Religious discrimination in the English workplace

Balancing competing interests

Mark Hill QC[1]

Abstract

This paper considers discrimination in the workplace on the grounds of religion, as a matter of English law and practice. It explores the extent to which the law both prohibits discrimination on grounds of religion and also, in certain circumstances, permits discrimination on grounds of religion. It examines English jurisprudence under the Equality Act 2010 in which the provisions relating to direct and indirect discrimination have been applied in relation to religious claims. Through a review of cases decided in the Employment Tribunal, this paper addresses the scope of religion or belief as interpreted by the judiciary and the extent to which relief will be granted when those of a particular faith group are subject to particular disadvantage in the workplace.

Keywords Religious discrimination, United Kingdom, workplace, Equality Act 2010, freedom of religion or belief.

1. Introduction

Many countries have constitutional protection for religious freedom, whether contained in a bill of rights or other constitutional provision.[2] This protects religious adherents from state infringements of their religious rights. This may not, however, protect against discrimination by individuals and corporations. One of the most significant changes in the last decade to the way in which English law regulates religion has been the extension of discrimination law specifically to include religion or belief. The law on religious discrimination marks something of a watershed since previously only some religious groups were protected, indirectly, under racial discrimination laws.[3] But this is not the

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[2] For a general introduction, see Mark Hill, "Locating the Rights to Freedom of Religion or Belief across Time and Territory," in Silvio Ferrari, Mark Hill, et al, The Routledge Handbook of Freedom of Religion or Belief (Routledge, 2021).

[3] Mandla v. Dowell Lee [1983] 2 AC 548; Seide v. Gillette Industries Limited [1980] IRLR 427; J H Wal-

only way in which discrimination law impacts upon religious groups. A number of specific exceptions from general prohibitions are afforded to religious groups. Thus, this article explores the extent to which English law both prohibits discrimination on grounds of religion and permits discrimination on grounds of religion.

Until fairly recently, English law only prohibited discrimination on grounds of race, sex and disability. In 2000, EU Directive 2000/78/EC stated that, in addition, discrimination on grounds of sexual orientation, age and religion or belief "should be prohibited throughout the Community" in employment and occupation. This led to new laws prohibiting discrimination on grounds of sexual orientation,[4] age[5] and religion or belief[6] covering discrimination in relation to employment. Subsequent legislation has extended protection to cover the provision of goods and services and other related matters.[7] The law is now to be found in the Equality Act 2010, which also protects gender reassignment, marriage and civil partnership, and pregnancy and maternity as "protected characteristics."

Most of the case law has concerned discrimination in relation to employment and has been heard at the level of the Employment Tribunal and also occasionally by the Employment Appeal Tribunal.[8] The Employment Tribunal is an independent tribunal that hears claims from applicants who maintain that an employer or potential employer has treated them unlawfully.[9] The Employment Appeal Tribunal hears appeals from the Employment Tribunal.[10] It should be noted that although the decisions of the Employment Tribunal do not serve as binding precedent for subsequent cases,[11] in practice later tribunal decisions often refer to earlier decisions and generally judges seek to ensure a level of consistency in decision making.

In July 2008, the Commission of the European Communities published a new draft Directive which would prohibit discrimination on grounds of disability, religion or belief, sexual orientation and age in relation to goods and services, housing, education, social protection, social security and social advantage.[12] In July 2009,

ker Limited v. Hussain and Others [1996] ICR 291; Crown Suppliers (PSA) Limited v. Dawkins [1993] ICR 517.

4 Employment Equality (Sexual Orientation) Regulations 2003.

5 Employment Equality (Age) Regulations 2006.

6 Employment Equality (Religion or Belief) Regulations 2003.

7 Equality Act 2006, Equality Act (Sexual Orientation) Regulations 2007.

8 For background, see Andrew Hambler, Religious Expression in the Workplace and the Contested Role of Law (Routledge, 2014).

9 Available at: https://www.gov.uk/courts-tribunals/employment-tribunal.

10 Available at: https://www.gov.uk/courts-tribunals/employment-appeal-tribunal.

11 Secretary of State for Trade and Industry v. Cook [1997] ICR 288 at 292, Per Morison. See Halsbury's Laws of England, vol. 16: Employment, 4th ed. (2000), para. 684.

