RELIGIOUS EXPRESSION IN THE WORKPLACE IN THE UNITED KINGDOM

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We should like to begin by thanking Alain Supiot and Matthew Finkin, for creating and organizing this symposium and the meeting in Nantes in May 2008 at which the papers were discussed in preliminary or draft form. Those thanks are given in a spirit that combines the intellectual with the personal. Both of these colleagues have made, and continue to make, a most important contribution to our own respective areas of work in, and personal experience of, labor or employment law. They do so in ways that converge upon, and are perfectly illustrated by, the present symposium.

Alain Supiot has enormously contributed to our respective areas of work, first by sketching out a particularly open-minded and innovative vision of the employment relationship in leading the "Beyond Employment" initiative; and second by creating in Nantes one of the most important forums in Europe for comparative and multi-cultural discourse in legal and social sciences.

As to Matt Finkin, not only does he match Alain's talents as an impresario of academic gatherings and academic activity in our field of work, from which many of us have greatly benefited, but he also has a very special place in the development of Anglo-American and European comparative employment law, so that his work in that sphere is exerting an increasing influence upon Anglo-European comparative legal reflections. For instance, he wrote a piece in the *Comparative Labor Law & Policy Journal* in 2002 under the heading of Menschenbild*: The Conception of the Employee as a Person in Western Law*,[1] which we have found most influential upon our own respective areas of work—and which forms an excellent point of departure for these deliberations on religious expression in the workplace.

When Matt Finkin's request to prepare the papers for this meeting came in, Lucy Vickers was just about to publish a book that would provide a full statement of the law concerning religious expression in the workplace

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1. 23 COMP LAB. L. & POL'Y J. 577 (2002).

in the United Kingdom and Mark Freedland and she agreed to produce a paper that would summarize the position in the United Kingdom and would place that position in a comparative context. For consideration at the meeting at Nantes we submitted two documents; the first was a chapter from Lucy Vickers' then forthcoming book in which she sets out the rationale for the current British law concerning religious freedom in the workplace. The second was a recent lecture by the Archbishop of Canterbury, the religious head of the Church of England, which caused enormous controversy in Britain, in which he argued for a certain form of incorporation of Sharia law into the law of the United Kingdom. At the Nantes meeting, Mark Freedland suggested ways of locating both writings in the current context of British law and practice concerning religious expression in the workplace.

The present paper consists of a short introductory section based upon that presentation at the Nantes meeting. It is followed by a substantial central section that Lucy Vickers has prepared on the basis of her book in order to give a synoptic picture of the current state of U.K. law concerning religious expression in the workplace. That in turn is followed by a concluding section in which we seek to draw together some thematic ideas from the preceding sections.

I. INTRODUCTION—FROM TOLERANCE TO MULTI-CULTURALISM?

In brief summary, the question of religious expression and religious freedom in the workplace was, before the present decade, only the subject of very limited legal regulation in the United Kingdom. The constitution, being an unwritten one, there was no enacted constitutional provision for religious freedom. The laws of discrimination in employment did not deal with discrimination on the ground of religion or belief, except in Northern Ireland, where it had been extended to religion or belief during the 1980s, something that made a significant contribution to the eventually successful efforts to resolve the profound conflict between the Catholic nationalists and the Protestant Unionists in that province.

In the present decade, as Lucy Vickers' book has described, two profound changes took place. In 2000, the Human Rights Act of 1998 came into force and incorporated Article 9 of the European Convention on Human Rights (ECHR) into British law. In 2002, the law of discrimination in employment was extended to the ground of religion and belief in implementation of the European Community Directive 2000/78. So, the formal and substantive position has changed very greatly in recent years, though we do not yet have very much case law applying this new legislation.

We would place this very brief description of the legal position in its larger context in the following ways. It seems to us, and the other papers in this symposium fully confirm this, that when national legal systems regulate religious expression in the workplace, they are really defining several very large things. They are, in an obvious way, defining their approach to the personal work relationship in respect of religion. But they are also defining the place of religious expression in the very conception of the employer, that is to say the employing enterprise or the employing institution. They are answering the question: How far and in what circumstances may religious expression be embodied in the employing organization itself? And they are, in an important way, even posing the question of the role of religious expression and religion as a whole within the state's own conception of itself.

So what is the approach of the British state to these ascendingly fundamental questions? We think the British state is, in this respect, in the course of a difficult transition, which is very well illustrated in the sphere of religious expression in the workplace. It is a difficult and uncertain transition from a state of religious tolerance to a state of multi-culturalism.

We would say that, effectively throughout the twentieth century at least, the British state identified itself as a state of religious tolerance both in general and with respect to personal work relations. It was and is, in formal terms, a Christian state, in which the Church of England is an established church, and in which the Queen is identified as the Defender of that Faith. But that self-conception of the state as a Christian one has been a loose and imprecise one, increasingly tempered by a sense of obligation to be tolerant—almost, one could say, neutral—as between different Christian confessions, and more generally toward the other Abrahamic religious and toward religious groups at large.

