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Religion and Belief Discrimination at Work: Legal Challenges in the UK

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The UK continues to be more ethnically and religiously diverse. The inclusion of religion and belief within the UK Equality Law framework however has been controversial since its inception in 2003. The aim of this paper is to examine the practical and legal complexities associated with religion or belief discrimination in the UK. Drawing on an analysis of religion and belief claims from 2003 onwards and using illustrative case law, the study highlights several thematic areas of litigation relevant to employers, potential claimants and legal advisors. The paper offers insights into the underdeveloped legal debates and variations in how tribunals and the courts have interpreted and applied the law.

Keywords: *Religion and Belief; Discrimination; Equality Law; Labour Law*

Introduction

The inclusion of religion and belief within the UK Equality Law framework has been a contentious issue since its inception. Several problems have been highlighted relating to the definitions of religion and belief as constructs within the law, and indeed, with its application in the courts. Sandberg[1] observes that religious pluralism and diversity renders the definition of religion as more difficult and important in terms of deciding when the law affords legal protection to individuals and groups. Pitt[2] similarly notes that the protected characteristic of religion or belief is problematic due to its expansiveness and the difficulties of assigning relative worth to different belief systems. The legal regulations pertaining to religion and belief discrimination also vary between nations. In the USA and Canada, the law imposes a requirement on employers to accommodate the religious practices of employees as long as this does not cause undue hardship to the organisation. The UK law, however, does not explicitly place such an obligation on employers.

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[1]Sandberg (2018).
[2]Pitt (2011).

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Several authors have observed difficulties in providing evidence for and proving religion or belief discrimination[3]. More critically, Bruce, Glendinning, Paterson & Rosie[4] state that both individual and shared *perceptions* of religious discrimination might show a considerable divergence from the *actual* experience of religion-based discrimination. Such concerns additionally speak to the occasional complications inherent in delineating religion or belief discrimination from other protected characteristics such as race or ethnicity[5]. It is noteworthy that prior to 2003, religious groups could advance a claim under the Race Relations Act 1976 only if their religion coincided with a racial group by its 'ethnic origins'. Therefore, the Jewish community is recognised as both a racial group and religion and would have protection, but not Rastafarians[6] who are recognised as a religious but not a racial group.

Ashcroft and Bevir[7] have observed that since the second world war, the demographic profile of the UK has shifted from one that was White, ethnically British, and Christian, to one that includes diverse cultures, creeds and communities from all over the world. Specifically in terms of religion, in England and Wales, ONS[8] data in 2011 revealed that 63.1 percent of the population identified as being Christian, 4.8 percent as Muslim, 1.5 percent as Hindu, while the Buddhist, Jewish and Sikh groups each accounted for less than 1 percent. Those claiming no religion amounted to 27.9 percent of the population. Looking ahead on a global scale, it is projected that by the year 2050, Islam will be the only major religion to increase faster than the world's population rate[9]. In terms of *religious conversion* modelling, which accounts for natural demographic increases (births minus deaths), the biggest increase is expected in the 'unaffiliated' identity group, and the religious category predicted to lead the growth are the Muslims, with the greatest decline anticipated in the Christian faith groups (with some countries likelier to have higher conversion rates than others[10]). These forecasts associated with switching in and out of religious categories suggests the legal difficulties associated with an expanded the notion of ethnicity to accommodate religious affiliations and simultaneously gives credence to the idea that religion and belief might be exercised as a choice for *some* individuals. Indeed, certain commentators oppose legal protection being offered to a characteristic which is essentially *opted for* by an person[11]. On the other hand, authors such as Vickers[12] contend that as the majority of people display adherence to the religious group they were born into, religion might not be experienced by these individuals as having been freely

[3]E.g. Weller (2011); Woodhead & Catto (2009).
[4]Bruce, Glendinnig, Paterson & Rosie (2005).
[5]Ball & Hague (2003); *Bouzir v Country Style Foods Ltd.* (2010); Pitt (2011).
[6]*Crown Supplies* v *Dawkins* (1993).
[7]Ashcroft & Bevir (2018)
[8]ONS (2011).
[9]Pew Research (2017).
[10]See also Barro, Hwang & McCleary (2010).
[11]E.g. Lester & Uccellari (2008) at 570.
[12]Vickers (2011).

chosen. Vickers[13] also notes that in certain religions, faith is understood to be communal and closely aligned with cultural identity (e.g. Judaism).

Similar arguments about the matter of 'choice' appear in the demonstration of one's religious identity at work. Research has suggested that the visibility of religion can be received by others in both a positive (e.g. enhancing esteem) or a negative manner (e.g. stigmatising)[14]. Moreover, the expression of certain religious opinions might be seen as political expressions or a purposeful disassociation from the norm[15]. In this regard, some critics such as the National Secular Society, believe that employers have the right to regard the workplace as secular and therefore refrain from pandering to religion and faith-based accommodations[16]. There is associated scepticism about whether the duty to make reasonable adjustments (as applicable to disability) should be extended to religion or belief[17]. It is argued that doing so could imply privileging religion or belief over other protected characteristics, such as sexual orientation.