12 See Michal Rynkowski, "The Background to the European Union Directive 2000/78/EC", in Mark Hill (ed.), Religion and Discrimination Law in the European Union (Trier, 2012), 395.

the Swedish Presidency published an amended version. The proposal had a first (and only) reading in the European Parliament. The fact that this Directive has not been approved means that English law currently goes beyond existing European obligations, which only prohibit discrimination in the context of employment.[13] However, the United Kingdom Supreme Court has held that, although domestic courts are not obliged to follow EU jurisprudence in discrimination claims not concerning employment, "for the sake of consistency and coherence it is highly desirable that we follow the same approach."[14] Thus, in *Lee v. Ashers Baking Company Limited*[15] the Supreme Court held that there had been no direct discrimination where a bakery had refused to provide to a gay customer a cake, iced with the message "Support gay marriage," because of the sincere religious beliefs of the bakery owners that same-sex marriage is inconsistent with Biblical teaching. Lady Hale observed that there was no less favourable treatment "because anyone else would have been treated in the same way … the objection was to being required to promote the message on the cake."[16] Judicial attitudes to religious discrimination in the provision of goods and services provide a useful comparison when considering the approach to discrimination in the workplace on the ground of religion or belief.

2. Prohibiting discrimination on grounds of religion

Discrimination on grounds of religion or belief has been expressly forbidden since 2003 in relation to employment and since 2006 in relation to goods and services.[17] The law is now to be found in the Equality Act 2010.[18]

One of the most contentious aspects of the new law on religious discrimination has been the vexed question of the definition of religion.[19] Although the original EU Framework Directive gave no further definition of the terms "religion or belief," the

[13] Unlike the current law (discussed below) the Directive would have covered harassment on grounds of religion or belief in relation to goods and services.

[14] Bull v. Hall [2013] UKSC 83, para. 29.

[15] [2018] UKSC 49. A fuller discussion of this recent judgment is beyond the scope of this article. It received a high level of media publicity, but was ultimately determined on the grounds of freedom of expression (compelled speech) rather than discrimination in the provision of goods and services.

[16] Para.47.

[17] Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660; Equality Act 2006 Part 2.

[18] For an overview, see Lucy Vickers, Religious Freedom, Religious Discrimination and the Workplace, 2nd ed. (Oxford: Hart Publishing, 2016); Peter Edge and Lucy Vickers, 'Review of Equality and Human Rights Law Relating to Religion or Belief', Equality and Human Rights Commission Research Report 97 (2015).

[19] See Peter Griffith, "Protecting the Absence of Religious Belief? The New Definition of Religion or Belief in Equality Legislation," Religion & Human Rights 3, no. 2 (2007): 149; Russell Sandberg, "A Question of Belief," in Nick Spencer (ed.), Religion and Law (Theos, 2012), 51; John Adentire, Religious Beliefs and Conscientious Exemptions in a Liberal State (Oxford: Hart Publishing, 2019).

2003 Regulations originally defined 'religion or belief' as any "religion, religious belief, or similar philosophical belief."[20]

Early employment tribunal decisions suggested that the Regulations took a broad conception of "religion" and a narrow conception of "belief." *Hussain v. Bhuller Bros*,[21] for instance, found that "attendance at home for bereavement purposes formed part of the Claimant's religion or religious belief" and seemed to go further than current human rights principles in recognizing that "If a person genuinely believes that his faith requires a certain course of action, then that is sufficient to make it part of his religion."[22]

By contrast, claims were excluded on the basis that the belief professed was not a "similar philosophical belief." In *Williams v. South Central Limited*,[23] loyalty to a national flag or to one's native country did not constitute "a religious belief, or similar philosophical belief"; while in *Baggs v. Fudge*[24] it was held that discrimination on the basis that someone was a member of the British National Party (BNP) was outside the scope of the Regulations. The BNP was a political party and not a "religion, or a set of religious beliefs, or a set of similar philosophical beliefs".

The Equality Act 2006[25] has changed the definition explicitly to include lack of religion or belief and to remove the requirement that philosophical beliefs needed to be "similar" to religious ones in order to be protected. The definition provided in section 10 of the Equality Act 2010 is in substance the same as in the Equality Act 2006.

In *Grainger PLC v. Nicholson*,[26] the Employment Appeal Tribunal concluded that an asserted belief in man-made climate change, together with the alleged resulting moral imperatives arising from it, was capable of constituting a "philosophical belief" for the purpose of the 2003 Regulations provided that (i) it was genuinely held; (ii) it was a belief and not merely an opinion or viewpoint based on the present state of information available; (iii) it was a belief as to a weighty and substantial aspect of human life and behaviour; (iv) it attained a certain level of cogency, seriousness, cohesion and importance; and (v) it was worthy of respect in a democratic society, was compatible with human dignity and did not conflict with the fundamental rights of others. Mr Justice Burton held that European Court of Human Rights (ECtHR) jurisprudence was directly relevant. Employment Tribunal Chairs have considered the *Grainger v. Nicholson* tests to be met in cases concern-