This, we think, translated itself into the employment sphere. There has been no strict separation of public and private employment, and the public employment sphere has not been identified as a formally secular one, or even as neutral between religion and non-religion.[2] So rather than being secular, the public employment sphere has been one in which religious tolerance has been the order of the day; and that has been the general expectation of the state in relation to the private employment sphere too. As a concrete example of the abstentionist position, for a long time employment law managed to avoid the regulation of personal work relations within religious organizations by conceptualizing those relations as intended to be "spiritual" ones, not coming within the idea of the contract of employment.

2. Religion in state schools.

Now we would say that in British society this tolerance is gradually breaking down or at least coming under increasing strain, and having to give way to a different demand for multi-culturalism. Multi-culturalism asks for something more than tolerance of "minority" groups by the established "majority" group—it demands something like full equality.

So in this paper we are essentially exploring a contrast and a possible transition between tolerance and multi-culturalism. We are suggesting that there is a theoretical contrast between a position of tolerance and a position of multi-culturalism. In stark terms, the position of tolerance is one in which one particular religion (and indeed confession) is recognized as having a primacy over others within the state, but in which there is a commitment to ensuring that adherents to other religions and confessions and non-believers in any religion are not personally disadvantaged by reason of their beliefs and in the practice of their religion or in abstention from religion of any kind. The position of multi-culturalism is one in which there is a commitment to ensuring equal regard and respect for a wide set of religious beliefs or an absence of religious belief, and for the adherents to the cultures or sub-cultures that are represented by those belief-systems.

This is the contrast and possible or hoped-for transition that we suggest is addressed in very different ways in the two papers that we submitted to the Nantes meeting. Lucy Vickers' chapter presents a rationale for the new laws of freedom and equality of religious expression that she describes. She argued in effect, that these new laws could operate as a framework for multi-culturalism in employment—that they could provide a basis for a particular kind of relativism of employment rights within which conflicts between religious groups and between religion and non-religion could be addressed and reconciled as far as possible.

The Archbishop of Canterbury, not especially concerned with the sphere of employment relations, suggests what we would describe as a more fundamentalist approach to multi-culturalism. He is more prepared to move toward the recognition of distinctive legal enclaves for different religious faith groups, taking Islam as his example, and proposing a separate recognition of Sharia law in certain aspects of the normative regulation of Muslim communities within Britain. We think this causes great alarm in Britain because it seems to many people to require too abrupt and complete a transition from tolerance to multi-culturalism.

In the concluding section of this paper, having considered the current state of the law in some detail, we shall discuss whether this analysis seems a sound one with respect to British law and society.

II. THE U.K. LEGAL PROVISIONS PROTECTING AGAINST DISCRIMINATION ON GROUNDS OF RELIGION AND BELIEF IN EMPLOYMENT

Protection against discrimination on grounds of religion and belief is provided in the Employment Equality (Religion or Belief) Regulations 2003, ("the Regulations"), introduced in December 2003.[3] The Regulations protect against discrimination caused by prejudice on the part of employers, as well as unreasonable refusals to adapt practices, such as uniforms or working time, to accord with the religious or other beliefs of staff. They protect against discrimination in employment and occupation, making it unlawful to discriminate on grounds of religion or belief in the arrangements made for determining whom to employ; in the terms of employment; and by refusing to offer employment. Once employed, it is unlawful to discriminate on grounds of religion or belief in the terms of employment afforded; in opportunities for promotion; by dismissal or subjection to other detriment, as well as after the end of the employment relationship.[4] Employment is defined more broadly than the term is defined in other employment legislation,[5] and includes clergy or other ministers of religion, whose employment status has often been a source of uncertainty.

The terms "religion" and "belief" are defined as "any religion, religious belief, or philosophical belief,"[6] and include reference to a lack of a religion or belief. No further definition is given, but guidance can be drawn from the ECHR.[7] In terms of belief, the ECHR suggests that beliefs must have sufficient "cogency, seriousness, cohesion and importance"[8] to warrant protection. It is clear that political beliefs are not covered.[9] Although the outer limits of the definition of belief are not clear, the

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3. Legislation to protect against discrimination on grounds of religion or belief was introduced in Northern Ireland in 1976 and is currently governed by the Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162 (N. Ir. 21). The Fair Employment and Treatment (Amendment) Regulations, 2003, S.I. 2003/520 (U.K.), amended the definition of harassment and indirect discrimination to bring it into line with the Directive. The position in Northern Ireland is not considered here. For further detail on the Regulations see LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE (2008) [hereinafter VICKERS, FREEDOM] and LUCY VICKERS, RELIGIOUS DISCRIMINATION AT WORK (2008) [hereinafter VICKERS, DISCRIMINATION].

4. Regulations, *id.* at art. 21.

5. Regulations, *id.* at arts. 8-14

6. The original definition was "any religion, religious belief, or similar philosophical belief," and was amended by the Equality Act, 2006 (Chapter 3) (U.K.).

7. For the approach under the ECHR, see CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS ch. 4 (2001).

8. X, Y and Z v. UK, (1982) 31 DR 50 (U.K.); Campbell and Cosans v. UK, 4 Eur. H.R. Rep 293 (1982) (U.K.).

9. Mr R A Baggs v. Dr P D A Fudge, Case No 140011/05 (4863/40) (2005) (U.K.). In Finnon v. Asda Stores Ltd. (Case No. 2402142/05) (2005) (U.K.), a Tribunal granted a full hearing to a BNP member, rather than dismiss the claim at a preliminary stage. *See* Barry Fitzpatrick, Report, *Sexual Orientation and religion or belief cases*, 24 Trades Union Congress (2007), *available at* http://www.tuc.org.uk/extras/SORBreport.pdf. However at the full hearing, the case was dismissed, as membership of the BNP was not covered by the protection.