These viewpoints, however, do not consider that irrespective of organisational attempts to make religion 'invisible' in the public sphere, one's faith and belief systems underpin how work tasks are interpreted and completed, and how individuals interact with one another[18]. It has been argued that ethnic penalties might be furthered in certain communities if reasonable accommodation is not considered at work[19]. Hunter-Henin[20] additionally contends that as courts unilaterally assess the validity of religious observances, the methods in place inevitably penalise minority practices. Indeed, a number of challenges with respect to employers offering religious accommodation have been identified by both lay and faith-based sources in the UK[21]. Complications might arise, for example, in accommodating particular types of dress or appearance, permitting leave from work for prayers or religious days, catering to specific food requirements, and resolving objections that religious minorities might have in providing goods or services that conflict with their religious beliefs.[22]

Following on from this argument, there is a conjecture in legislation that the various equality strands share common interests and agendas as a result of 'common experiences of exclusion and discrimination'.[23] The veracity of such assumptions is challenged by observing how various constituents of the Equality Law might conflict with each other. For example, ideological and practical tensions can surface between distinct protected characteristics (e.g. disability and religion; sexual orientation and religion) and among different groups within a single equality strand (e.g. religious Christians and atheists). Illustrating such

[13]Vickers (2011).
[14]Atar & Shapira (2016); Nath, Bach & Lockwood (2016); Squelch (2011).
[15]Sayed & Pio (2010).
[16]Hambler (2014).
[17]Pitt (2013).
[18]Cadge & Konieczny (2014).
[19]e.g. Ghumman & Ryan (2013);
[20]Hunter-Henin (2021).
[21]Shah (2013).
[22]Hambler (2016).
[23]Valentine & Waite (2012).

potentially competing rights, a Muslim taxi driver who declined to offer transportation to a blind man with a guide dog (because taking the dog in the car was against his religion) was fined for breaching the Disability Discrimination Act[24]. Wald[25] relatedly problematises the issue of 'accommodation' by critically questioning the extent to which certain religious traditions, or forms of those traditions, might instead be able to adapt to the culture and values of the law in a particular society.

With the UK evidently becoming more ethnically and religiously diverse, and given the deleterious outcomes associated with harassment and discrimination due to religion or belief [26], this paper explores the content of religion or belief discrimination claims brought to tribunals and higher courts since 2003. The first part of the article describes the incorporation of religion and belief in UK Equality Law and alludes to the definitions adopted to guide legal advisors, policy makers and the courts. Drawing on a random sample of cases from Employment Tribunals and the Employment Appeals Tribunal (EAT) from 2003 onwards, with purposeful sampling used for further elaboration, the second part presents several thematic areas relevant to litigation in religion or belief claims. The cases illuminate some of the complications, contradictions and outcomes that relate to accommodating individual religion or belief concerns within the workplace. Despite the controversial nature of managing the manifestations of religion and belief in the workplace, the third part of the paper summarises the implications for potential claimants and employers in the UK.

The Legal Context

European law has been influential in developing the UK equality law in many areas, including religion or belief discrimination. The Framework Directive for Equal Treatment in Employment and Occupation (2000/78) requires Member States to implement legislation prohibiting discrimination on grounds of religion. The UK introduced the law to comply with its EU obligations in the form of the Employment Equality (Religion or Belief) Regulations 2003. The current provisions are contained in the Equality Act 2010 which largely replicates the regulations. Since the EU (Withdrawal) Act 2018, UK courts and tribunals are no longer bound by decisions of the European Court of Justice, but might have regard to them where relevant.

The protected characteristic of religion or belief is provided for in section 10 of the Equality Act 2010. The definition reflects Article 9 of the European Convention on Human Rights (ECHR) [freedom of thought, conscience and religion]. Religion is defined in the Act as including all religions, and any religious or philosophical belief, including atheism and agnosticism. Denominations or sects of religions like Baptists or Sephardic Jews are also protected. While the definition includes religions that are not mainstream, a religion must however have a clearly

[24]BBC (2017).
[25]Wald (2009).
[26]Weller (2011).

defined belief system and structure. The EAT in *Greater Manchester Police Authority* v *Power* (2010) recognised that spiritualism was a religious belief, pointing out that the Spiritualist Church was the eighth largest worshipping group in Britain.

Belief covers both religious and non-religious belief, and it does not have to involve faith or worship, but must fulfil certain broad criteria. In *Grainger Plc and others* v. *Nicholson* (2010), it was found that the claimant suffered discrimination at work because of his belief in climate change. In this case, Burton J. helpfully described belief as comprising the following:

(i) It must be genuinely held;
(ii) It must not simply be an opinion or viewpoint;
(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; and
(v) It must be worthy of respect in a democratic society and not be incompatible with human dignity and not conflict with the fundamental rights of others.

In *Gray* v *Mulberry Company (Design) Ltd.* (2019), Choudhury P. expressed the view that the proper approach to the application of the Grainger criteria was:

> "*to ensure that the bar [was] not set too high, and that too much [was] not demanded, in terms of threshold requirements, of those professing to have philosophical beliefs*".

Forms of Discrimination

Discrimination, in employment or otherwise, can be direct and overt or indirect and inferential. Prohibited conduct, which is unlawful under the Equality Act 2010, includes direct and indirect discrimination, harassment and victimisation. Direct discrimination (s13) arises when 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. The definition includes discrimination by association (treating one person unfavourably because of their association with another person who does have a protected characteristic) or perception (treating someone unfavourably because of an incorrect and maybe stereotypical belief about their attributes, abilities or beliefs related to a protected characteristic). There is no defence to direct discrimination except on the grounds of occupational requirements.