[20] Employment Equality (Religion or Belief) Regulations 2003, reg 2(1).
[21] ET, Case no: 1806638/2004 (5 July 2005).
[22] Compare Arrowsmith v. United Kingdom (1981) 3 EHRR 218.
[23] ET, Case no: 2306989/2003 (16 June 2004).
[24] ET, Case no: 1400114/2005 (23 Mar. 2005).
[25] Equality Act ss. 44, 77(1).
[26] [2009] UKEAT 0219/09/ZT (3 Nov. 2009).

ing: beliefs in spiritualism and psychic powers;[27] anti-fox hunting beliefs;[28] beliefs in the virtue of public service broadcasting;[29] and humanist beliefs.[30] In contrast, other Employment Tribunal Chairs have concluded that the tests have not been met in cases concerning beliefs in conspiracy theories regarding 9/11,[31] a belief that a poppy should be worn during the week prior to Remembrance Sunday,[32] and Marxist / Trotskyite beliefs held by trade union members.[33]

Given the adoption of the ECtHR jurisprudence, it would appear that the decision in *Baggs v. Fudge* stating that political beliefs are unprotected is no longer good law.[34] Tribunals have suggested that some political beliefs may be protected. In *Kelly v. Unison*[35] it was suggested that a distinction could be drawn between "political beliefs which involve the objective of the creation of a legally binding structure by power or government regulating others," which are not protected, and the beliefs that "are 'expressed by his own practice but where he has no ambition to impose his scheme on others'", which may be protected.[36] However, this distinction has not found favour with subsequent Employment Tribunal decisions. In *Maistry v. The BBC,*[37] in reaching its conclusion that a belief in public service broadcasting could be a philosophical belief, the Tribunal stated that he did not accept that the claimant's belief was a political opinion or based on a political philosophy. However, he commented that "even if it had been, the appellate courts have not yet definitely determined that question".[38]

More recently, the case of *Forstater v. CDG Europe and Others*[39] concerned the claimant's belief that sex is biologically immutable: her contention was that her opinions constituted a philosophical belief and she had been discriminated against because of them. The judge considered that "the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others";[40] adding "people cannot expect to be protected if their core belief involves violating others' dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them."[41] A similar decision was reached in *Mackereth v. Department for Work and Pensions and Another*.[42] In that case, also the rights of transgender individuals not to be discriminated against prevailed against the religious sensibilities of the doctor.

A different approach was taken by the High Court in *Miller v. College of Policing and Another*,[43] which concerned the lawfulness of the College's operational guidance on "non-criminal hate speech." Having posted a number of tweets, the claimant was contacted by a police officer and warned that if his tweeting escalated it may be treated as a criminal offence. The judge held:

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[40] Para. 84.

> The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society … the police's actions, taken as a whole, had a chilling effect on his right to freedom of expression. That is an interference for the purposes of Article 10(1).[44]

It has been argued that, in respect of *Miller*, whilst the claimant's right to speak on transgender issues was protected by Article 10, it does not follow that the same views would qualify as a philosophical belief under the Equality Act 2010.[45] In other words, freedom of expression is one thing, protecting the belief that underpins the expression is another. Note also *JV v AM*,[46] which concerned private law proceedings between the mother and father of five children, the father having left the family home in order to live as a transgender woman. The family were Charedi Jews, which the judge described as "ultra-Orthodox." Accommodating transgender people within the community was said to be entirely inconsistent with Charedi beliefs, such that the strong views of the community were that the father should have no contact with the children. The judge observed:

> Many would disagree with this approach. Indeed, it is offensive to those who believe in a tolerant, diverse, pluralistic society. In a mature society, however, accommodations have to be found, and this includes recognising and respecting religious and cultural beliefs that are outside what might loosely be called "mainstream opinion."[47]

The public debate concerning the clash of rights, including transgender issues, will doubtless continue: it will ultimately be for the courts to determine where the balance should be struck on a case-by-case basis.

3. Direct discrimination

Direct discrimination occurs where A treats B less favourably (because of religion or belief) than they would treat others in circumstances which are materially the same.[48] This would apply, for instance, if A refuses to offer the job to B because B is

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44 Paras. 259-261.

45 See Paul Johnson, "Gender Critical' Beliefs and the European Convention on Human Rights," European Human Rights Law Review 2 (2020):120.

46 [2020] EWFC 3.