Regulations clearly cover atheism and other non-religious viewpoints. Amendments to the Regulations in the Equality Act 2006 state that references to religion or belief include reference to a lack of a religion or belief. This should mean, for example, that an employer who will only employ Christians discriminates against any applicant who is not a Christian.

A. The Right to Freedom of Religion and Interpreting the Regulations

Although framed as an equality measure, the Regulations clearly provide a level of protection for religious freedom, and to this extent they share some interaction with the right to freedom of religion and belief, protected in international and European law. Within the U.K. jurisdiction the Human Rights Act 1998 protects the human rights of employees in the public sector, and provides that all domestic legislation must be interpreted to comply with the Convention rights. The overall effect of the Human Rights Act in this context is that the Regulations must be interpreted in light of the ECHR protection for freedom of religion and belief. Article 9 of the ECHR provides that everyone has an absolute right to freedom of thought, conscience, and religion. It also provides a qualified right to manifest religion or belief, subject to necessary restrictions to protect the rights of others. Because the right to manifest a religion or belief is not absolute, there will be times where religious freedom may be legitimately restricted at work. This will arise in particular where the exercise of freedom of religion or belief interferes with the rights of others.

Article 9 protects religious freedom as an individual right, but also as a group right; enjoyment of religious freedom comprises a right to manifest and practice the religion, alone or with others. Part of the group right to religious freedom may include a right to work together with others of the same faith, to create religiously homogenous workplaces. In the English context, there is evidence of a number of such workplaces: businesses run along religious lines, with a religious culture or ethos. In some cases the work may be explicitly religious, such as the appointment of teachers of the religion. However, in other cases the link is less explicit, such as the appointment of catering or administrative staff. Indeed there are also examples of religious individuals choosing to work with others of the same religious persuasion, grouping together to supply goods and services without any specific religious link, running, in effect, a secular business, except that the staff all share a religion. There is no requirement in English law that such businesses should have a charitable purpose, nor, if they are to have a religious culture or ethos, are they prevented from being profit-making. The freedom of religious individuals to group together and work

together in a religious environment can be viewed as part of the group's freedom to manifest religion, and prior to the introduction of the Religion and Belief Regulations, there was no reason to restrict the employment practices of such employers.[10] With the introduction of the Regulations, as will be discussed below, the freedom of such "religious ethos" organizations is limited where their employment practices discriminate disproportionately on religious grounds.

The interaction of the protection against religious discrimination and the right to freedom of religion can give rise to some tensions, which may cause some difficulties in the interpretation of the Regulations. For example, conflict can arise between the collective rights of religious people to work together in faith-based workplaces, and the rights of those outside the religious group to work in a workplace free from religious discrimination. Moreover, the fact that the Regulations apply equally to those without a religion or belief means that any protection for religious interests has the potential to infringe the interests of those who want to work, or enjoy service delivery, free from religious influences. Thus, the very process of protecting one person's religious interests may involve some interference with the simultaneously protected interests of others to be free from religion. Religious freedom can also interfere with the rights of others where religious groups are not committed to the equality of women and equality on grounds of sexual orientation. It is likely that any potential tension between a "tolerant" approach as opposed to a "multicultural" approach to dealing with religious difference will be played out in the context of these conflicts.

B. Direct Discrimination

Direct discrimination is defined as less favorable "on grounds of . . . religion or belief."[11] It covers discrimination on the basis of a person's perceived as well as actual religion or belief, and discrimination based on an association with people of a particular religion (for example, discrimination against someone married to a member of a religious group or whose child has joined or left a particular religious group). The Regulations also provide that an employer can discriminate against a worker even if they share the same religion. However, direct discrimination does not occur where it is based on the employer's religion rather than that

10. For further discussion of the right of religious groups to act as employers, see VICKERS FREEDOM, *supra* note 3, at ch. 3.

11. Regulation 3 (1)(a) as amended by Equality Act 2006 (Chapter 3) (U.K.).

of the worker.[12] For example, a Catholic employer could refuse to employee a divorcee because of his religious beliefs about divorce. Discrimination on the grounds of the employer's religion remains outside the remit of the Religion and Belief Regulations, and would seem therefore to remain legal.

Specific exceptions exist where, having regard to the nature of the employment or the context in which it is carried out, being of a particular religion or belief is a genuine and determining occupational requirement and it is proportionate to apply that requirement in the particular case. An additional, somewhat broader exception is provided for organizations with a religious ethos.

1. Genuine Occupational Requirements

Regulation 7(2) provides that the non-discrimination duty does not apply where having regard to the nature of the employment or the context in which it is carried out:

(a) being of a particular religion is a genuine and determining occupational requirement of the job; and,

(b) it is proportionate to apply that requirement in the particular case.

This will mean that, for example, an organization undertaking youth work and mentoring of young Muslims could require that a youth worker or mentor be Muslim. The exception is narrow and only applies where there is a very clear connection between the work to be done and the characteristics required: the occupational requirement must be genuine *and determining*. In effect, the need to be of a specific religion or belief must be a defining characteristic of the job.