Indirect discrimination (sec. 19) arises if A applies to B a provision, criterion or practice (PCP), which is discriminatory in relation to a relevant protected characteristic of B. The defence of justification applies when the employer can show that the practice is a proportional response to a legitimate aim in the particular circumstances [sec.19(2)(d)].

Harassment (sec. 26) includes three different categories:

1. Characteristic-related harassment involves unwanted conduct, which is related to a relevant characteristic and which has the intention or effect of

violating one's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
2. Unwanted conduct of a sexual nature that has the same intention or effect as in (i) above.
3. Treating someone less favourably because that person has either submitted to or rejected sexual harassment or harassment related to sex or gender reassignment.

Victimisation (sec. 27) includes the undesirable treatment of someone who has asserted their right under the Equality Act 2010 (e.g. made a complaint) or someone supporting them.

The European Convention on Human Rights (ECHR) *and the Human Rights Act* (HRA)

The European Convention on Human Rights (ECHR) came into operation in 1953. It requires signatories to abide by a number of fundamental civil rights, including the rights to liberty and security (Article 5), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), and freedom of assembly and association (Article 11). The rights to life (Article 2), a fair trial (Article 6) and privacy and family life (Article 8) are also included. Prior to the introduction of the HRA 1998, the convention was not directly enforceable in the UK courts. Claimants had to take cases alleging breaches by government to the European Courts of Human Rights at Strasbourg. With respect to the HRA, section 3(1) provides, so far as it is possible to do so, that primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the ECHR drafted in 1950[27].

Religion and Belief Discrimination Claims

Overall, to succeed in the courts, a religion or belief discrimination claim would need to provide evidence that a belief is 'protected', that the issue complained about constitutes discrimination and that it cannot be justified. An inductive analysis of religion or belief case law reveals several thematic areas relevant to litigation that employers, potential claimants, and legal advisors might consider. The following subsections exemplify these aspects of decision-making in the law. It should be noted that in numerous case illustrations, the thematic issues overlap and might be read simultaneously, but have been presented separately herein for clarity.

[27] Adams, Caplan & Lockwood (2020).

(a) Establishing whether a belief meets the Legal Criteria

To qualify under the Equality Act, religion might constitute both larger organised religions such as Christianity and Islam and smaller religions, for instance Rastafarianism, which have a clear structure and belief system. With respect to cases of philosophical belief, it is crucial to satisfy the Grainger criteria. A key factor in determining success or failure in these cases is whether the specified belief is considered by the tribunal as a weighty and substantial aspect of human life and behaviour and has cogency and cohesion. Another important consideration is whether the *manifestation* of the belief is compatible with human dignity and whether it conflicts with the fundamental rights of others. It is evident from the analysis of cases that claims on the grounds of philosophical belief can be difficult to maintain and raises complex issues for employment tribunals. For example, in *Dunn* v *University of Lincoln* (2017), the claimant sought to rely on "*a belief that challenges the tendency to favour what is palatable in social policy discussion over the truth, in colloquial terms the tendency known as 'political correctness'*". The employment tribunal held that the claimant's belief was not entitled to protection under the Equality Act 2010. Interestingly, and somewhat surprisingly, the court observed that the issue was unfamiliar territory that made it difficult for the tribunal to reach a decision. The tribunal concluded that the belief was not protected on the following grounds: (i) it was more of an opinion than a belief; (ii) whilst the tribunal accepted that the belief was a weighty and substantial aspect of social policy study, it was not a weighty and substantial aspect of human life and behaviour; and (iii) it lacked cogency and cohesion.

The difficulty in predicting the outcome of meeting the legal criteria for a philosophical belief is also illustrated in the following cases. In *Maistry* v *BBC* (2011), a tribunal held that a belief that public service broadcasting has the higher purpose of promoting cultural interchanges and social cohesion, qualified as a philosophical belief. It might be contended that this was a surprising decision with Maistry's belief being more akin to a viewpoint or opinion rather than a philosophical belief. The tribunal were influenced by the fact that there had been comment from academics and the then Director General of the BBC on the importance of public sector broadcasting. Therefore expert opinion had played a role in shaping the employment tribunal's decision-making. Equally in *Farrell* v. *South Yorkshire Police Authority* (2011), it was held that an employee's beliefs that the 9/11 and 7/7 attacks were "false flag operations" authorised by the US and UK governments and that the media is controlled by a global elite seeking a new world order, were not philosophical beliefs. While the tribunal accepted that the belief was genuinely held and that whilst the views were not incompatible with human dignity, the claimant's beliefs did not have the necessary cogency, seriousness and coherence to constitute a philosophical belief. Considering 'widely accepted' public knowledge, the beliefs were deemed absurd. In *Lisk* v. *Shield Guardian Co Ltd.* (2011), it was held that the belief that a poppy should be worn as a mark of respect for military war dead was too limited to be a protected belief.

On the other hand, in *Hashman* v *Milton Park (Dorset) Ltd*. (trading as Orchard Park) [2011], an employment tribunal held that the claimant's belief in

the sanctity of life and that foxhunting should consequently be banned met the Grainger criteria and qualified as a protected belief. In *Costa* v *League of Cruel Sports* (2018), the claimant had been dismissed from his employment after raising concerns that the pension fund operated by his employer was investing in businesses involved with animal testing which was against his belief of ethical veganism. The claimant sent several emails to work colleagues informing them of the situation and was subject to disciplinary action and dismissed from his employment. Mr Costa argued that he had done nothing wrong and that his actions were motivated by his belief in ethical veganism. In order for a claimant to succeed in a philosophical belief claim, as stated previously, a tribunal or court needs to be convinced that the specified belief is capable of constituting a philosophical belief and that the claimant adhered to that belief. The claimant became a vegan in 2000 and also disposed of any clothing containing animal products. Ethical veganism was deemed as rooted in the way persons led their life, what they wore, what personal care products they used, their hobbies, the work they undertook and how they travelled to work. The employment tribunal concluded that ethical veganism was capable of being a philosophical belief and was therefore a protected characteristic under the Equality Act 2010.