47 Para. 3.

48 Equality Act 2010, s. 13. Prior to the Equality Act 2010, the requirement was that direct discrimination needed to be "on grounds of religion or belief". The Equality Act 2010 replaces the words "on grounds

a Hindu, if A sacks B because B's wife is an atheist, or if A refuses to teach B because he thinks B is a Muslim. A can discriminate against B even if A and B are of the same religion, provided that A discriminates on the grounds of B's religion or belief and not A's own religion or belief.[49]

There is no general defence of justification to direct discrimination.[50] The claimant must prove facts from which the Tribunal could conclude that unlawful discrimination has occurred. If the claimant makes such a prima facie case, then the burden of proof passes to the respondent. In direct discrimination cases, the respondent can prove that there was no discrimination but cannot justify the discrimination.[51]

Direct discrimination claims have seldom been successful. However, *Bodi v. Teletext*[52] provides one exception to this rule. Bodi claimed that he had not been short-listed for the job of Duty Editor for Teletext on the grounds of his Asian race or Muslim religion; he compared his treatment with that of the short-listed candidates with equivalent or lesser experience. The Employment Tribunal found that Bodi had been directly discriminated against on grounds of race and/or religion.

Most other direct discrimination cases fail because unlike *Bodi* the claimant is unable to make a prima facie case. The Employment Appeal Tribunal has found that if the employer's objection is to an employee inappropriately promoting his religion (rather than to the employee's religion per se), then there is no direct discrimination.[53]

Tribunals have found that in order to establish that there has been discrimination on grounds of religion or belief, the tribunal must be satisfied that the prohibited ground is one of the significant reasons for the treatment, 'significant' meaning

of" with "because of", and according to the Explanatory Notes, this had the intention not of changing the meaning but of making the legislation more accessible: See Equality Act 2010 Explanatory Notes, para. 61.

[49] This is not explicitly stated in the Equality Act 2010 due to the broadness of the new definition of direct discrimination: See Equality Act 2010 Explanatory Notes, para. 59. Under the former law, this was explicit: Employment Equality (Religion or Belief) Regulations 2003, regulation 3(1)(a); Equality Act 2006, s. 45(1).

[50] However, the Supreme Court has held that direct discrimination can be justified in relation to the protected characteristic of disability: Seldon v. Clarkson Wright and Jones [2012] UKSC 16.

[51] The court or tribunal must be satisfied that the explanation for the less favourable treatment was discriminatory: see Ladele v. London Borough of Islington [2009] EWCA (Civ) 1357: para. 30.

[52] ET, Case no: 3300497/2005 (13-14 Oct. 2005).

[53] Chondol v. Liverpool City Council [2009] UKEAT/0298/08 (11 Feb. 2009). See also Monaghan v. Leicester Young Men's Christian Association [2004] Employment Tribunal Case no. 1901839/2004 (26 Nov. 2004).

more than trivial.[54] For instance,[55] in *Ferri v. Key Languages Limited*[56] a Roman Catholic was told not to wear certain necklaces at work as they were rather loud and overtly religious. She was later dismissed due to alleged poor performance. She claimed that the dismissal constituted direct discrimination. The Tribunal found that she had not made her case: she had not proved that she was sacked for her religious belief rather than her poor performance. The Court of Appeal in *Ladele v. London Borough of Islington*[57] stated that the acts of alleged discrimination must be "motivated" by the claimant's religious beliefs.[58] A failure to accommodate religious difference rather than a complaint that the claimant had been discriminated against because of that difference will not amount to direct discrimination. Treating people in precisely the same way cannot constitute direct discrimination.[59]

Other cases have failed because the claimant has not couched his claim as religious discrimination as such. For instance,[60] in *Devine v. Home Office*[61] Devine claimed that he had been rejected for a job at the Home Office due to his sympathy for underprivileged asylum seekers. He claimed that he had been discriminated on grounds of religion or belief since his care for disadvantaged people was a demonstration of the Christian virtue of charity. The Tribunal found his claim to be "far too vague and ill-defined to amount to a case to answer for." Similarly, in *McClintock v. Department of Constitutional Affairs*,[62] concerning a Lord Justice of the Peace who resigned since he could not in conscience agree to place children with same-sex couples, both the Employment Tribunal and the Employment Appeal Tribunal held that there had been no direct discrimination since McClintock had never made it plain that his objection was underscored by conscientious or religious objection.

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[54] Ladele v. London Borough of Islington [2008] EAT Case no: UKEAT/0453/08/RN (10 Dec. 2008).

[55] See also Mohamed v. Virgin Trains ET, Case no: 2201814/2004 (12-14 Oct. 2004; 20 May 2005); EAT (2006) WL 25224803 (30 Aug. 2006).

[56] ET, Case no. 2302172/2004 (12 July 2004).

[57] [2009] EWCA (Civ) 1357.

[58] Para. 36. The Court of Appeal also stated that remarks must be taken in context. Lord Justice Dyson rejected what he perceived to be "a pedantically literal, unrealistic or a contextual interpretation" of a comment by a line manager's that it was wrong to "be accommodating people's religious beliefs in the Registry Services". He held that this did not show that she was motivated by the claimant's religious beliefs. See para. 35.

