachree* the tribunal strongly implied that dismissal for the ‘incident’ of proselytism itself would not be reasonable. Such an over-reaction creates injustice for the religious employees concerned and may intimidate other staff to hide their religious beliefs in the workplace for fear of possible consequences.

The third point to note is that, in the (admittedly limited) evidence considered in this chapter, employers may not always seek to draw distinctions between different forms of active manifestation, particularly in the interpretation of their policies. Thus, in the NHS, an offer to pray for a patient may be seen in a similar light as an attempt to convert that patient. This suggests, *inter alia*, that the ECHR concepts of ‘proper’ and ‘improper’ proselytism have not percolated downwards to inform policy making and interpretation. Not employing this dichotomy has potential advantages and

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<sup>96</sup> Berg, ‘Religious speech in the workplace’, 982.

<sup>97</sup> See discussion in Chapter 4 above.

<sup>98</sup> D Epstein, ‘Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment’ (1997) 85 Geo LJ 649, 664. The author does not specifically refer to religious speech but her analysis is clearly applicable to religion.

disadvantages. In this instance it is the disadvantages which are in play, as a failure to distinguish between milder forms of religious expression, such as an offer to pray (to which it might be argued no reasonable person could legitimately take offence) and stronger forms (where there might be legitimate objection), merely results in the suppression by employers of both.

However, to rely without further discrimination on a straightforward dichotomy between proselytism (forbidden) and expression short of proselytism (permitted), could also lead to injustice. A proposed way forward for employers when engaging in policy-making, and for tribunal investigations, would be to use the ‘proper/improper’ filter (although adopting more useful terminology) as a first stage test, such that ‘mild’ expression is always permitted; ‘stronger’ expression is not forbidden *per se*, but may be subject to further restrictions (which may depend on the nature of the work, or the job role, or the organisational environment). In policy formation, the onus should always be on the employer to offer genuine and credible reasons for restrictions on stronger forms of religious expression. As Berg suggests ‘... requiring the employer to show some disruption or other significant cost before it restricts the speech can ensure that the employer acts from more than just disagreement with or hostility to the employee’s message. The high status of religious speech justifies efforts to root out such hostility.’<sup>99</sup>

The fourth point to note is the implications of active manifestation beyond the workplace. Under the ECHR, whilst the specific situation rule is controversially applied to allow employers to restrict manifestation of religion in the workplace, the same rule cannot be applied to manifestation beyond the workplace. However, amongst the cases considered in this chapter, there have been some instances where employers have penalised employees for active manifestation within a grey area between the work and non-work spheres. This ‘grey area’ is perhaps in part a consequence of the fact that the domains of work and ‘non-work’ cannot always be neatly compartmentalised.

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<sup>99</sup> Berg, ‘Religious speech in the workplace: harassment or protected speech?’, 982.

## Links to models

In Chapter 3, various models of potential state responses to workplace religious expression were set out. In this section, the evidence for the application of these models to active manifestation will be considered.

Conclusions concerning how courts approach this issue remain tentative because of the very limited authoritative case law. However, what can be ascertained so far is that tribunals certainly have not acted to ‘protect’ religious expression (Model V). Where Article 9 arguments have been advanced (usually indirectly), the specific situation rule has been applied to deny the right to active manifestation. Equally, indirect discrimination claims have been rejected at both the first and the second stages. Instead of protecting active religious expression, tribunals rather allow employers the leeway to exclude religious expression (Model I). This is particularly evident in the discrimination decisions. When it comes to unfair dismissal, the evidence appears to be that tribunals adopt a more *laissez-faire* approach (Model III). The emerging evidence here is not necessarily one of uncritical endorsement of decisions to dismiss because of active manifestation, but nevertheless a reluctance to substitute a finding of unfair dismissal – hence in *Amachree* there is a clear suggestion that the employer had over-reacted by dismissing Amachree, but the dismissal was allowed to stand (ostensibly for different reasons).

The reasons for the tribunals’ stance may well be due, in part, to a general suspicion of ‘individuals whose religious beliefs and practices are an integral part of their daily lives’<sup>100</sup> (a suspicion shared by employers). However, it may also be due, in another part, to tribunals’ awareness of laws concerning harassment and their double effect on religious expression. Consideration of the possible effects of ‘offence’ to others forms part of the analysis, implicitly or explicitly (for example, in *Apelogun Gabriels* and *Monaghan*).

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<sup>100</sup> Kaminer, ‘When religious expression creates a hostile work environment’, 112.

As well as providing some indications of the development of judicial approaches (largely at first instance), these cases and examples also provide some evidence of the approaches taken by the state in its capacity as employer. Here, the 'exclusion' model is even more evident. For example, NHS policy, buttressed for many staff by legally-recognised professional regulations, appears to outlaw proselytism and other forms of religious speech without any serious attempt to find any accommodations for those employees for whom religious speech is of primary importance to their identities. Religious employees are therefore forced to 'privatise' their faith, as their employer subordinates their right of active religious expression to the rights of others not to encounter religious expression, whether or not they would find it objectionable.