The dilemmas facing employment tribunals indicate a thin dividing line between success and failure in this domain. With difficulties involved in defining both religious and non-religious beliefs, the application and interpretation of the law might be considered subjective and uncertain. The view expressed by the tribunal in *Dunn* v *University of Lincoln* (2017) that such cases required them to engage in '*unfamiliar territory that made it difficult for the tribunal to reach a decision*' indicates an unmet need for more specialist training of employment tribunals in relation to this aspect of equality law[28]. Indeed, as Sandberg asserts, "*with the exception of beliefs that are deliberately insincere and / or harmful to others, it is possible to argue that most beliefs would meet the (Grainger) criterion*".[29]

(b) Establishing Rationale within the Context

Whilst a claimant might genuinely believe that the comments or conduct that they were subjected to were offensive on the grounds of religion or belief, employment tribunals and courts often take the view that mere comments and conduct do not constitute discrimination. In this context, the cases often fail because the claimant cannot meet the legal threshold for establishing discrimination or harassment. In *Quersh*i v *The Commissioners of Her Majesty's Revenue and Customs* (2019), the claimant did not shake hands with female colleagues because of his firmly held religious beliefs. He alleged that as a result of this he was subject to harassment at work. The tribunal concluded that his employer's conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. In this case the claimant could not establish facts and in the absence of any other explanation, an act of

[28]TUC Report (2007) at 11.
[29]Sandberg (2013).

harassment on the grounds of the claimant's race or religion could not be established. The burden of proof did not shift to the respondent. If it had so shifted, the tribunal was satisfied that the employer had shown that their conduct was entirely appropriate and did not amount to harassment.

In *Heathfield* v *Times Newspaper* (2012), the claimant who was a Roman Catholic was a sub-editor with the respondent. An editor, who was chasing a story about the Pope shouted across to the senior production executives, "*can anyone tell what's happening to the f***ing Pope*?". The claimant raised an internal complaint which he did not think was adequately dealt with, and brought claims of harassment and victimisation to the employment tribunal. The employment tribunal dismissed both claims, saying in relation to harassment that the colleague had indeed engaged in 'unwanted conduct' but neither did the conduct have the purpose or effect of violating the claimant's dignity or creating an adverse environment for him nor was the conduct on the grounds of the claimant's religion. The claimant appealed against the ruling in respect of harassment, but this was dismissed by the appeals tribunal. In relation to the motive of the conduct, the employment appeal concluded that there was no anti-Catholic purpose in what the colleague had said, and that bad language was used because of irritation and work pressure. In terms of the effect of the conduct, the tribunal found that to the extent that the claimant felt that his dignity had been violated or that an adverse environment had been created, it was not a reasonable reaction in the circumstances and rejected the claimant's appeal.

(c) Establishing the Degree of Harm caused by the Conduct

The failure of a claimant to complain or challenge particular conduct, or to inform the alleged perpetrator that the conduct is unwelcome, damages the claimant's likelihood of success. For example, in *Ullah* v *B&Q Plc* (2019), the claimant alleged race and religious discrimination. In a meeting concerning Mr Ullah's work performance and promotion, the following exchange took place between the parties (recorded by the claimant): The manager said*:* "*There are times when you seem very engaged and very up for it and there's other times you have almost been verging on being, I hate to say it because it's such an inappropriate word, but being a terrorist. And do you know that is an old B&Q word don't you?"*. Mr Ullah said: "*Yeah"* and is heard laughing on the recording which he made of the interview. The claimant's manager continues: "*That is not me saying another kind of terrorist, I am not saying that*". Mr Ullah responds: "*You're calling a Muslim guy a terrorist"*. Again, he is heard laughing on the recording. The manager then says: "*No, no, no, no, I know that's why it sounds so ridiculous I'm not saying anything*". Mr Ullah responds: "*OK*". He subsequently claimed that the exchange amounted to the manager calling him a terrorist and argued that this denoted discrimination because of race and religion.

The tribunal observed that the 'terrorist' comment was made almost halfway through a lengthy interview and that at no point during the meeting did the claimant suggest that he was upset or exhibit signs of distress due to the comment. The court concluded that the claimant had only raised his grievance because he

was disappointed at not being selected for promotion. The tribunal found that the use of the word 'terrorist' did not amount to race or religious discrimination and fell significantly short of amounting to harassment within the meaning of the Equality Act 2010. However, it could be contended that the claimant's laughter in the recording was a reasonable way for him to respond in dealing with an uncomfortable situation. The tribunal took the view that 'feeling uncomfortable' is not the same as being subject to race and religious discrimination or harassment. It is evident that in order to succeed in religious discrimination cases of this nature, the claimant will need to provide tangible supporting evidence about specific comments, to list any specific detriments suffered, and be able to discuss these in detail while giving evidence.