In addition, any requirement to be of a particular religion must be proportionate, which means that it must not only be genuine, but will need to serve a legitimate aim, there will need to be a real need on the part of the undertaking to impose the religious occupational requirement, and it will need to be appropriate and necessary to impose the requirement in order to achieve that aim.[13] This includes the requirement that there be no alternative, less discriminatory way to achieve the aim. It will be necessary to consider the requirements of the job very closely before being able to use the exception. While a mosque may require its religious teachers to be Muslim, a requirement that the cleaner or administrator be Muslim is

12. Discrimination only occurs where "on the grounds of the religion or belief of B or of any other person except A . . . A treats B less favourably than he treats or would treat other persons." *Id.*

13. Case 170/84, Bilka-Kaufhaus v. Weber von Hartz, 1986 E.C.R. 1607, 2 C.M.L.R. 701 (1987) (U.K.).

unlikely to be allowed under this exception. Regulation 7(2) will not allow discrimination in favor of those who share a religion just because people wish to work with like-minded colleagues. Thus, for example, a Muslim factory owner, or Christian bookshop owner would not be allowed to discriminate on grounds of religion in recruiting workers under Regulation 7(2).

The Regulations contain an additional exception to the non-discrimination rules, one that is unique to the Religion Regulations, in the form of an exception for organizations with a religious ethos. This would include churches, temples, or mosques that employ workers, as well as profit-making companies run by individuals with strong religious or other beliefs, and having an ethos or work culture based on that religion or belief.

Regulation 7(3) applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out:

> (a) being of a particular religion or belief is a genuine occupational requirement for the job;
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> (b) it is proportionate to apply that requirement in the particular case; and,
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> (c) either:
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> (i) the person to whom that requirement is applied does not meet it, or
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> (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

Here, the requirement of proportionality is retained, and the occupational requirement has to be genuine, but the requirement that it be a determining requirement is removed. Moreover, it is not only the nature of the job that is considered, but also the ethos of the employer. In effect, a less rigorous approach is applied in deciding whether the particular job requires a particular characteristic where the employer has a religious ethos, or an ethos based on a particular belief. This can be contrasted with the general exception under Regulation 7(2), where the emphasis is clearly on the nature of the job itself.

In relation to "religious ethos employers" it may be possible to argue that all staff must share the religion, even categories of staff such as secretarial or catering staff for whom religion is not a determining requirement. The provision would apply to organizations that run workplaces according to religious principles, such as Islamic bookshops or Christian publishers. It also applies to religious organizations that employ ancillary staff in jobs that are not religious in nature, such as administrative staff, cleaners, etc. The imposition of a requirement to be of a particular

religion would not meet the demands of Regulation 7(2) as having a shared religion is not a determining characteristic of these jobs, but might meet the requirements of Regulation 7(3).

Although more broadly drafted than the standard Genuine Occupational Requirement exception, the religious ethos employer exception is not without limitations, as requirements must be genuine and occupational, and therefore must have some form of link to the job in question. It will be difficult to argue that all staff must share the religion, unless it can be shown that they are expected to participate in the religious purposes of the organization, or take a specifically religious approach to their work.

At times, religious requirements, which may satisfy the exception for genuine occupational requirements, will come into conflict with other non-discrimination rights. For example, an employer who sets religious observance as a preference in making an appointment in order to maintain the religious ethos of the organization may indirectly discriminate on grounds of sexual orientation where the religion in question is hostile to homosexuality, and it is unlikely that such indirect discrimination will be justified. The result is that the creation of single faith workplaces will not be allowed where this results in indirect discrimination. For example, partners in a Christian legal practice who believe that homosexuality is incompatible with biblical teaching will not be protected if they refuse to employ a gay solicitor: the religious occupational requirement might be lawful under the Religion Regulations, but would be unlawful indirect discrimination under the equivalent Sexual Orientation Regulations. Again, this is an area where the difference between an approach based on tolerance and one based on multiculturalism may be of relevance. A tolerance-based approach may allow such indirect discrimination to be justified, bearing in mind the right to freedom of religion in determining proportionality, and accepting an argument that those with religious views that are hostile to homosexuality should be given some space in which to operate as employers. A multicultural approach would be less likely to accept any religious discrimination that has a disparate impact on gay and lesbian workers.

2. Special Exceptions for those Employed for the Purposes of Religion

Although where a genuine religious occupational requirement discriminates on other grounds, it will (almost always) be unlawful; a further exception is provided in the Sex Discrimination Act and the Employment Equality (Sexual Orientation) Regulations 2003 to cover "employment for purposes of an organised religion." This is limited to

restrictions imposed so as to comply with the doctrines of the religion, or (because of the nature of the employment and the context in which it is carried out), so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.[14] In effect, discrimination against women is accepted where it is part of the belief system that such discrimination is necessary; for example this would apply to the Catholic Church where it is a doctrine of the religion that only men can act as priests. The exception also allows churches or mosques to refuse to employ priests or imams on the basis of their sexual orientation, or their beliefs about homosexuality.