## Chapter 8: Conclusion

### *The Models Revisited*

The first chapter of this thesis was preoccupied with an attempt to conceptualise and categorise religious expression, and a ‘taxonomy’ of religious expression was presented, ranging from belief and identity to more contentious forms of expression, using the headings: *passive*, *negative* and *active manifestation*. The purpose of the discussion was therefore, in large part, to identify what aspects of religious expression might have an effect on others, with an aim of understanding both the nature of such expression and the motivation underlying it. The second chapter dealt with how the law might *react* to religious expression and set out various models, each of which represented a particular imperative:

- (I) the exclusion model with the aim of suppressing religious expression;
- (II) support for a preferred historic (‘majority’) religion only;
- (III) *laissez-faire* (to allow the employer to respond);
- (IV) protection but only within ‘islands of exclusivity’ (religious organisations);
- (V) protection; and
- (VI) protection for minority religions only.

These models have been used as reference points in the analysis presented in this thesis and will be revisited in the first part of this concluding chapter.

There are three immediate and perhaps unsurprising conclusions which may be drawn from the application of the models. The first is that modern law in England and Wales does not offer any enduring ‘special’ support for the expression of the ‘majority’ historic religion of Christianity in the workplace. There are some very limited exceptions, for example, the existence of an opt-out

for retail workers<sup>1</sup> and the remnants of restrictions on Sunday trading,<sup>2</sup> but, it has been argued, these were concessions during a rapid process of the erosion of State sponsorship of a rest day.<sup>3</sup> Administratively, many government activities cease on Sunday (and often Saturday also), thus providing a rest day for staff, but it may be argued that this is entirely due to the cultural legacy of the timing of a rest day (rather than any enduring deference to Christianity), which a majority of writers agree would be problematic to dismantle, given the difficulties of reaching a consensus on an alternative. The second is that the principle of forming ‘islands of exclusivity’<sup>4</sup> for religious workers to retreat to has been largely rejected. Exemptions from discrimination law are, with the theoretical exception of denominational schools,<sup>5</sup> narrowly drawn for religious ethos organisations making it difficult for them to maintain robustly ‘religious’ staffing policies,<sup>6</sup> particularly given the subordination of these exemptions to other rights in cases where they might involve discrimination on other grounds such as sexual orientation.<sup>7</sup> Looked at more positively, the assumption therefore is that religious people will remain in ‘mainstream’ employment rather than marginalised into religious ‘ghettos’. The third is that employers’ freedom of action has been reduced over time, particularly since 2006, by the passage of laws to regulate religious discrimination, although a degree of discretion still remains.

It is also apparent that the model, protection for minority religions, is influential, but not in its fullest form. The argument that religion should be protected because of its cultural value has not been embodied into law or its interpretation, and remains a theoretical possibility only, albeit one which enjoys a degree of academic support.<sup>8</sup> Nevertheless, the model has some practical influence not least in the focus on minority religions in some of the guidance material (e.g. the

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<sup>1</sup> Employment Rights Act 1996, Part IV; see discussion in Chapter 4.

<sup>2</sup> Sunday Trading Act 1994.

<sup>3</sup> See discussion in Chapter 4.

<sup>4</sup> Esau, ‘Islands of Exclusivity’.

<sup>5</sup> Under the School Standards and Framework Act 1998 (s 58); see discussion in Chapter 4.

<sup>6</sup> Equality Act 2010, Sch 9, s 3.

<sup>7</sup> See *Reaney v Hereford Diocesan Board of Finance*.

<sup>8</sup> See, for example, McColgan, ‘Class wars?’

ACAS guide)<sup>9</sup> and, more significantly, in the more positive impact on minority religions, as opposed to Christianity (a religion more characterised by personal convictions) of the development of the ‘necessity test’ (see below).

Where conclusions are more difficult to draw is in respect of the reach of the remaining models: suppression and protection. The Equality Act 2010, for example, contains elements of both. In making unlawful direct and indirect discrimination because of the protected characteristic of religion, the legislation appears to be congruent with the protection model. Yet, in applying the definition of harassment to religion and belief in the same way as the other relevant protected characteristics,<sup>10</sup> such that workplace religious speech might be considered to create an offensive environment for others and giving employers a clear incentive to suppress it, the legislation appears to be congruent with the exclusion model.

The tension between the models is also evident at a judicial level. In one respect, judges acknowledge the value of religious expression to individual claimants yet, at another, they frequently utilise various devices (such as the specific situation rule, or the necessity test)<sup>11</sup> to prevent the extension of legal protection to religious expression and so allow the employer to suppress it.

What this overall tension between these two (opposite) imperatives points towards is perhaps a more general confusion in respect of religious expression and how far it is deserving of protection. This confusion finds its expression in part in a linked series of dichotomies which appear to have an effect on law-making and judicial interpretation in the United Kingdom: the apparently public or private nature of religion; core and non-core expressions of religion; and the respective roles of choice and obligation in religion.

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<sup>9</sup> ACAS, *Religion or Belief in the Workplace*.