[59] Para. 29. In Eweida and Others v. United Kingdom (2013) 57 EHRR 8, the Court held that the direct discrimination claim brought by Ladele was inadmissible since the applicant had failed to exhaust domestic remedies: para. 55.

[60] See also Harris v. NKL Automotive Ltd & Anor [2007] UKEAT/0134/07/DM; 2007 WL 2817981 (3 Oct. 2007).

[61] ET Case no: 2302061/2004 (9 Aug. 2004).

[62] [2007] UKEAT/0223/07/CEA (31 Oct. 2007).

The distinction between direct and indirect discrimination was discussed by the Supreme Court in *Bull v. Hall.*[63] The case concerned whether refusing it was discrimination on grounds of sexual orientation to refuse to provide a double-bed room in their private hotel to a couple in a civil partnership, on the grounds that as Christians they believed that sexual activity should take place only within the context of (heterosexual) marriage. The Supreme Court, though unanimous in dismissing the appeal, was divided as to whether the discrimination complained of was direct or indirect. Lady Hale, Lord Kerr and Lord Toulson held that the appellants' policy constituted direct discrimination on grounds of sexual orientation. Lord Neuberger and Lord Hughes held that the appellants' policy constituted indirect discrimination. Lord Hughes held that the sexual orientation was not the ground for the less favourable treatment; the ground was that they were unmarried.[64]

4. Indirect Discrimination

Indirect discrimination occurs where A applies or would apply a provision, criterion or practice (a PCP) equally (i) which puts, or would put, persons of B's religion or belief at a particular disadvantage compared with others; (ii) which puts, or would put, B at that disadvantage; and (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.[65] For example, A applies 'no headwear' policy to staff. B, an employee, is a Sikh. This rule disadvantages Sikhs in general and B in particular.

The key point about indirect discrimination is that it can be justified, for example, by security or health and safety concerns. Its operation is therefore similar to the analysis of the right to manifest under Article 9, where the focus is on interference rather than justification. Indirect discrimination is more common than direct discrimination and there have been some successful cases, including the first case argued under the goods and services provisions of the Equality Act 2006, *R (on the application of Watkins-Singh) v. The Governing Body of Aberdare Girls' High School*.[66] The jurisprudence on discrimination in the provision of goods and services informs the approach to the case law concerning discrimination in the workplace and is worthy of study.

Watkins-Singh concerned a fourteen-year-old girl of Punjabi-Welsh heritage who was told to remove her Kara bangle[67] at school. While the school saw the case as con-

[63] [2013] UKSC 83.

[64] Para. 91.

[65] Equality Act 2010, s. 19.

[66] [2008] EWHC (Admin) 1865.

[67] The Kara bangle is a steel bracelet worn as a matter of obligation by all initiated Sikhs and as a gesture of solidarity by many uninitiated Sikhs.

cerning Article 9, Watkins-Singh's legal team argued that the refusal to allow Watkins-Singh to wear the Kara at school was unlawful as indirect unjustified race and religious discrimination contrary to the Race Relations Act 1976 and the Equality Act 2006.

In relation to the indirect discrimination claim, Mr Justice Silber noted that it was not disputed that Sikhs were both a racial and religious group[68] and that the school's uniform policy constituted a provision, criterion or practice which had a disparate impact upon pupils who shared Watkins-Singh's race and religion compared with those "pupils whose religious beliefs or racial beliefs were not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery".[69] Mr Justice Silber rejected the defendant's contention that there would only be a "particular disadvantage" where a member of the group is prevented from wearing something that they are required to wear.[70] Rather, the judge concluded that a "particular disadvantage" would occur – but would not only occur – where a pupil is forbidden from wearing an item where "that person genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to this or her racial identity or his or her religious belief" and where "the wearing of the 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".[71] He concluded that both these subjective and objective elements were satisfied on the facts of the case: nothing had been suggested to undermine the truthfulness of Watkins-Singh's comments[72] and the wearing of the item could be shown to be of exceptional importance to her religion and race as a Sikh even if not a requirement of the religion or race.[73]

Having decided that there was a particular disadvantage, Mr Justice Silber turned to the question of justification, holding that the indirect discrimination was not justified by a legitimate aim. He held that it could not be said that allowing pupils to wear a Kara caused substantial difficulties because pupils may stand out, nor that it undermines the uniform policy's aim of fostering community spirit, because the Kara is small and is usually hidden by a long-sleeve sweater. Moreover, it could not be said that the ban was justified in that it minimized pressures resulting from wealth and style. The claim of indirect discrimination therefore succeeded. The contrast between Mr Justice Silber's judgement and the much more restrictive ap-

[68] Mandla v. Dowell Lee [1983] 2 AC 548; Equality Act 2006, s. 44(a).

[69] Para. 46.

[70] Paras. 51-55.

[71] Para. 56B.