These exceptions to sex and sexual orientation discrimination apply only to the appointment of religious personnel for the purposes of an organized religion. This refers to the appointment of clergy, or their equivalent for other religious groups. Concerns that this provision could cover a wide range of workers employed by religious organizations, such as teachers or nurses in religious foundations, were alleviated by the decision of the English High Court in the *Amicus* case,[15] which limited the words "for the purposes of a religion" to the appointment of religious leaders and teachers such as priests and imams.[16]

C. Indirect Discrimination

Indirect discrimination is defined to cover the application of a provision, criterion, or practice that is applied equally to those not of the same religion, but that puts persons of the religion in question at a particular disadvantage compared to others, and that cannot be shown to be a proportionate means of achieving a legitimate aim.[17] The wording accords with other new definitions of indirect discrimination[18] and will mean that

14. Section 19 SDA 1975, as amended by Employment Equality (Sex Discrimination) Regulations, 2005, S.I. 2005/2467, reg. 20 (U.K.), and Employment Equality (Sexual Orientation) Regulations, 2003, S.I. 2003/1661, reg. 7, ¶ 3 (U.K.).

15. R (on the application of Amicus – MSF and others) v. Secretary of State for Trade and Industry and others, [2004] EWCH (Admin.) 860 (U.K.).

16. The provision was used in Reaney v. Hereford Diocesan Board of Finance, Case No. 1602844/2006, an Employment Tribunal (ET) case brought by a gay Christian youth worker who was denied employment as a diocesan Youth Officer. The ET suggested that had the work been limited to administration and management rather than "face to face" work with young people, the Regulation 7(3) exception would not have applied. The case confirmed that Regulation 7(3), as it is an exception to the principle of non-discrimination on grounds of sexual orientation, will be applied restrictively.

17. Employment Equality (Sexual Orientation) Regulations, 2003, S.I. 2003/1661, reg. 3, ¶ 1(b) (U.K.). The wording of the Directive is, "where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief… at a particular disadvantage compared with other persons' unless it can be justified." Employment Equality (Sexual Orientation) Regulations, 2003, S.I. 2003/1661, reg. 2, ¶ 2 (U.K.).

18. *E.g.*, the new section 1 RRA provided by the Race Relations Act 1976 (Amendment) Regulations 2003, which applies to discrimination on grounds of race or ethnic or national origins.

indirectly discriminatory preferences will be covered by the Regulations, as well as absolute bars to employment.[19] Indirect discrimination reflects the fact that neutral rules that are generally applied can have a particularly detrimental effect on some religious groups. Clearly such requirements are sometimes necessary, and so the concept of indirect discrimination includes an element of justification.

In order to establish indirect discrimination it must be shown that the neutral work requirement operates to the disadvantage of the particular religious (or non-religious) or belief-based group. The fact that an employee can, in fact, comply with a requirement will not prevent a claim being made; the focus is on whether it is harder for the employee to comply in practice, and so whether the requirement puts the applicant at a disadvantage in comparison with others. For example, Christian workers are clearly physically able to work on Sundays, but to do so may interfere with their religious observance.

Where a work requirement puts a person at a disadvantage, there will only be unlawful indirect discrimination where the requirement cannot be justified. Once the employee has shown that a practice puts her at a disadvantage, then it is for the employer to show that the requirement is justified as a proportionate means of achieving a legitimate aim. Examples of justified indirect discrimination from the early case law include *James v. MSC Cruises*[20] where it was held that requiring a Seventh Day Adventist to work on Saturdays was justifiable on business grounds; and *Azmi v. Kirklees Metropolitan Council*[21] where the refusal to allow a teaching assistant to wear a veil covering her face was justified as necessary as it upheld the interests of the children in receiving the best instruction possible.

Determining the proportionality of otherwise indirectly discriminatory workplace requirements is likely to be one of the key issues facing Tribunals in interpreting the Regulations. If they find discriminatory requirements to be justified too readily they will undermine the effectiveness of the Regulations to protect against unfair treatment. On the other hand, in assessing proportionality they will need to balance not only the size and resources of the employer, but also the needs of other groups at work, such as the interests of those who have no religion. Added into the equation in assessing proportionality will be the need to give due regard to the right to freedom of religion of employers and staff. This right is both positive and negative, in that it protects those who have a religion and those

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19. Contrast the position under the original RRA 1976 in Perera v. Civil Service Commission, [1983] I.R.L.R. 166 and still applicable to discrimination on grounds of color and nationality.

20. James v. MSC Cruises Ltd., Case No. 2203173/05 (U.K.). Reported in 157 EQUAL OPPORTUNITIES REV. (2006).

21. Azmi v. Kirklees, [2007] ICR 1154 (U.K.).

who do not, and is both an individual and a group right, hence it may apply to both employer and employee. For example, the negative aspect of freedom of religion may allow practices that aim to provide a "religion-free" environment to be justified. This could be particularly pertinent if a work place operates in an area where there is religious tension between groups; in such cases it may be justifiable to require a secular work place, even though this causes disadvantage to religious interests. Or an employer may wish to project a secular image to the public. Although there may be some economic reasons for this, it may also be motivated by the employer's own views, or the views of the majority of staff. If the rights of all parties are to be respected, it may be that the indirectly discriminatory effect of such a policy can be justified, as serving the legitimate aim of upholding the "rights of others," even in the absence of a business or economic case. Conversely, the adverse effect of a requirement to work in an overtly religious atmosphere that may be experienced as a disadvantage by an atheist working for a religious employer may be justified as necessary to uphold the religious freedom of the employer. Again this is an area where the question of whether the aim of the Regulations is to promote tolerance, or to promote multiculturalism may be of relevance.