<sup>10</sup> Equality Act 2010, s 26(1).

<sup>11</sup> These terms are discussed in detail in Chapter 4.

## Public/private dichotomy

As discussed in Chapter 2, there is a view that religion, and its outworking, is something essentially private in nature and not something which should be brought into the workplace. Under this perspective, the workplace is considered to be in some way part of the ‘public’ forum, and by contrast, activities take place in the non-work sphere are (usually) ‘private’ in nature. This view appears to inform the ECtHR specific situation rule which implies that an individual’s religious convictions can be taken off at the entrance of the workplace, and put on again at the exit. Such a view might also lead to greater sympathy for that form of negative manifestation of religion in the workplace where employees request time off for pursuing what are, essentially, private devotions. Although these activities may be carried out in community with others, they are nevertheless separate from the workplace (unless the employer has agreed to provide facilities such as a prayer room). The partial success of employment tribunal claims, where time off for religious activities outside of the workplace has been denied, supports this contention.

There is however a problem with this view. It is a highly questionable assumption ‘that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time.’<sup>12</sup> Religious employees do not necessarily accept that their most cherished beliefs should be kept discreetly hidden in public; rather they may ‘seek to integrate their lives and integrate their activities’.<sup>13</sup> Indeed they may feel under an obligation to do so. The public/private (or, alternatively, work/non-work) dichotomy denies religious employees the opportunity to express their beliefs in the workplace; it also risks trivialising religious practices as being at the same level as a sport or leisure activity which an individual pursues in her spare time, with little implication for the rest of her life, including her working life.

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<sup>12</sup> *EEOC v Townley Engineering and Manufacturing Co*, 859 F.2d 610,625 (9th Cir. 1998) (Noonan J, dissenting).

<sup>13</sup> *ibid.*

## Core/non-core dichotomy

A second dichotomy is that which can be identified between ‘core’ and ‘non-core’ religion. This dichotomy most often appears in two ways. The first and most common application of the concept is where it is used to distinguish between elements of religious belief and practice which are seen as giving rise to an absolute right as opposed to those elements which are seen as somehow less significant and with the potential to have restrictions applied. Article 9 ECHR encapsulates this aspect of the dichotomy by identifying the right to freedom of religion as somehow separate from freedom to ‘manifest’ religion. Freedom to manifest religion is clearly a qualified rather than an absolute right, as it is this which can be subjected to restrictions. Essentially the same dichotomy was applied by Lord Justice Neuberger (in *Ladele*) who described Ladele’s conscientious objection (a manifestation of her religion) as ‘not a core part of her religion’;<sup>14</sup> he then gave what can only be taken to be an example of what would constitute a core part of her religion: ‘worshiping as she wished’.<sup>15</sup> In essence, in both ECHR jurisprudence, a distinction is applied between the *forum internum* and the *forum externum*.<sup>16</sup> The precise boundary between these two terms may not always be easy to draw. However, it would seem that in broad terms, and to utilise the typology of religious expression presented at Chapter 2, religious belief and identity and the right to worship with others, are seen by courts to belong to the *forum internum* and so ‘core’; whereas, the forms of expression considered in Chapters 5 to 7 are considered part of the *forum externum* and so ‘non-core’. A very similar distinction has been read into religious discrimination law, such that detrimental treatment due to religious belief receives full protection, under the doctrine of direct discrimination where justification defences are not permissible; whereas religious expression tends to find more qualified protection under the doctrine of indirect discrimination, where justification can be offered as a defence. ‘Non-core’ religious expression does therefore receive some legal recognition; there is *prima facie* protection, but

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<sup>14</sup> *Ladele* (CA) [52].

<sup>15</sup> *ibid.*

<sup>16</sup> *C v the United Kingdom* (1983) 37 DR 142; see discussion in Chapter 2.

there are various bases for restricting such expression, including in consideration of the rights of others,<sup>17</sup> or if the employer is able to show that the restriction represents ‘a proportionate means of achieving a legitimate aim.’<sup>18</sup>

There is, however, a second application of the *core/non-core* dichotomy which essentially involves an assessment by courts of the centrality of particular forms of religious expression to a given religion. Those which are considered central are therefore ‘core’ and carry more weight than those considered to be non-central which could therefore be characterised as ‘non-core’ and thus carry less weight. This point is amply illustrated with reference to a further filter which has been developed in ECHR case law (and has been transferred in turn to domestic discrimination law) - the necessity test, the effect of which has been particularly evident in ‘passive manifestation’ cases. This filter accepts as ‘manifestations’ of religion only those forms of religious expression which are considered to be ‘mandatory’. For this reason, the right to wear a cross at work has been excluded from protection as courts have considered that it is not mandatory to Christianity but only ‘motivated’ by Christianity.<sup>19</sup> As a result, even the ‘first stage’ protection afforded to manifestations of religion can be denied when the necessity test is invoked. This expressly creates a division within the *forum externum*, the effect of which is that non-mandatory forms of religious expression lose even what little protection is offered to mandatory forms. It should be noted that the legitimacy of this filtering device (which, in some recent cases, has not been consistently applied) is currently being challenged in *Eweida v UK* and *Chaplin v UK*; it may be therefore that this obstacle to the protection of religious expression is removed when judgment is handed down.