[72] Paras. 59-62.

[73] Paras. 63-66.

proach taken in the Article 9 case law[74] has led commentators to question whether the litigants may be best advised to argue discrimination law claims in preference to Article 9 claims, at least in relation to the wearing of religious dress and symbols.[75]

A further example of a successful claim of indirect discrimination in relation to religious dress and symbols is the Employment Tribunal's decision in *Noah v. Sarah Desrosiers (Wedge)*.[76] The claimant, Mrs Noah, applied for a job as an assistant stylist at the respondent's hairdressing salon. When Noah attended the interview wearing a headscarf, the interview was terminated on the basis that the hair salon was known for "ultra modern" hair styles which staff were supposed to display to clients. No other person was ultimately appointed to the job. The Tribunal held the provision, criterion or practice (PCP) that an employee would be required to display their hair at work for at least some of the time put persons of the same religion as the claimant at a particular disadvantage and disadvantaged the claimant notwithstanding the fact that she would not in fact have been offered a job given that no assistant stylist was ever appointed. The 2003 regulations sought to make unlawful discrimination in relation to job applicants and did not merely make reference to whether or not they were offered a job but also covered discrimination in relation to other arrangements made as part of the recruitment process. This indirect discrimination was not justified. Although it was reasonable for the respondent to take the view that the issue posed a significant risk to her business, too much weight was accorded to that concern.

Another area where the law on indirect discrimination has had a significant impact is in relation to making employees work on their holy day.[77] For instance,[78] in *Fugler v. MacMillan-London Hairstudios Limited*,[79] a new "no Saturdays off work" rule at a hairdressers was held to constitute indirect discrimination since this put Jews at a disadvantage and actually put the Jewish claimant at a disadvantage on a particular Saturday. Although serving clients on a Saturday was a legitimate aim, the employers should have considered how or if they could rearrange Fugler's duties and customers for that Saturday.

However, many indirect discrimination claims fail because the respondent can justify the discrimination. For instance, in *Azmi v. Kirklees Metropolitan Council*,[80]

[74] See Part II.

[75] Russell Sandberg, "The Changing Position of Religious Minorities in English Law: The Legacy of Begum," in Ralph Grillo et al. (eds.), Legal Practice and Cultural Diversity (Ashgate, 2009), 267.

[76] [2008] ET, Case no. 2201867/07 (29 May 2008).

[77] However, see the litigation culminating in Mba v. Mayor and Burgesses of the London Borough of Merton [2013] EWCA (Civ) 1562.

[78] See also Williams-Drabble v. Pathway Care Solutions ET, Case no: 2601718/2004 (2 Dec. 2004).

[79] ET, Case no: 2205090/2004 (21-23 Jun. 2005).

[80] ET, Case no: 1801450/06 (6 Oct. 2006); [2007] UKEAT 0009 07 30003 (30 Mar. 2007).

concerning a teaching assistant who was suspended for insisting on wearing a full-face veil when male members of staff were present contrary to a school instruction not to wear the full-face veil when teaching children, both the Employment Tribunal and the Employment Appeal Tribunal held that the indirect discrimination was justified. Although the "no face-veil when teaching rule" put Muslims at a disadvantage and actually put Azmi at a disadvantage, it could be justified as a proportionate means of achieving the legitimate aim of children being taught properly.

In *Ladele v. London Borough of Islington*,[81] in respect of a registrar refused on grounds of conscience to register civil partnership ceremonies, the Court of Appeal held that although there was no doubt that the Council's policy decision to designate all registrars as civil partnership registrars put a person like Ladele at a disadvantage, this was justified.[82] The "only way" in which the Council could have achieved their aim of promoting equal opportunities and requiring its employees to act in a non-discriminatory way was to require all registrars to conduct civil partnerships.[83] For Lord Justice Dyson, the aim of the Council's equality policy "was of general, indeed overarching, policy significance [having] fundamental human rights, equality and diversity implications, whereas the effect on Ms Ladele of implementing the policy did not impinge on her religious beliefs: she remained free to hold those beliefs, and free to worship as she wished".[84]

Ladele was followed in *McFarlane v. Relate*[85] concerning a counsellor who refused on grounds of his Christian beliefs to counsel same-sex couples on sexual matters. He originally worked in couples counselling but volunteered to undertake a diploma course in psycho-sexual therapy. When he asked to be exempt from advising same-sex couples on sexual matters, he was told that he had to comply with Relate's equal opportunities policy and was later dismissed. In terms of indirect discrimination, the Court of Appeal found *Ladele* to be definitive on this point.[86] It was held that, although McFarlane had been disadvantaged, the employer's actions had had a legitimate aim (the provision of counselling services to all sections of the community regardless of their sexual orientation) and was proportionate.