(d) Establishing the Credibility of Parties

Tribunal and court decisions in discrimination cases often turn on the key issue of witness credibility which can be derived from the strength of the evidence and the responses of the litigating parties. There is an appraisal of whether reactions are evasive or exaggerated, if explanations provided are unclear or contradictory, and whether the allegations are supported by contextual circumstances. In a significant number of religious discrimination cases where the tribunals are faced with an allegation of offensive behaviour by a work colleague or manager, there is often a straight denial from the alleged perpetrator, constituting two conflicting versions of the events (rarely witnessed by others in the workplace). The hearing is then essentially a 'credibility contest'[30].The outcome of the claim will be determined by whose evidence the employment tribunal prefers.

By way of example, in *Roderick* v *Chief Constable of South Wales Police* (2018), a claim by a police officer of religion and belief discrimination was held not to be well founded and was dismissed. The claimant alleged that he was called *'Father Ted'* by one colleague and that another colleague commented that '*Jesus did not exist and the Bible is a pile of nonsense*'. The employment tribunal did not regard the claimant as a credible witness and noted that he regularly raised religion as a conversation topic and initiated discussions about it by inviting questions about his faith and the Bible. The tribunal took the view that the comments made to the claimant were not presented in an argumentative or derogatory manner, and arose in a more general conversation about religion and the Bible (paragraphs 20-22).

(e) Establishing the Sufficiency of Proof

Offering specific evidence of discriminatory conduct is essential and would bolster the likelihood of success in litigation. Making a claim with a paucity of evidence reflects a lack of knowledge and understanding about the legal process and what is required to establish religious discrimination to the satisfaction of an employment tribunal or court. A claim should also be brought within three months of an act that is deemed discriminatory on the grounds of religion or belief. The

[30]Samuels (2004); Lockwood, Rosenthal & Budjanovcanin (2011).

burden of proof in discrimination cases initially falls on the claimant to adduce facts from which the tribunal could infer that unlawful discrimination has occurred. The burden then shifts from the claimant to the employer in order to show there is a non-discriminatory reason for the conduct, behaviour or comment. In many cases that fail or are struck out by the employment tribunals, there is insufficient direct evidence of an act of discrimination and therefore the tribunal concludes that there is no reasonable prospect of success[31].

In a number of claims, the allegation of religion or belief discrimination is considered speculative in nature and not supported by the contextual circumstances. This might suggest that too many petty and spurious claims are being made. For example, in *Dunhulow* v *Imperial College Healthcare* (2019), whilst it was evident that the claimant had many unresolved grievances relating to her workplace, she attempted to shoehorn these individual grievances into allegations of discrimination on account of age discrimination and religion, often in a somewhat haphazard manner. Whilst the claimant genuinely believed in the discrimination, there were no grounds for the employment tribunal to infer from the evidence that the issues were in any way related to her age or religion and belief. In another example[32], a claimant alleged that when his area manager visited the shop in which he worked, the manager made comments about his skin colour, race and religion. The tribunal viewed the allegations about skin colour, race and religion as vague with a lack of specific examples, and therefore concluded that the incidents had not occurred.

(f) Establishing the Degree of Threat to Organisational Image, Culture and Reputation

There is increasing evidence of employees wanting to manifest their beliefs at work by wearing religious clothing or symbols and expressing their philosophical views[33]. However, an organisation's ethos might be challenged by an employee's dress, behaviour or conduct in the workplace, demonstrating one area of conflicting rights [see also section (g)]. The difficulty for employers is how best to accommodate individual employee authenticity with the organisation's brand vision and reputation. In *Noah* v *Sara Desrosiers* (trading as Wedge) (2007), the claimant was Muslim and applied for the position of stylist at the salon. She wore a headscarf, which she considered essential to her religion. The respondent did not hire the claimant as the wearing of a headscarf was considered unsuitable for the post. The owner made it clear that if an employee at her salon wore any type of head covering, she would ask them to remove it as it would not be consistent with the promotion of the business. Here the claimant complained of direct and indirect discrimination. While the claim of direct discrimination was rejected, the complaint of indirect discrimination was well-founded. The tribunal accepted that the respondent had a legitimate aim and was objectively entitled to view hair coverings as a risk to business. However, a combination of factors, including the discriminatory impact, the fact that the PCP did not go to the core requirement of

[31]*Sidhu* v *Hovis Ltd.* (2019).
[32]*Said* v *PCC Abbey Ltd.* (2018).
[33]Aquelch (2013).

the job function, and a critical assessment of the available evidence as to the degree of risk and adverse impact to the respondent's business had the claimant been employed and covered her hair at all times, meant that the respondent could not show that the PCP was a proportionate means of achieving a legitimate aim (para 160).

Similarly, in *Farrah* v *Global Luggage* (2012) it was held that an employer who required a Muslim employee to resign because she wore a headscarf on the grounds that the business wanted to maintain a 'trendy image' was liable for constructive unfair dismissal. By way of further example, in *Sethi* v *Elements Personal Services* (2019), the claimant - a Sikh man, was refused employment because he had a beard. The employer had a 'no beards policy' for appearance (and not hygiene-related) reasons. The tribunal held that this placed Sikhs generally, and the claimant, at a particular disadvantage because the beard is a tenet of the Sikh faith. The tribunal viewed the 'no beards' rule to be a disproportionate requirement for the maintenance of high standards of appearance – an alternative requirement to keep the beard tidy in this instance would have been reasonable.