### **Obligation/choice dichotomy**

A third dichotomy is reflected in the very different attitudes towards the role of choice and its alternative, obligation, as the primary motivation underlying

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<sup>17</sup> Art 9 (2) ECHR.

<sup>18</sup> Equality Act 2010, s 19(2)(d).

<sup>19</sup> See *Eweida v British Airways*.

religious expression. One view is that religion is a matter of obligation – an individual responds to the call of God which he could not resist even if he wanted to.<sup>20</sup> Another view is that religion is essentially a matter of choice. An individual chooses his religion and so chooses to take on the beliefs and obligations associated with that religion. As Lord Justice Sedley put it in *Eweida*:

[T]he same definition is used for all the listed forms of indirect discrimination, relating to age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. One cannot help observing that all of these apart from religion or belief are objective characteristics of individuals; religion and belief alone are matters of choice.<sup>21</sup>

But choice is a questionable concept to apply without qualification to religion and belief. If actions motivated by or expressing religion and belief represent a deliberate choice, then that choice can be denied. The value placed on individual autonomy gives some value to those choices but allows them to be subordinated to other imperatives (such as those arising from the other, apparently immutable ‘protected’ characteristics) with great ease.<sup>22</sup> Moreover, when seen through the prism of ‘choice’, the decisions an individual may make can allow her to be characterised negatively. Thus, a person convinced because of her religious beliefs that she should ‘conscientiously object’ to an aspect of her job, can be described (depending on the nature of the objection) as a ‘discriminator’, and the conscientious objection denied.<sup>23</sup> Such a view plays into a lurking suspicion of religious expression, in its ‘stronger’ forms, as something potentially malign and destabilising, and likely to intrude on the rights of others.

Thus far, an analysis has been presented which suggests that protections for religious expression are in practice weak, not least due to the influence of

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<sup>20</sup> Alternatively, particularly in the case of minority religions, there may be an additional obligation which is owed to a wider group of religious adherents, to follow its ‘cultural’ practices.

<sup>21</sup> *Eweida (CA)* [40] (Sedley LJ).

<sup>22</sup> This analysis gives some advantage to those members of minority religious groups who are also recognised as protected on the basis of their ethnic or racial grouping.

<sup>23</sup> As in *Ladele*; see discussion in Chapter 5.

perspectives which are at best sceptical, at worst hostile. Some of these perspectives find expression in legal approaches which remove protection entirely from some forms of religious expression. Many other imperatives may ‘trump’ the right to religious expression, particularly any rights connected to other protected characteristics, even where indirectly engaged (such as in cases of conscientious objection to activities promoting same-sex relationships). It is submitted that this treatment of religious expression derives from a series of contested beliefs about the essentially private nature of religion, the optionality of various forms of manifestation and the primacy of choice, rather than obligation, in forming religious convictions. The problem with this approach is that it sees religious expression through an external prism and fails to engage with the experience and values of the religious employee.

An alternative approach is to view religion, subject to a test of sincerity,<sup>24</sup> as a highly significant, if not the most significant, aspect of an individual’s life, and the personal autonomy which allows him to pursue that life.<sup>25</sup> Indeed, many religious people build their lives around their religious convictions and are unprepared to compromise these convictions as they feel that their obligations to God outweigh their obligations to human authorities.<sup>26</sup> If this alternative approach is to be preferred then it follows that that the right to express and manifest religious beliefs should be accorded a high status in law – higher than is currently the case such that ‘protection for religious expression’ should be the dominant legal model. How this might be achieved is the subject of the next section.

### ***Moving further towards the Protection Model – An Assessment of the Options***

Thus far it has been argued that whereas there is some protection for workplace religious expression, there is a competing imperative, exclusion, which manifests

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<sup>24</sup> See discussion in Chapter 2.

<sup>25</sup> See discussion in Chapter 3.

<sup>26</sup> See Ahdar and Leigh, *Religious Freedom in the Liberal State*; and also discussion in Chapter 3.

itself in various ways. The result is that religious expression enjoys only partial protection and tends to be relegated to second place when other rights are in play. For religious employees, such protection is therefore inadequate. This inadequacy, however, has a differential effect on the three areas of ‘controversial’ manifestation such that negative manifestation (for reasons of conscience) and active manifestation are the most exposed. It is submitted that, given the arguments considered on the subject of dignity, equality and personal autonomy,<sup>27</sup> not to mention the paramount significance for religious adherents of religious obligation, this situation should be addressed and the law reconsidered to give greater priority to, and indeed buttress, the ‘protection’ imperative. To this end, in the following section, the options for improving legal protection for workplace religious expression will be assessed and, where appropriate, recommendations made.