D. Harassment

Under the definition in the Regulations, harassment is defined as follows:

> (1) a person ("A") subjects another person ("B") to harassment where, on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect of –
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> (a) violating B's dignity; or
>
> (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) Conduct shall be regarded as having [this] effect only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.[22]

In order to come within the definition of harassment, unwanted conduct must have the purpose or effect of violating dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the victim. Creating an "intimidating," "hostile," or "degrading" environment suggests that fairly high levels of harm to the victim will need to be caused. The alternative terms "humiliating" and "offensive" suggest a

22. Employment Equality (Religion and Belief) Regulations 2003, S.I. 2003/1660, reg. 5 (U.K.).

more subjective understanding, and leave open the possibility that the victim could be humiliated or offended by behavior that others may not understand to be harmful. The fact that the question of whether an offensive, hostile, or humiliating environment is created may be contested is addressed by Regulation 5(2): account should be taken of the victim's perception of the offensive conduct, but an objective "reasonableness" standard is retained to protect against unreasonable claims of harassment by hypersensitive victims.[23] It would appear that a single incident, if severe enough, would be capable of creating hostile, degrading, or offensive environment.[24]

A number of potential difficulties can be identified with regard to religious harassment. One problem may be a lack of shared understandings about what is offensive. In contrast to most sexual or racial harassment cases,[25] it may be more readily argued by an individual accused of harassment on grounds of religion or belief that he or she did not realize that the behavior was offensive. For example, calling a set of beliefs a "cult" might be understood by some to be highly offensive, but may be no more than mildly irritating to others, with differences in opinion even between those who share the particular beliefs.

Another difficulty is the potential for clashes between different rights at work.[26] For example, a manifestation of religion by one individual, such as an attempt to convert colleagues, may result in another person experiencing harassment because the behavior causes offense. Further difficulty can arise as a result of the parallel protection against harassment on grounds of sex and sexual orientation. This could mean, for example, that religious individuals could harass others on grounds of sexual orientation by explaining their beliefs about the sinfulness of homosexuality, or on grounds of gender by explaining their beliefs about the leadership role of men within the family.[27] Although this creates a

23. The objective nature of the same test was challenged with respect to sexual harassment in EOC v. Secretary of State for Trade and Industry, [2007] EWHC (Admin.) 483 (U.K.). The High Court decided that the objective nature of test was consistent with the Directive and reflected the state of the domestic law prior to the new regulations.

24. Again, a similar understanding was developed in relation to the earlier law on sexual harassment. Bracebridge Engineering v. Darby, [1990] IRLR 3 (U.K.) (sexual assault); Insitu Cleaning v. Heads, [1995] IRLR 4 (U.K.) (offensive name calling).

25. *See*, *e.g.*, Insitu Cleaning v. Heads, [1995] IRLR 4 (U.K.) where the EAT had no hesitation in saying that references to a man's bald head could not be equated with a coarse reference to the size of a woman's breasts.

26. For further discussion of this difficulty, see Lucy Vickers, *Is All Harassment Equal? The Case of Religious Harassment*, 65 CAMBRIDGE L.J. 579 (2006).

27. This problem was recognized in the judicial review of the regulations prohibiting harassment on grounds of sexual orientation in Northern Ireland in An application for Judicial Review by (1) The Christian Institute, (2) The Reformed Presbyterian Church in Ireland and others, [2007] NIQB 66. The Court recognized that protection against harassment may conflict with the freedom of speech of religious individuals, a possibility also recognized by the Joint Committee on Human Rights in their

potential problem in terms of competing rights, as long as religious views are explained with sensitivity to any individuals, there should be no harassment, as harassment requires the violation of dignity, or the creation of an environment that is intimidating, hostile, degrading, humiliating, or offensive. Merely explaining a religious position on the subject of homosexuality or the subordinate position of women should not create such an environment. However, if further action is taken such as repeated attempts to change a person's mind, name calling, "sending to Coventry," etc., it may be that the boundary into creating a hostile or offensive environment will be crossed.

The difficulties in dealing with competing views on religion and sexual orientation in the employment sphere, and the potential for claims and counter claims of harassment are illustrated by the Employment Tribunal case of *Ladele v. London Borough of Islington*,[28] a claim of religious harassment by a Christian registrar who wished to opt out of any duty to conduct civil partnership ceremonies. Her stance led to complaints by gay and lesbian staff who felt victimized. The religious member of staff then claimed that she experienced harassment at the hands of the gay and lesbian staff, on the basis that their response created a hostile environment for her. To some extent, it would appear that the difficulties in handling the case experienced by the employer was caused by the need to ensure that any accommodation of a request not to conduct civil partnership ceremonies was not experienced by the gay and lesbian staff as offensive; in the event, however, the Tribunal found that the employer had failed to treat Ladele's religious views with respect, and had failed to protect Ladele from action by the gay and lesbian members of staff who, for example, were alleged to have refused to work with her.