[81] [2009] EWCA (Civ) 1357.
[82] At para. 43.
[83] At paras. 45, 46 and 50.
[84] At para. 51. Lord Justice Dyson held that this conclusion was reinforced by Article 9 of the ECHR (see paras. 54-61).
[85] [2010] EWCA (Civ) 880.
[86] The application was also noteworthy because the case was supported by a witness statement by the former Archbishop of Canterbury, Lord Carey of Clifton, in which he argued for "a specially constituted Court of Appeal of five Lords Justices who have a proven sensibility to religious issues." See further Russell Sandberg, "Laws and Religion: Unravelling McFarlane v. Relate Avon Ltd," 12(3) Ecclesiastical L. J. (2010): 361.

The decisions in *Ladele* and *McFarlane* were both appealed to the European Court of Human Rights in *Eweida and Others v. United Kingdom*[87] contending that the United Kingdom had breached Article 9 because domestic law had failed adequately to protect their right to manifest their religion.[88] In respect of *Ladele*, the ECtHR held that any discrimination on grounds of religion had been justified. The Council's actions had a legitimate aim and the means pursued was proportionate.[89] It was noted that the Court "generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights".[90] This wide margin of appreciation had not been exceeded in this case. In respect of *McFarlane*, the ECtHR held that there had been an interference with the applicant's Article 9 rights but that this was justified due to the margin of appreciation.[91]

Other indirect discrimination claims, however, have failed on the interference point rather than the justification point. For instance,[92] in *Eweida v. British Airways*,[93] a member of check-in staff wore a silver cross in breach of BA's uniform policy which prohibited visible religious symbols, unless their wearing was mandatory. The tribunal held that there was no indirect discrimination: although there was a provision that personal jewellery should be concealed by the uniform unless otherwise expressly permitted, which was applied equally, it did not put Christians at a particular disadvantage and did not disadvantage the claimant. There was no evidence that practising Christians considered the visible display of the cross to be a requirement of the Christian faith and no evidence that the provision created a barrier to Christians employed at BA.

Chaplin v. Royal Devon & Exeter NHS Foundation Trust[94] concerning a nurse who was asked to remove the crucifix she wore around her neck at work on grounds of health and safety. Although Chaplin had been a nurse for thirty years and had always worn the crucifix, a change to a v-necked uniform had now made the crucifix visible and the concern was that there was a risk of injury when handling patients. When she refused to remove her crucifix, she was redeployed to a non-clinical role where the hospital had no objections to her wearing the crucifix when undertaking those duties. The Employment Tribunal dismissed her claims of direct

87 (2013) 57 EHRR 8.

88 For a discussion of the new interpretation of Article 9 in the decision, see Mark Hill, "Religious Symbolism and Conscientious Objection in the Workplace," 15 Ecclesiastical L.J. (2013):191.

89 Paras. 105-106.

90 Para. 106.

91 Para. 109.

92 See also Harris v. NKL Automotive Ltd & Anor [2007] UKEAT/0134/07/DM; 2007 WL 2817981 (3 Oct. 2007).

93 [2010] EWCA (Civ) 880.

94 [2010] ET Case no: 17288862009 (6 Apr. 2010).

and indirect discrimination. In terms of indirect discrimination, the Employment Tribunal held that the uniform policy did not "place 'persons' at a particular disadvantage." Despite evidence that another nurse, Mrs Babcock, had been asked to remove her cross and chain,[95] the Employment Tribunal held that Mrs Babcock had not been put at a particular disadvantage since the word "particular" meant that the disadvantage suffered needed to be "noteworthy, peculiar or singular" and this criteria had not been met since Mrs Babcock's religious views were not so strong as to lead her to refuse to comply with the policy.[96] The Employment Tribunal added that if they had needed to decide whether the disadvantage was justified they would have held that it was since health and safety concerns provided a legitimate aim and the actions by the respondent were proportionate.[97]

The decisions in *Eweida* and *Chaplin* were considered by the ECtHR in *Eweida and Others v. United Kingdom.*[98] In respect of *Eweida*, the ECtHR held that her wish to wear a crucifix "was a manifestation of her religious belief, in the form of worship, practice and observance, and as such attracted the protection of Article 9".[99] Moreover, BA's refusal for her to remain in post whilst visibly wearing the cross "amounted to an interference with her right to manifest her religion".[100] The question was whether this interference was justified under Article 9(2). The Court concluded that a fair balance had not been struck.[101] Although the national courts were afforded a margin of appreciation, they had given too much weight to the employer's wish to project a certain corporate image and not enough to the applicant's desire to manifest her religious belief. This meant that the State had "failed sufficiently to protect the first applicant's right to manifest her religion, in breach of the positive obligation under Article 9".[102]

In relation to *Chaplin*, the Court held that her wearing of her crucifix at work was a manifestation of her religious belief and the refusal of the health authority to allow it constituted a manifestation.[103] However, here the Court held that there was no violation of Article 9 since this interference was justified. The Court noted that the reason for asking her to remove the crucifix and neck-chain was the protection of health and safety on a hospital ward and this 'was "inherently of a greater

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[95] Para. 15.