The analysis which follows will draw on the framework of the three ‘potentially contentious’ forms of religious manifestation which have been employed in this thesis. It is true that the key recommendation which follows (the partial reframing of the doctrine of indirect discrimination) would benefit all three forms. Equally the discussion of reasonable accommodation has a potential resonance for at least two of the forms of manifestation (negative and passive). However, the threefold division remains useful as there are secondary recommendations and discussion points which relate specifically (or most fully) to one particular area of contested manifestation (such as the respective discussions of conscience clauses and the configuration of ‘harassment’ as a form of prohibited conduct). Given the importance of the respective considerations of indirect discrimination and reasonable accommodation, these are debated within the first section dealing with negative manifestation, although cross-referenced where appropriate under the later headings.

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<sup>27</sup> See discussion in Chapter 3.

## Negative Manifestation

Within the domain of negative manifestation, it is submitted that requests for ‘time off’ for religious devotions are a relatively unobtrusive form of manifestation, often taking place outside the workplace and seldom engaging others in any way who do not share the same religious convictions. Nevertheless, there are sometimes clashes between an individual’s religious obligations away from the workplace and the demands of the employer. Whereas it became evident in *Copsey* that Article 9 would offer no protections to an individual penalised for taking time off for religious obligations, the Religion and Belief Regulations 2003 provided a legal recourse. Few cases have progressed beyond the employment tribunals and it is therefore difficult to frame a solid critique at this stage, beyond noting that cases have been both won and lost depending on the employer’s success in offering an adequate ‘practical’ justification for its actions.

That qualification notwithstanding, employment judges should be careful to fully appreciate the significance of the religious obligations for which employees request time off. There also appears to be limited awareness of a Christian’s perceived obligation not to work on a Sunday because of its status as the Sabbath; in the main, a tribunal’s focus is on a claimant’s desire to worship with others at a particular time on a Sunday. This shows only a partial appreciation of the motivation of the religious employee. In these areas, it may be helpful to provide employment judges with training to ensure that they have a fuller appreciation of the religious perspective.

With regard to the rather more contested aspect of negative manifestation, i.e. for reasons of conscientious objection, in the first part of this chapter it was noted that protection in the workplace would appear to be inadequate, particularly if the objection has implications for another protected characteristic. It is submitted that there are broadly three options to increase the level of legal protection for conscience, whilst remaining inclusive of rival claims in the event of a ‘clash of rights’:

- (a) Statutory exemption
- (b) A duty of reasonable accommodation
- (c) Modifying discrimination law.

Each of these options, and their implications, will be explored in this section.<sup>28</sup>

*(a) Statutory Exemption*

It will be recalled from Chapter 4 that an amendment to the Equality Bill 2006 to incorporate a specific statutory exemption for registrars and social workers with a conscientious objection to the outworking of the Civil Partnerships Act 2004 for their respective roles was set out in full.<sup>29</sup> It is a useful example of a ‘conscience clause’, or a specific ‘opt-out’, and there are at least four interesting points to note from the way in which it is drafted. First, it sets out three situations in which employees (in this case, public servants) might wish to invoke a conscientious objection – conscientious objection arising from situations not covered by this amendment are thus ineligible for protection. Second, the situations in which conscientious objection might arise are widely drawn (in contrast to s 4(1) of the Abortion Act). Third, the right to conscientiously object is specifically referenced to an underlying religion and belief giving rise to the objection. Fourth, the right to object, following in the tradition of the Abortion Act, is absolute.

Lady O’Cathain’s amendment sets out one formula for identifying and accepting conscientious objection. There are however other possible formulae, most of which would involve a degree of flexibility around one or more of the four points outlined in the preceding paragraph: i.e. the right could apply to more situations;

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<sup>28</sup> This section draws heavily on the second part of Hambler, ‘Recognising a right to “conscientiously object”’.

<sup>29</sup> Equality Bill 2005, Amendment No. 191A.

it could be more narrowly drawn; the link to religion could be omitted and the right could be conditional. If the right to conscientiously object is to be conditional, then this conditionality is likely to relate to the availability of other employees willing and able to perform the relevant duties. In a US context, Wilson proposes a free standing conditional constitutional right to conscientious objection to participation in same-sex marriage on religious grounds for individuals, but this right does not apply if ‘another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay.’<sup>30</sup> What is meant by ‘prompt’, ‘inconvenience’ or ‘delay’ is not of course specified.

This indeed illustrates the problem with specific conscience clauses. The way they are drafted and interpreted is crucial. As noted from *Janaway* the abortion conscience clauses are very narrowly understood and potentially strongly-held objections to indirect involvement in abortion are not recognised or protected. Thus, although the O’Cathain amendment, for example, appears to be carefully drawn to be inclusive of direct and indirect participation in civil partnerships, it is quite conceivable that an alternative (compromise?) formulation might make a distinction for registrars, for example between officiating at a ceremony and the simple signing of a register.<sup>31</sup> In this example the conscience clause could be narrowly drafted to apply to participation in ceremonies but exclude the formal registration of the civil partnership union. Such a conscience clause would not have availed some registrars (such as Ladele) whose conscientious objection embraced both activities.

