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Reasonable Accommodation and Religious Liberty

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The current UK law on indirect discrimination has failed to provide protection to religious believers in a number of recent cases, leading to a concern about loss of religious liberty. The concept of 'reasonable accommodation', which imposes a greater duty on employers to accommodate religious differences, could improve the legal framework, although it would not provide an answer to every situation.

The state of religious discrimination law today and its limitations

There has been mounting concern in the last few years over the fear that religious liberty is increasingly under threat in the UK. Whilst some press coverage has exaggerated the problem and there remains a high level of freedom for Christians and those of other faiths to manifest their beliefs in their workplaces and businesses, there have been some worrying developments. In particular, there have been a number of recent judgments in both the British and European courts in which religious believers who have sought protection from indirect discrimination on grounds of their religion have been unsuccessful under the legal framework as it currently stands.

Take, for instance, the case of Lilian Ladele, a civil marriage registrar in Islington who did not want to conduct civil partnership ceremonies on conscience grounds. However, Islington Council designated her as a civil partnership registrar anyway (although it did not have to) and insisted that she undertake civil partnership work because this was necessary in order to further the aims of the Council's Dignity for All policy, which prohibited discrimination by its employees. Ms Ladele complained to the employment tribunal of indirect discrimination on grounds of religion and was successful at first instance, but the judgment was overturned on appeal, with the Employment Appeal Tribunal and Court of Appeal finding no indirect discrimination and the European Court of Human Rights finding that her right to manifest her religion had not been breached.

The Equality Act 2010 prohibits discrimination against a range of 'protected characteristics', one of which is religion or belief, in various spheres of activity including employment, education, the actions of public bodies and the provision of goods and services. Discrimination can be either direct or indirect. Direct discrimination is relatively straightforward, and is where A treats B less favourably than others because of B's religion or belief. Such treatment cannot be justified and so there is no legal defence under the Act. Indirect discrimination is more complex. This is the situation where A applies a 'provision, criterion or practice' to B which, although it applies to persons with whom B does not share a religion or belief, puts or would put persons with whom B does share a religion or belief at a particular disadvantage, and has in fact put B at that disadvantage. This form of discrimination can be justified if it can be shown to be a proportionate means of achieving a legitimate aim.

Discrimination on grounds of religion and belief is thus protected in the same way as the other protected characteristics, but there is a growing body of case-law which has meant that the extent of the protection has been reduced in practice. A major reason for this is a series of unsuccessful indirect discrimination claims. The three main categories of such cases have been those involving a clash between an employee's beliefs about same-sex relationships and their duties at work,[1] those involving time off for religious observance,[2] and those involving the wearing of religious clothing or symbols.[3]

There are undoubtedly several inter-connected reasons for these cases going against the employees. Discrimination cases are highly fact-sensitive and some of the circumstances have been complicated. Arguably there has been a repeated failure by the courts to appreciate the importance of religious convictions to believers, particularly as

compared with the importance regularly attached to sexual orientation. Judges are generally uneasy about getting involved in religious disputes (and the secular courts historically have avoided them), so have perhaps been less willing to make findings that there has been discrimination on grounds of religion.

However, a significant reason for the repeated lack of success seems to be the current structure of indirect discrimination. In particular, the fact that a claimant must show 'group disadvantage' under the law as currently drafted has been a problem where they have been the only employee affected adversely by a particular policy, as quite commonly happens, especially in conscience cases. In addition, even where indirect discrimination has been proved, the courts have taken a fairly generous view towards justification under the present formulation of 'a proportionate means of achieving a legitimate aim'. The fact that alternative options could be identified that would have avoided any disadvantageous treatment of the employee (such as a different rota, or swapping certain duties) has repeatedly been found not to preclude a discriminatory provision, criterion or practice from being justified.[4]

The idea of reasonable accommodation

'Reasonable accommodation' is one idea that has been put forward by several academics and legal commentators in various different forms[5] to address the surprisingly limited protection for religious believers under the current law. The basic concept is that employers should take reasonable steps to accommodate the religious beliefs of their employees, provided that this does not impose undue or disproportionate hardship on the employer.

The principle has operated in Canada for many years.[6] In Canadian equality law there has for some time been no distinction between direct and indirect discrimination, but rather one single test which incorporates a duty on employers to make reasonable accommodation for their employees. The relevant steps for a court to consider are as follows: (i) has the employer adopted the discriminatory standard for a purpose rationally connected to the performance of the job; (ii) did the employer do so in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and (iii) is the standard reasonably necessary to the accomplishment of that purpose? In order to show a standard is reasonably necessary the employer must demonstrate that it is impossible to accommodate the employees sharing the protected characteristic of the claimant without imposing undue hardship on the employer.[7] Undue hardship might arise as a result of a wide range of factors such as financial cost, disruption of collective agreements, morale problems for other employees, inter-changeability of workforce and facilities, the size of the employer or safety.[8] However, crucially, this test requires an employer to make every effort to accommodate an employee before it will be found that a discriminatory standard or practice is lawful.