An employee's behaviour or conduct, both in their public and private life, that is associated with religion or belief might also need careful consideration and proportionate action by an employer. In *Gen Menachem Hendon Ltd.* v *De Groen* (2019), a teacher at a religious Jewish nursery was dismissed after disclosing to pupils' parents that she lived with her boyfriend, which was contrary to the ultra-orthodox religious principles of the school. The nursery was concerned that such an admission to parents would taint its image, have a detrimental effect on the school's credibility and result in financial loss. The claimant subsequently refused the respondent's request to lie and state that she was not living with her boyfriend, so that the nursery could communicate that information to relevant persons. However, the teacher's claim for religious discrimination failed because she had not been dismissed because of *her* lack of belief, but because of the *organisation's own religious belief* forbidding cohabitation of non-married couples. Here, the claimant could not satisfy the comparator requirement in direct discrimination, since the employer would have dismissed any other person cohabiting outside of marriage irrespective of their religion. However, it could be argued that as a consequence of this application of the law, the school's beliefs on cohabitation was being prioritised over the less favourable treatment experienced by the teacher because of her belief system. As appraised by O'Dempsey[34], the "over focus (on the concept of religion) tends to mask the fact that *belief* as a characteristic operates in a completely different way and requires more detailed consideration". This illustration highlights how the law will have to tread a difficult path where the claimant and defendant might be of the same religion, but have different interpretations about certain aspects of their belief systems.

[34]O'Dempsey (2019).

(g) Establishing the Degree of Threat to others and balancing Conflicting Rights

Ideological and practical tensions can surface between distinct protected characteristics (e.g. disability and religion; sexual orientation and religion) and among different groups within a single equality strand (e.g. religious Christians and atheists). In such instances, a notion of 'competing rights' emerges which shores up questions about how incongruent individual equality-related rights are to be assessed, and indeed, whether one set of rights could trump another. The issue of balancing conflicting rights is raised in a range of cases. Exemplifying circumstances of religious tensions between the same equality strand, in *Ali* v *Heathrow Express Operating* (2020), a Muslim employee claimed discrimination because his Sikh colleagues objected to him wearing a Kara, which is intrinsically associated with the Sikh religion. The work colleagues emphasised that the claimant's religion (Islam) was the reason for them objecting to him wearing a Kara. However, as they also made inflammatory remarks about incidents of sexual abuse by Muslims who specifically wore the Kara, the tribunal had no hesitation in finding that this was discrimination against the claimant on the basis of his religion.

In *Ladele* v *The London Borough of Islington* (2010), the claimant (a registrar) lost her religious discrimination claim when she was disciplined for refusing to conduct same-sex civil partnership ceremonies on the grounds of her strict Christian religious belief. Here, the Borough was deemed as authorised to use its 'Dignity for All' policy to oblige all its registrars to perform civil partnerships and marriages. The court's decision has been criticised for not acceding on the point that the employer could have reasonably accommodated Ladele's conscience objection (additionally given her experienced distress) when other councils had found ways to do so in such circumstances[35]. Similarly, in *McFarlane* v *Relate Avon Ltd.* (2010), the claimant lost his claim of religious discrimination when he was dismissed for refusing to carry out certain same-sex counselling sessions because of his Christian belief that same-sex activity was sinful. The narrow dividing line between success and failure in some cases might, however, be exemplified by the employment tribunal decision in *Mbuyi* v *Newpark Child Care* (2015), where it was held that a Christian nursery assistant had been subject to direct religious discrimination when she was dismissed for expressing her belief to a lesbian colleague that God did not approve of same-sex relationships. This decision was highly context specific– in that the claimant was *replying to a question asked by the colleague*, and not promulgating her views in the workplace.

In *Mackreth* v *Department for Work and Pensions* (DWP)] [2018], the applicant who was a Christian claimed several religious and/or philosophical beliefs, including his belief in the truth of the Bible and a lack of belief in, and conscience objection to, transgenderism. The claimant asserted that his religious beliefs meant he could not refer to individuals undergoing, or who had undergone, gender reassignment with the pronoun of that person's choice (as required by the DWP). The tribunal accepted that lack of belief in transgenderism and conscience objection to transgenderism are genuinely held and that the lack of belief in

[35]Vickers (2010).

transgenderism are beliefs that relate to a weighty and substantial aspect of human life and behaviour and attain a certain level of cogency, seriousness, cohesion and importance. However, the court held that such beliefs were incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals.

The ambiguity/confused state of the current framing, application and interpretation of the law is also demonstrated in *Forstater* v *CGD Europe* (2021). The claimant held the belief that sex was immutable and not to be conflated with gender identity. She made comments on social media which some of her colleagues found offensive to transgender people. At the conclusion of an investigation, the claimant's working relationship with the respondent was terminated. At first instance, the employment tribunal held that whilst the claimant's belief satisfied the first four criteria in *Grainger*, it did not satisfy the fifth criterion – her belief was deemed as incompatible with human dignity and in conflict with the fundamental rights of others. However, on appeal, the EAT overturned the decision on the grounds that the employment tribunal had incorrectly applied the *Grainger* criteria. The employment tribunal had interpreted the law too narrowly and that a philosophical belief should only be excluded for failing to satisfy the *Grainger* criteria if the belief was *extreme* in nature, such as a belief in terrorism, Nazism or totalitarianism (and therefore in contravention of Articles 9 and 10 of the ECHR). Whilst the claimant's views were controversial, objectionable and offensive they did not fall into the category of 'extreme' that would exclude it from legal protection. This wider interpretation of the law has been welcomed by commentators, however, given the uncertain state of the law in this domain, the Policy Exchange has called for Section 10 of the Equality Act 2010 to be amended to explicitly state that only '*extreme beliefs*' should be excluded from protection and not mere controversial or offensive views[36].