Conscience clauses are also open to criticism on the basis that they are potentially inflexible to the needs or rights of others, on the basis that if too many people availed themselves of a conscience clause then others might be deprived of a service or experience delays in obtaining that service. Whilst it is difficult to

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<sup>30</sup> R Wilson, ‘Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws’ 5 (2010) *Northwestern Journal of Law and Social Policy* 368. Such a right in theory could be adopted as a statutory right in the UK and applied to civil partnerships.

<sup>31</sup> The compromise offered to, and rejected by, Ladele; see *Ladele (CA)* [10].

cite realistic examples of this scenario, to accommodate the theoretical objection, there is the additional permutation of a right to conscientiously object being conditional on the practicability of accommodating the objection. In principle, this has potential to create uncertainty for the would-be conscientious objector, as the conscientious objection, having first been accepted, may be at any time later denied if the conditions for allowing the conscientious objection no longer apply (e.g. demand for civil partnerships comes to outstrip the supply of non-objecting registrars). It is submitted that it would provide a greater degree of certainty to the dissenting employee if the objection were to be accepted for a given period, based on an assessment of capacity at the time the request was made. At the end of this period the situation could be reviewed to identify if either the supply of similarly qualified employees or the demand for particular services had changed, and whether this assessment could justify the withdrawal of the acceptance of the conscientious objection. The alternative, an ongoing case-by-case conditionality, would create, for the conscientious objector, too great a burden of uncertainty and consequent employment insecurity, to be a realistic or fair approach to adopt.

In summary, 'opt out' clauses are not a panacea for conscientious objection. Much depends on the way they are drafted and the extant examples (in the medical field) are generally narrow in nature and thus offer quite limited protection. In situations where it is difficult to make the case for absolute as opposed to conditional conscientious objection, there are difficulties in identifying the exact scope of the relevant opt out. Thus opt out clauses on their own are unlikely to provide comprehensive protection for conscience. This analysis is not intended to imply that such clauses should be dispensed with. Indeed existing conscience clauses should be retained and where possible more should be sought (e.g. if assisted euthanasia were to be legalised). However, other legal mechanisms, with more general application, are also likely to be needed.

*(b) A duty of reasonable accommodation*

Another means of offering greater protection to the religious conscience would be to amend the Equality Act to create a statutory duty on employers to ‘reasonably accommodate’ the needs of religious employees.<sup>32</sup> This would require employers to proactively identify and alter workplace rules and practices in order to accommodate workers’ religious beliefs where it is ‘reasonable’ to do so, not unlike the current obligations they have to make ‘reasonable adjustments’ for disabled employees.<sup>33</sup>

There are, however, some potential problems with a duty of reasonable accommodation. Firstly, there is no guarantee that case law arising from the application of a duty of reasonable accommodation would apply in the same way to religion and belief as has a requirement to make reasonable adjustments in the case of disability. Reasonable accommodation might develop as a much reduced right, not least since religion and belief appears to be lower down the hierarchy of protected characteristics than is the case in respect of disability.<sup>34</sup> In the USA, for example, the duty of reasonable accommodation is circumscribed at the point that it creates ‘undue hardship on the conduct of the employer’s business.’<sup>35</sup> The US Courts have interpreted this in favour of employers such that undue hardship is suffered if the costs of accommodation are more than ‘de minimis’.<sup>36</sup> This is quite different from the corresponding duty in UK disability discrimination law which can require employers to go to considerable lengths and some cost to accommodate disability.<sup>37</sup> If a such a ‘de minimus’ rule were adopted in the UK,

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<sup>32</sup> See Hepple and Choudhury, *Tackling Religious Discrimination*; and also discussion in Chapter 4.

<sup>33</sup> Equality Act 2010, s 20.

<sup>34</sup> Vickers, ‘Religious Discrimination in the Workplace: an emerging hierarchy?’

<sup>35</sup> Title VII Civil Rights Act 1964, s 701(j).

<sup>36</sup> *Trans World Airlines v Hardison*.

<sup>37</sup> See for example Lady Justice Hale’s judgment in *Archibald v Fife Council* [2004] UKHL 32, [2004] All ER 32.

and applied to a request by an employee for the reasonable accommodation of conscience, this could conceivably lead to a realistic request being ‘legitimately’ turned down, depending on the circumstances, in particular how the associated ‘costs’ of accommodation are interpreted and subsequently calculated.<sup>38</sup>

A more fundamental problem is that the introduction of a requirement for reasonable accommodation would privilege religion and belief (alongside disability) ahead of the other protected characteristics in the sense of conspicuously endowing the characteristic with an additional (apparent) protection not available to the other characteristics. Of course, the need for accommodation for other characteristics (except for maternity, where separate provisions exist) may not be obvious. Nevertheless, bolstering the protection for religion and belief, or more particularly being seen to do so, is likely to prove contentious (as a form of special pleading), particularly given the hostility towards religious expression in the workplace in particular, from groups such as the National Secular Society. Given the negative reaction which the adoption of a duty of reasonable accommodation might create, it is particularly important that such a duty, if enacted, should truly provide the protections, for example for religious conscience, which are required to buttress the protection model in the way suggested here. Given that there appears to be no guarantee that this would be the result, adopting reasonable accommodation would be costly (politically) without necessarily bringing the needed benefits.