Although it is in Canada that reasonable accommodation has been most fully developed, it is not an entirely foreign concept to UK anti-discrimination law. A very similar idea already exists in relation to disability – the duty to make reasonable adjustments. This duty has been in place since the Disability Discrimination Act 1995 and is now enshrined in the Equality Act.[9] It is well-understood by UK courts and tribunals.

How would reasonable accommodation help?

Reasonable accommodation is conceptually more apt to religion and belief discrimination as it recognises that in such cases claimants are often seeking <u>different</u> rather than equal treatment – the Muslim nurse does not want everyone in the canteen to eat the same food as him, he simply wants a halal option; the Jewish manager wants an exception to the normal hours to allow her to leave early on Fridays to observe Shabbat.

It also addresses both problems with the current structure of indirect discrimination in how it applies in practice to religion and belief cases. There is no longer any need to prove group disadvantage, which means that in cases where an individual's conscience is in issue and there is no group which has suffered unfavourable treatment there is still the potential for protection. In relation to justification it shifts the burden of proof and encourages employers or service-providers to think creatively about ways to accommodate religious employees or customers. The claimant does not need to demonstrate that they have been unjustifiably disadvantaged but instead the employer or provider has to show it has acted reasonably and considered all possible alternatives.

This would hopefully result in a more tolerant way of thinking that gives greater protection to religious believers. In the case of Lilian Ladele, for example, civil partnerships were a tiny fraction of the total number of ceremonies

that took place and her colleagues were content to re-arrange their rotas so that she did not have to conduct them. Yet on an indirect discrimination analysis it was nevertheless held to be justifiable to require her to do so. If instead of the broad question 'was this requirement a proportionate means of achieving a legitimate aim?', the question had instead been 'could her conscientious objection have been accommodated without imposing undue hardship on the Council?' the court may well have come to a different decision.

Reasonable accommodation is certainly no panacea for all cases involving religious minorities. There would be cases where it would not make a difference to the outcome because the courts would think that it was not reasonable to accommodate a religious believer's requests, for example where no alternative solution or person can be found to make sure an essential service is provided.[10] However, even in such cases a reasonable accommodation approach would be preferable to the current indirect discrimination framework because it would require more precise reasoning and thus greater transparency in setting out why a discriminatory standard was considered to be justifiable.

Overall, reasonable accommodation fits a modern, plural, multi-religious society better than the existing model. Whilst the focus of the above discussion has been on the employment context, reasonable accommodation can also work in relation to other areas in which the Equality Act currently applies. In each of these settings it moves away from the negative duty not to discriminate indirectly on grounds of religion or belief (which can generate conflict, especially when there are clashes with another protected characteristic such as sexual orientation) and towards a positive duty to accommodate religious difference wherever this is reasonable. This would be a more coherent and pragmatic approach that would strengthen protection for religious minorities in particular.

What prospect is there of reasonable accommodation being adopted in UK law?
Although the idea of reasonable accommodation has been around in academic circles for a decade or more, it has not until recently gained any traction in the courts. It was mentioned in passing by the Court of Appeal in *Copsey v. WBB Devon Clays Ltd,*[11] and the Equality and Human Rights Commission (EHRC) and 8 interveners in *Eweida* suggested it would be a useful analysis when that case (along with *Ladele*, *McFarlane* and *Chaplin*) came before the European Court of Human Rights (ECtHR), but the Court itself said nothing about it.

However, Baroness Hale, the Deputy President of the UK Supreme Court, has in the past three or four years become interested. In *Preddy v. Bull*, a case involving Christian bed and breakfast owners who refused a double room to an unmarried same-sex couple on grounds of conscience, she commented that 'I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases' even though on the facts she held (with the rest of the Court) that there was unlawful discrimination.[12] Baroness Hale indicated support for further exploring reasonable accommodation when she gave the Law Society of Ireland's annual Human Rights Lecture in June 2014[13] and in her judgment in *Greater Glasgow Health Board v. Doogan*, a case involving midwives who objected to being involved in abortion procedures.[14]

It is possible that under judges such as Baroness Hale the courts may develop the concept of reasonable accommodation as they interpret the existing provisions of the Equality Act. Judge-made law is often careful and nuanced but it is a slow and unpredictable process. There are at least three other possible routes by which reasonable accommodation could be integrated into UK law.