[96] Para. 27. This was the decision of the majority. Mr Parkhouse, by contrast, held that both nurses had been placed at a disadvantage.

[97] Para. 29.

[98] (2013) 57 EHRR 8.

[99] Para. 89.

[100] Para. 91.

[101] Para. 94.

[102] Para. 95.

[103] Para. 97.

magnitude than that which applied in respect of Ms Eweida".[104] This was a matter where a "wide margin of appreciation" was allowed since the "hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence."[105]

In *Mba v. Mayor and Burgesses of the London Borough of Merton*,[106] the Court of Appeal considered the impact of *Eweida v. United Kingdom* upon the domestic law of indirect discrimination. The claim concerned whether Sunday working constituted indirect discrimination on grounds of the claimant's Christian beliefs. The original Employment Tribunal had dismissed the claim and as part of its reasoning had taken into account how the claimant's "belief that Sunday should be a day of rest and worship upon which no paid employment was undertaken, whilst deeply held, is not a core component of the Christian faith."[107] The Court of Appeal dismissed the claimant's appeal because, although there had been errors of law in the Employment Tribunal's decision, their ultimate conclusion that the disadvantage had been proportionate was plainly and unarguably right.[108]

For Lord Justice Maurice Kay, the Employment Tribunal had made an error in law by stating that the belief was not a core component. The Employment Tribunal "went wrong" in that, although for indirect discriminations it is necessary to show that "persons" were put (or would be put) at a disadvantage, "it is not necessary to establish that all or most Christians, or all or most conformist Christians are or would be put at a particular disadvantage".[109] The description of the claimant's belief as "not a core component of the Christian faith" erred in that "it opened the door to a quantitative test on far too wide a basis." This left open, however, "the question whether there is a quantitative element to be considered alongside the qualitative factor of genuine belief to be considered as part of the proportionality exercise".[110] Lord Justice Maurice Kay expressed the view that he was "not convinced that there is, over and above the requirement of group disadvantage."[111]

Lord Justice Elias agreed that the question of whether the belief was a core component "ought not to have been weighed into the balance in relation to the justification defence" but reached this conclusion for different reasons than Lord Justice Maurice Kay.[112] For Lord Justice Elias, the Employment Tribunal did not

[104] Para. 99.
[105] Para. 99.
[106] [2013] EWCA (Civ) 1562.
[107] Para. 8.
[108] Paras. 23-24.
[109] Para. 17.
[110] Para. 19.
[111] Para. 19.
[112] Para. 30.

err in law by having regard to the matter "purely in terms of establishing indirect discrimination".[113] Rather, the error was that considering whether the belief was compulsory breached Article 9 ECHR, following *Eweida v. United Kingdom*.[114] Article 9 was directly engaged in this case since the defendant was a public body and, although Article 9 cannot be enforced directly in employment tribunals, domestic law must be read as to be consistent with Convention rights where possible.[115] It was "the Article 9 dimension of this case which made it inappropriate for the Employment Tribunal, when assessing justification, to weigh in the employer's favour the fact that the appellants religious belief was not a core belief of her religion so that any group impact was limited".[116]

5. Conclusions

This paper has explored equality laws in England and, in particular, the protection against discrimination on the basis of religion or belief. Most of the cases relate to discrimination in employment where the rights of the workforce are enforced by the Employment Tribunal and the Employment Appeal Tribunal, with a few cases being appealed to the higher appellate courts and fewer still to the ECtHR in Strasbourg. The interpretation of "religion or belief" has been quite broad, often even including political opinions. As it is difficult to prove direct discrimination on the basis of religion or belief, the successful cases have tended to relate to indirect discrimination. This occurs when an employer applies a practice – on its face neutral – that disadvantages persons of certain religions. This can include dress codes or the requirement that employees work on one of their religious holy days. Tribunals will consider whether the belief or practice is core to the adherent's religion. In certain cases, the employer may be able to justify the discrimination, for example, if there are health and safety considerations.

Although this paper has focussed on cases which came before Employment Tribunals – some of which were the subject of further appeal – anecdotal evidence suggests that at a local level, reasonable accommodations were often made in individual workplaces on a case-by-case basis. It may be that the full picture is rather more positive than the hard cases which find their way into courts and tribunals.

[113] Para. 33.
[114] Para. 34.
[115] Paras. 34-35.
[116] Para. 37.