The case turns largely on its facts (for example, the employer had disclosed confidential information relating to disciplinary action to other staff and had treated others who objected to civil partnerships differently). However, it certainly would seem that there was a general breakdown in staff relationships, between the religious employee and gay and lesbian members of staff, with great potential for offense to be caused on both sides. The case illustrates the need for great care to be taken by employers to ensure that strongly held religious convictions are treated with respect, even if it does not require that they be accommodated. However, although

report on the harassment provisions of the Northern Ireland sexual orientation regulations, House of Lords and House of Commons Joint Committee on Human Rights, 6th Report of Session 2006-7 on Legislative Scrutiny: Sexual Orientation Regulations, Feb. 26, 2007.

28. Case No. 2203694/2007 (U.K.). The decision was handed down on July 3, 2008, and the remedy was still to be decided at the time of writing. The case has since been decided by the EAT, however the general conclusions made here apply. [2008] UKEAT 0453_08_1912.

a graphic illustration of the practical difficulties in managing such competing claims of offense, the case does not suggest that homophobic views held by religious individuals must be accommodated at work, on pain of a finding of religious harassment. There is no sense in which religion affords a "defense" to any claim of sexual orientation discrimination or harassment. For example, where individuals make homophobic or sexist remarks to colleagues it would be unlikely for them to be successful in claiming a "religious defense" to any claim of sexual or sexual orientation harassment. Although a requirement to be respectful and treat others with dignity regardless of gender or sexual orientation could, arguably, be said to put at a disadvantage those whose religious beliefs do not include a belief in equality on grounds of sex or sexual orientation, any such indirectly discriminatory effect on religious individuals is likely to be justified and proportionate. Thus, there will be no unlawful discrimination by an employer requiring a religious employee to treat a gay employee with respect.

Moreover, religious individuals who are disciplined for making homophobic remarks will be unlikely to be successful in claiming religious harassment themselves, as the disciplinary action will not violate their dignity, and cannot reasonably be considered to create for them an intimidating, hostile, degrading, humiliating, or offensive environment. Even if the religious individual believes the environment to be offensive, this is subject to a reasonableness test under regulation 5(2), and it is unlikely that a tribunal would accept that a work-based code of conduct based on mutual respect for others could be capable of creating an offensive environment for those who refuse to abide by the code.

E. Victimization

The Regulations also provide protection for those who suffer victimization for making use of their provisions. Victimization, defined as a form of discrimination in the Regulations, occurs where a person is treated less favorably by reason that he has brought proceedings or given evidence under the Regulations, alleged that acts of discrimination have occurred and for doing "anything under or by reference to [the] Regulations in relation to [the discriminator] or any other person."[29] Protection is only lost if an allegation is neither true nor made in good faith.[30] The aim of this provision and the parallel provisions in other equality legislation is to protect individuals from being deterred from exercising their rights under

29. Equal Equality (Religion and Belief) Regulations 2003, S.I. 2003/1660, art. 4 (U.K.).
30. *Id.* at art. 4(2).

the legislation by adverse treatment by the employer. In such cases the adverse treatment is not on grounds of religion or belief, and so without the specific victimization protection the treatment would not be covered.

The key issue with regard to victimization is that the treatment is the result of bringing proceedings or doing anything related to the Regulations. Thus if an individual is treated less favorably than others because, for example, she has brought proceedings, has threatened to bring proceedings, has raised a concern about religious discrimination with her employer, or has started to investigate a case or begun to ask questions of the employer that precede the bringing of a claim she will be able to bring a victimization claim.

F. Applying the Regulations to the Workplace

Areas where the Religion and Belief Regulations are likely to have an impact will be considered in turn. These are the imposition of dress codes, requests for time off for religious observance, and the use of lifestyle requirements imposed by religious employers.

1. Dress and Grooming Codes

Employers will often impose some sort of dress code on staff. This may be a uniform, or may consist of rules on hair length, grooming, or bans on the wearing of religious symbols such as crosses, headscarves, or turbans. Employers' requirements that staff comply with a particular dress code can put religious individuals at a particular disadvantage, and where this is the case they need to be justified. There may be a legitimate aim for a dress code, such as presenting a particular corporate image, but any refusal to adapt would also need to be proportionate. A number of interests will have to be balanced in assessing justification and proportionality. These include the freedom of religion and freedom of expression of the employee seeking an adaptation of the dress code, the employer's freedom to create a religiously neutral workplace, the interests of staff and customers or service users to enjoy the negative aspects of freedom of religion, and the interest in promoting diversity at work.

Much of the discussion of religious dress codes at work has involved the issue of whether or not it is lawful to refuse to allow female Muslim staff to wear headscarves. More recently attention has focused on the wearing of a veil over the face. The issues that arise in cases of headscarves and veils are more complex than those that arise in relation to some other adaptations of work uniforms, due to the fact that wearing a headscarf or veil involves an interaction with other interests such as those in gender equality. Nonetheless, the debate over the wearing of headscarves in the

workplace provides a useful illustration of the range of issues that may need to be balanced in considering dress codes at work, as well as illustrating the possible differences between a tolerance approach to religious discrimination and one based on the notion of multiculturalism.