The first is through European case-law. The jurisprudence of the Court of Justice of the European Union (CJEU) will soon become much less significant as Brexit gets underway, but in the sphere of religious freedom this is probably a positive development, as two recent judgments from the CJEU took a fairly restrictive approach to the wearing of hijabs in the workplace, with no application of reasonable accommodation to the issue.[15] In contrast, the Parliamentary Assembly of the Council of Europe (the organisation to which the ECtHR belongs and of which the UK remains a member) has passed a resolution supporting the adoption of reasonable accommodation by Member States,[16] and so the ECtHR may in its future judgments develop the idea. There is no guarantee of this, though, and it may take even longer than the UK courts.

The second is through official guidance or private initiatives. The main body which produces formal guidance for employers and businesses is the EHRC and the current version encourages employers to consider a form of

reasonable accommodation in practice.[17] The polling company ComRes, which has done a lot of work on religion and belief in the UK, has recently started a project to champion religious diversity in the workplace.[18]

However, although such moves are welcome and have significant 'soft power' to change attitudes, they are not as immediately effective as the third option, legislative change. Despite apparently being open to the idea of reasonable accommodation at the time of the *Eweida* case and in its guidance for employers, the EHRC's December 2016 report 'Religion or belief: is the law working?' concluded that there was no need to introduce a duty of reasonable accommodation into the legal framework.[19] In the report the opposition from some secularist campaigners that such a duty would privilege religion[20] is noted and it is suggested that it might also cause uncertainty for employers and would make little change in practice, but it is still not very clear why the EHRC has had a change of heart on the matter. The EHRC would be the most obvious impetus for any significant legislative change to the present equality framework, so in normal political times its lack of support would probably mean the chances of it happening would be slim. However, these are not normal political times, and at least one think-tank which has seen many of its policies picked up by the Conservative Party has published a report promoting reasonable accommodation.[21]

There may yet therefore be a proposal to introduce a duty of reasonable accommodation of religion and belief into UK law. Although much depends on how precisely such a duty is formulated, and as noted it would be no panacea, it is nevertheless likely to be a change that would increase protection for religious liberty in the UK for those of all faiths.

For further reading:

- M. Gibson, 'The God "Dilution"? Religion, Discrimination and the Case for Reasonable Accommodation' (2013) *Cambridge Law Journal* 72(3), 578-616.
- K. Alidadi, 'Reasonable accommodations for religion and belief: adding value to Art.9 ECHR and the European Union's anti-discrimination approach to employment?' (2012) *European Law Review* 37, 693-715.
- L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2016).

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[1] *McClintock v. Department of Constitutional Affairs* [2008] IRLR 29, *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357, *McFarlane v. Relate Avon Ltd.* [2010] EWCA Civ B1.

[2] *Cherfi v. G4S Security Services* [2011] Eq LR 825, *Mba v. London Borough of Merton* [2013] EWCA Civ 1562.

[3] *Azmi v. Kirklees Metropolitan Council* [2007] IRLR 484, *Eweida v. British Airways Plc* [2010] EWCA Civ 80.

[4] Examples include *Ladele* and *Azmi*, supra.

[5] See for example E Bribosia et al, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Anti-discrimination Law?' (2010) 17 *Maastricht Journal of European and Comparative Law,* 137-161; R Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) *Modern Law Review* 77(2), 223-253.

[6] It emerged at common law in *Ontario Human Right Commission (O'Malley) v. Simpson Sears* [1985] 2 SCR 536.

[7] *British Columbia (Public Service Employee Relations Commission) v. BCGEU* [1999] 3 SCR 3.

[8] *Central Alberta Dairy Pool v. Alberta Human Rights Commission* [1990] 2 SCR 489.

[9] Sections 20-22.

[10] E.g. *Mba*, supra, which involved provision of weekend care at a children's home.

[11] [2005] ICR 1789 at [68]-[69] *per* Rix LJ.

[12] [2013] UKSC 73 at [45-46].

[13] Available at https://www.supremecourt.uk/docs/speech-140613.pdf.

[14] [2014] UKSC 68.

[15] *Achbita v. G4S Secure Solutions NV* [2017] IRLR 466 and *Bougnaoui v Micropole SA* [2017] IRLR 447.

[16] Available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21549&lang=en.

[17] Available at https://www.equalityhumanrights.com/en/religion-or-belief.

[18] http://www.comresglobal.com/belief-at-work/introduction/.

[19] Available at https://www.equalityhumanrights.com/en/religion-or-belief, see section 4.5.

[20] http://www.secularism.org.uk/blog/2015/10/the-unreasonableness-of-reasonable-accommodation.

[21] J Orr, *Beyond Belief: Defending religious liberty through the British Bill of Rights*, ResPublica, November 2016.