To summarise, therefore, as far as reasonable accommodation is concerned, the exact value for individual religious expression of adopting the approach is not entirely clear and, unless this is known, it may be that focussing on the shortcomings of the existing mechanisms for protecting religious expression, in particular the concept of indirect discrimination, would be a surer route to

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<sup>38</sup> It should be noted however that Trotter provides a more positive account of the benefits of ‘reasonable accommodation’ for conscientious objectors based on his analysis of Canadian law; see G Trotter, ‘The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants – A Response to Professor Bruce MacDougall’ (2007) 70 *Saskatchewan Law Review* 365.

enhancing legal protections. There is a particular attraction in considering this area because of the possibility of amending the formula by which employers are able to justify *prima facie* indirect discrimination – something which would apply equally to all the protected characteristics (and consequently there would be no special pleading). This discussion is the subject of the next section.

### *Discrimination Law*

As discussed in Chapter 4, discrimination law in England and Wales penalises employers who engage in ‘prohibited conduct’ towards workers because of a ‘protected characteristic’ one of which is religion and belief.<sup>39</sup> Prohibited conduct is defined in various ways, but the two most long-standing definitions are direct discrimination and indirect discrimination. Direct discrimination refers to the unlawful application of ‘less favourable treatment’.<sup>40</sup> Indirect discrimination refers to the unlawful application of ‘a provision, criterion or practice’ which puts those who share a protected characteristic at a disadvantage compared to others, and which the employer cannot justify as ‘a proportionate means of achieving a legitimate aim’.<sup>41</sup>

The key authority for how discrimination law applies to conscientious objectors is *Ladele v Islington Borough Council*. The judgments in this case were analysed in some detail in Chapter 5 and it was concluded that the reasoning in the EAT and Court of Appeal judgments were substantially flawed, not least in allowing an employer to trump conscientious objection based on abstract principles rather than being required to show an operational justification (which the employer in *Ladele* was unable to show). In endorsing such a position, it has been submitted that the courts failed to properly apply the proportionality equation and thus allowed the employer to easily defeat the objections of the claimant.

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<sup>39</sup> Equality Act 2010, s 10.

<sup>40</sup> *ibid.*, s 13.

<sup>41</sup> *ibid.*, s 19.

This is unsatisfactory. However, the question arises, could existing discrimination law be recalibrated in some way to provide a greater degree of recognition of the rights of religious-based conscientious objectors? McCrudden argues that judges should be given training to enable them to better understand the position of the religious claimant (the ‘internal viewpoint’);<sup>42</sup> such training might help to ‘rebalance’ the ‘proportionality equation’ to give more weight to the claims of the religious conscience. Alternatively, the definition of indirect discrimination could be redrafted in an amendment to the Equality Act to remould what is meant by the word ‘proportionate’ to mean something much closer to ‘necessary’ - thus putting the employer under a greater burden of justification (irrespective of the protected characteristic in question). In fact, such a change would more accurately reflect the text of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation which requires that indirect discrimination is ‘objectively justified by a legitimate aim and the means of achieving that aim are appropriate and *necessary*’.<sup>43</sup>

### **Passive Manifestation**

It was argued earlier that an individual’s desire to passively manifest his religious convictions is impeded by the test of necessity. It is also impeded by the need to show plural rather than individual disadvantage to meet the requirements of the first stage of an indirect discrimination claim. The two issues are linked to the extent that showing that something is necessary to a religious belief would strongly support the contention that that belief is shared by others (and so ‘plural’ in character). This particular problem is not unique to passive manifestation, and indeed can apply to all three forms of manifestation. However, it seems, from the case law to date, to have had a particularly significant effect for this particular form, and so will be considered here.

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<sup>42</sup> McCrudden, ‘Religion, Human Rights, Equality and the Public Sphere.’

<sup>43</sup> Art 1(2)(b)(i) (my emphasis).

An alternative approach to the necessity test was considered in Chapter 6. This involves the imposition of a test of ‘exceptional importance’ to the individual of a particular form of religious expression,<sup>44</sup> potentially a broader test than the necessity test, but a test nevertheless. Another alternative is to remove the need for a test at all and consider only the motivation of the individual claimant. This involves posing the question, ‘was she motivated by her religion to wear, for example, a visible cross, irrespective of any other authorities?’ The problem with this approach is that it can be too all-inclusive which, as discussed in Chapter 2, has a potentially damaging effect on the scale of the protection offered to religious expression. A test of ‘exceptional importance’ is helpful because the term has potential to be linked both to individual motivation and to some external basis for that motivation, such as the range of sources of religious authority presented by Audi.<sup>45</sup> A form of external validation is helpful as it reduces the extent to which a particular form of religious expression can be characterised by others as the result of simple personal choice or, worse, individual whimsy.