(h) Establishing the Degree of Threat to Job Performance and Health and Safety

In certain contexts, the employer and claimant will need to balance job-performance or health and safety issues with respect to religious expression. In *Azmi* v *Kirklees Metropolitan Borough Council* (2007), Mrs Azmi was employed at a junior school as a bilingual support worker. The claimant asked whether she could wear a veil whilst teaching in the presence of male colleagues. Mrs Azmi was informed that she could wear a veil while working around the school, but that she must remove it whilst teaching because obscuring the face and mouth reduced the nonverbal signals required between the instructor and pupil. Essentially, it was determined that she performed her work more effectively when not wearing a veil. The claimant complained of indirect discrimination and the court found that the local authority had applied a provision, criterion, or practice that put persons of Mrs Azmi's religion at a disadvantage when compared with others. Here there was a potential case of indirect discrimination, however, in this context the PCP was a proportionate means of achieving a legitimate aim. There was objective evidence

[36]Yowell (2021) at 36.

that when the claimant was wearing the veil, children did not engage with her as effectually as when she was unveiled.

In another instance, a claimant (an observant Muslim) was offered employment at a nursery. Her religious beliefs required her to wear a *jilbab* - a garment that reached from her neck to her ankles[37]. She claimed that she was at a disadvantage by reason of the manifestation of her religious belief because she had been told that she would not be permitted to wear a *jilbab* (contrary to her religious beliefs) and was therefore unable to accept the post. It was held by the EAT that the claimant had not been instructed by the hiring organisation that she could not wear a *jilbab*, but was asked if she could wear a shorter one. The employer was concerned about staff wearing any garment that might constitute a tripping hazard to themselves or the children in their care; the provision, practice, or criterion was not indirectly discriminatory to Muslim women. The PCP was applied equally to staff of all religions and if it did put some Muslim women at a particular disadvantage, any indirect or direct discrimination was justified as being a proportionate means of achieving a legitimate aim; namely protecting the health and safety of staff and children.

In *Onuoha* v *Croydon Health Services NHS Trust* (2021), the employment tribunal held that a Catholic nurse was subject to direct discrimination for wearing a cross necklace. The trust had argued that the wearing of the cross posed an infection risk. The tribunal found that the infection risk was very low and that the organisation's dress code was applied in an arbitrary manner and in a way that was not proportionate. There was no cogent explanation as to why rings, neckties, kalava bracelets, hijabs and turbans were permitted, but a cross necklace was not (paras 270- 271). This decision contrasts with *Chaplin* v *Royal Devon and Exeter Hospital NHS Foundation Trust* (2010), where the claimant, a nurse in a hospital, was prevented from wearing a cross at work on the grounds of health and safety because management were concerned about the associated risks (e.g. a patient seizing and tugging on the cross thereby causing injury or the item coming into contact with an open wound). Here however, the hospital had engaged in extensive consultation with Ms Chaplin to accommodate the wearing of a cross or brooch, however, a compromise could not be reached.

Dress codes and uniform policies can also be contentious in other public service contexts. For example, in *Singh v Greater Manchester Police* (2018)[38], a Sikh officer was asked not to wear a turban during riot training and was told to wear a Force regulation helmet during training exercises; this requirement was held to be indirect discrimination on grounds of both race and religion. Here the tribunal noted that "it is appropriate to recommend that Greater Manchester Police should amend its uniform and equipment policy to take into account the race and religious requirements of Sikh officers". While the Force stated that they thought they were acting in the officer's best interests in terms of job performance and health and safety, they were obliged to eventually accommodate the request. It is noteworthy that under the Employment Act 1989, Sikhs who wear a turban have exemption from the requirement of wearing head protection on construction sites,

[37]*Begum* v *Pedagogy Aurus UK Ltd.* (2015).
[38]Guardian (2009).

or indeed more recently, at any other workplace (The Deregulation Act 2015). These cases demonstrate inconsistencies in the application of law in the area of religion and health and safety. In some cases, there might be calls for empirical evidence to ascertain the degree of threat posed by non-adherence to a PCP, whereas in others, exemptions are automatically granted with few exceptions.

(i) Establishing the Fairness of Procedural Issues

The manner in which employer policies, practices and procedures are applied have been a relevant issue in litigation. In *Noufel* v *Royal Mail* (2018), the claimant alleged direct and indirect religion or belief discrimination based on the way his request for leave was handled. In August 2017, the claimant first informed his employer that he wanted to carry forward a week's leave from 2017 to 2018 in order to request time off for *Hajj* (religious pilgrimage). His leave form was initially returned to him without consent because it was a period which was oversubscribed, and he had been granted a similar period of leave the year before. The employment tribunal found that the claimant was not treated less favourably than anyone else would have been treated under the employer's absence policy. In fact, the tribunal concluded that the claimant was treated *more* favourably than others in that his request for leave to go on *Hajj* was previously approved as an exception subject to his putting it in writing. It was determined that the employer's system for dealing with absence requests was a proportionate means of achieving the legitimate aim of securing the required service level at peak holiday seasons. Mujtaba and Cavico[39] observe tensions can arise among employees when a particular individual's religious practices are seen to impinge on another employee's work life. Here, it is conceivable that permitting a special absence for certain workers could result in a disproportionate workload allocation for others, which would need careful management.