The application of a test of exceptional importance does not fully resolve the problem of the need to show group disadvantage in pursuit of an employment claim. Although, as Hepple argues, the conditional aspect of the definition of indirect discrimination permits the possibility of using hypothetical persons to establish the existence of plural disadvantage,<sup>46</sup> it is submitted that this is likely to be easier to demonstrate if the issue of necessity disappears. Instead, the individual would simply need to show that there are other people who believe that wearing a particular form of religious dress or symbol is considered by them to be of ‘exceptional importance.’

Nevertheless this may not be necessary, as some commentators argue that the ‘group’ or ‘plural’ aspects implicit in the definition of indirect discrimination are in fact unnecessary and that the concept of indirect discrimination, as it is

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<sup>44</sup> See *Watkins-Singh* [56B] (Silber J); and also discussion in Chapter 6.

<sup>45</sup> See Audi, ‘Liberal Democracy and the Place of Religion in Politics’; and also discussion in Chapter 2.

<sup>46</sup> See Hepple, *Equality* 67-68.

currently configured, can (and should) be stretched to be inclusive of individual religious expression.<sup>47</sup> This argument is doubtful, indeed it was directly considered by Lord Justice Sedley in *Eweida* and rejected.<sup>48</sup> It is strongly arguable that the legislation itself would require amending, to remove plural references, for this approach to be followed. Alternatively, a statutory duty to reasonably accommodate the religious claimant (as discussed earlier), dependent upon drafting and judicial interpretation, may obviate the need to rely on indirect discrimination protections, and so the issue could be resolved through this alternative means.

### **Active Manifestation**

In the first part of this chapter, it was noted that there is evidence of hostility towards active manifestation (or workplace religious speech). In Chapter 7 it was posited that a likely justification for such hostility is grounded in an awareness of the harassment provisions of the Equality Act 2010, which serve to create an incentive for employers, considered under discrimination law to be vicariously liable for the actions of its employees,<sup>49</sup> to ban religious speech, with no corresponding incentive to support it.

A large part of the problem then is the way in which harassment is defined under the Equality Act, with its recognition of a perceived offensive environment as sufficient to trigger claims. It is submitted that a one-size fits all approach to harassment, across the protected characteristics to which it applies,<sup>50</sup> is failing to protect legitimate religious speech. To remedy this, the bar needs to be raised for religious speech so that greater consideration is given to the religious claim. There is possibly more than one legal mechanism to achieve this, but the most obvious would be an amendment to the Equality Act to include a separate

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<sup>47</sup> See Hatziz, 'Personal Religious Beliefs in the Workplace'; and also discussion in Chapter 6.

<sup>48</sup> *Eweida* (CA) [15].

<sup>49</sup> Equality Act s 109; see discussion of the concept in Chapter 4.

<sup>50</sup> Marriage/Civil partnerships and pregnancy/maternity are not protected from this form of prohibited conduct.

definition of harassment of others (on both religious and other grounds) as a result of religious speech. This definition of harassment would need to be carefully considered. What it should not do is allow religious employees free rein to intimidate others or create a genuinely hostile environment. However, it may be that there are occasions when it is unavoidable that a co-worker is ‘offended’ by religious speech, because in that instance the religious right outweighs the offence caused. It may be that the word ‘offensive’ which serves to set the bar for harassment very low, is the major problem and should be omitted or cast differently in respect of harassment related to religious speech. This would still allow employers to identify stronger forms of harassment, for example those which are animus-related or which can be genuinely said to amount to ‘improper’ proselytism (e.g. where a vulnerable member of staff is repeatedly subjected to unwanted and ‘strong’ forms of religious speech personally directed at him).<sup>51</sup>

### ***Conclusion***

Legal approaches to the manifestation and wider expression of religion are currently inconsistent, drawing heavily on two fundamentally opposing imperatives - protection and exclusion. Such inconsistencies are manifest in a number of areas, but most particularly in the treatment of religious speech and conscientious objection. In terms of the latter, there may shortly be a movement towards a greater degree of protection should the judgments in *Ladele v UK* and *MacFarlane v UK* be given in favour of the respective applicants. Equally, there may be greater protection for individual forms of visual religious manifestation should *Eweida* and *Chaplin* be successful in their respective applications against the UK government. It is submitted that success in these applications would be very welcome, not only to achieve justice for the applicants concerned, but also, and moreover, for the opportunity which it would create in for a longer and deeper look at laws in England and Wales designed to protect religious expression in the workplace *per se*, and, it would be hoped, to remove inconsistencies in approach in a manner compatible with the protection model.

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<sup>51</sup> See discussion of the usefulness of a distinction between ‘strong’ and ‘mild’ forms of proselytism (at Chapter 7).

Some options of how this could be achieved have been considered in this chapter. To do otherwise would perpetuate a situation where the significance of religious expression continues, in large measure, to be devalued, and the deep sense of obligation which can underpin it, underplayed. It is submitted that this approach is out of step with core liberal values (of equality, dignity and personal autonomy) and, for this reason, there is a pressing case for fundamental revision.

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