Conclusion

Our analysis highlights some of the major thematic areas relevant to litigation in religion or belief claims. While employment tribunal decisions do not create binding precedent, they reveal the nature, complexities and the scope of such litigation claims. The current legal framework pertaining to religion or belief is highly complex and employment tribunals and higher courts appear to be unilaterally vested with the task of adjudicating religion or belief claims and setting the limits of the law[40]. Sandberg[41] observes that tribunals and the courts have interpreted the law in different ways, reaching inconsistent and arbitrary decisions. Case law further demonstrates that the protection proffered by the Equality Act 2010 to philosophical belief is potentially wide in scope and the

[39]Mujtaba & Cavico (2012).
[40]Hunter-Henin (2021).
[41]Sandberg (2018).

boundaries/limits of the law are not always clear. As acknowledged by Pitt[42], "the inclusion of all religions and all beliefs within the rubric of a protected characteristic leads to a real danger of trivialising the equality principle". The legal regulations pertaining to religion or belief therefore continue to present significant challenges for both employers and employees in terms of predicting how the law will be interpreted and applied by tribunals or courts. Whilst the review of legal claims demonstrates areas of ambiguity and subjectivity, it nevertheless points to certain implications for both employers and employees.

To summarise, employees should be aware that if they are contemplating making a religious discrimination claim, there is a requirement for sufficient and direct evidence of the act of discrimination, listing any specific detriments suffered and discussing these in detail while giving evidence. Workers should note that the failure to complain or challenge conduct, or to inform the alleged perpetrator that the conduct is unwelcome, harms the likelihood of success[43]. As Pearson observed,[44] the outcome of an employee's claim is likely to depend on how offensive the conduct was; whether it took place in work time; whether it arose in the context of a general discussion about religious issues or if it was unwanted and unwarranted behaviour.

Demonstrating the existence of religious discrimination can be problematic due to the subtle means by which religious discrimination might manifest itself. The importance of legal advice for employees when taking a claim is particularly pertinent to ensure that speculative and unworthy claims are not brought to court and that an employee has cogent evidence to support the claim. If an employee is taking a philosophical belief claim against an employer, the belief must meet the *Grainger* criteria. A belief might potentially be protected, but in the context of a particular case, the employee might not gain protection of the law if the manner in which the person manifested the belief is deemed incompatible with human dignity and the fundamental rights of others[45].

With respect to employers, whilst organisations might wish to preserve their brand and reputation, managers must be sensitive to the right of employees to express their beliefs and religious identity. Complexities in this arena commonly arise on grounds of dress requirements[46] which might amount to unfavourable treatment by preventing a person from manifesting their religion. However, indirect discrimination might be seen by the courts as justifiable if the employer can show that its regulations are proportionate and necessary to fulfil a legitimate aim. Indeed, it has been observed that employment tribunals and higher courts have been reluctant to treat religious discrimination claims as direct discrimination, preferring instead to classify issues as indirect discrimination, thereby providing an employer with an opportunity to objectively justify the treatment[47].

[42]Pitt (2011) at 403.
[43]*Ullah* v *B&Q Plc* (2019)
[44]Pearson (2016) at 42.
[45]*Mackreth* v. *Department for Work and Pensions* [2018]; *Forstater* v *CGD Europe* (2021).
[46]Middlemiss (2018); Nath, Bach & Lockwood (2016).
[47]Pearson (2016); Hatzis (2011); TUC Report (2007); *Azmi v Kirklees Metropolitan Borough Council* (2007).

While the right to express religious freedom might increase the morale of individuals in the workforce, it presents challenges to organisations if other groups of workers view religious expression negatively as a means of promulgating faith against their wishes. Therefore, a claimant who manifests their religion in a way that is inappropriate and which upsets other members of staff could be dismissed for a permissible reason, and they would not be considered to have been subject to less favourable treatment in such a situation[48]. In the event of a conflict, an employer must balance this right of an employee against the rights and freedoms of others.

An employer will also need to balance health and safety issues with respect to religious expression, considering where the employees religious freedoms cease, and health and safety issues commence. The key question is whether the employer can justify the PCP on health and safety grounds[49]. They should ensure policies, practices and procedures are explicit, applied reasonably and even-handedly, and do not discriminate on the grounds of religion or belief[50]. It is also important that management should not act in haste relating to disciplinary action and dismissal[51]. As Mujtaba and Cavico observe[52], management might avoid religion or belief litigation by taking positive measures to educate and train staff in the areas of culture, religion and diversity and implement policies prohibiting discrimination on the grounds of religion or belief. To avoid the likelihood of legal action, employers could consider adopting the US and Canadian approach of reasonable accommodation (see Vickers[53] for an alternative viewpoint). Overall, it would be prudent for organisations to gather feedback and review their policies, practices and procedures that could raise issues concerning belief and religious observance at work.

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[48] *Chondol* v *Liverpool CC* (2009); *Grace* v *Places for Children* (2013).
[49] *Begum* v *Pedagogy Aurus UK Ltd.* (2015).
[50] Nath, Bach & Lockwood (2016).
[51] *Costa* v *League of Cruel Sports* (2018).
[52] Mutjaba & Cavico (2012).
[53] Vickers (2019).

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