The conflicts that arise regarding the wearing of veils or headscarves at work are complicated because they involve a number of competing interests. The right to religious freedom is clearly engaged when any restriction is imposed on a religiously motivated choice of dress. However, this can conflict with the interests of individuals who wish to be free from religion, and who prefer to work, or to have services delivered, in a non-religious environment.[31] The conflict between the positive and negative aspects of freedom of religion is inescapable. For example, if schools or hospitals allow staff to wear a headscarf, this upholds the religious freedom of the wearer, but may infringe the negative aspect of religious freedom of the pupil or patient.

The legal question in the context of a restriction on wearing a headscarf at work is whether the restriction is proportionate to a legitimate aim. In some cases there may be performance-related reasons for the restriction if, for example, communication is restricted by the wearing of a veil. This was the case in the *Azmi v. Kirklees MBC*[32] and was the reason why the restriction on the wearing of the face veil was said to be proportionate. However, in many cases there will be no practical or operational reason for prohibiting the wearing of headscarves. Nonetheless, a number of other legitimate aims may exist, such as the aim of providing a religiously neutral workplace, of ensuring equality between genders, and of maintaining the freedom of religion of other Muslims to be free from social pressure to wear more conservative religious dress.[33] Such interests may provide a legitimate aim for any restriction, but this must then be balanced against the interests of the person wearing the veil or headscarf, so that restrictions are only imposed if it is proportionate to do so.[34]

In relation to proportionality, a large range of factors may be relevant, and a comprehensive review of the issue is not possible here. However, in brief, the following are some of the factors that may be relevant. First, a

31. In Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397 (1993), the ECHR recognized the need for respect for the freedom of religion of others. This requires respect for others freedom not to be religious.

32. [2007] ICR 1154 (U.K.).

33. In Sahin v. Turkey, App. No. 44774/98, Eur. H.R. Rep. (2005). The ECHR took into account the argument that other Muslim women may feel pressurized by others into wearing the veil. If the veil is banned for all, then they will be free from such pressure. Of course, such an approach may be contested, but nonetheless they were accepted by the ECHR as legitimate aims. *See also* Dahlab v. Switzerland, App No.42393/98, Eur. H.R. Rep. (2001).

34. *See* DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE (2006) and VICKERS, FREEDOM, *supra* note 3.

ban on the display of religious affiliation through dress will not affect all religions equally. It is likely to have a greater effect on Sikhs and Muslims, and is unlikely to affect the majority of Christians as their beliefs do not require specific forms of dress, or at least forms of dress that are visibly different from those of the majority of the population. Second, there is the contested question of gender equality, which can be used on both sides of the equation. On the one hand, the headscarf is understood by many to be illustrative of the subjection of women to the power of men. It is therefore viewed as antithetical to the interests of women to facilitate the practice by allowing headscarves to be worn at work. On the other hand, bans on wearing religious dress will adversely affect Muslim women, and will militate against their ability to achieve workplace equality. In practice, rather than removing the veil in order to work, it is as likely that Muslim women will not enter the workplace at all. Third, there are socio-economic factors at stake: Muslims tend to be from ethnic minorities in the United Kingdom and can suffer economic disadvantage,[35] with that economic disadvantage exacerbated by issues of gender. It may be that accommodating the religious practice of Muslim women will give them access to work and a way out of the social exclusion they may otherwise experience. A fourth factor is the interaction between religious freedom and freedom of expression. The wearing of a headscarf or veil is an expressive act, and it may have a number of meanings: tribunals should be wary of interpreting on behalf of women the meaning of their actions.

In terms of how the wearing of headscarves should be treated under the Religion and Belief Regulations in the context of employment, the approach seems to be to require a clear objective basis for any restriction on religious dress. Any requirement regarding headscarves or veils, or indeed any other dress codes, will have to be objectively justified by a legitimate aim and the means of achieving the aim will need to be appropriate and necessary. If an employer seeks to justify on the basis of hypothetical claims (e.g., that customers may object) this may not be sufficient justification, as the employer will need to show that the requirement is necessary. In terms of legitimate aims however, justification may be possible because of the wide range of additional interests that may be at stake.

35. *See Fairness and Freedom: The Final Report of the Equalities Review* (February 2007), *available at* http://www.theequalitiesreview.org.uk/publications.aspx (last visited June 22, 2007), which identifies Pakistani and Bangladeshi women as suffering particular disadvantage in the employment sphere, and this is likely due to discrimination. See page 78 of the report.

2. Hours of Work/Time Off for Religious Observance

Refusal of requests to accommodate changes in hours of work to enable members of staff to participate in religious observance will usually amount to indirect discrimination.[36]

Refusal of requests (for example, to be excused work on Friday, Saturday, or Sunday) amounts to a requirement to work to a particular timetable, which puts the religious employee at a disadvantage, and will need to be justified. In many cases there will be a legitimate aim: although many jobs can be adapted to work flexibly, many require constant presence during specific working hours. Even if there is a legitimate aim, the requirement will need to be proportionate to that aim. The question of proportionality will depend on a number of issues such as the requirements for cover during the member of staff's absence, the ease with which shifts can be swapped between staff, the availability and cost of cover, the length of time off requested, the frequency of requests, and the interaction between these factors. If it is easy to cover an absence using volunteers, it may be that it is not proportionate to refuse a religiously motivated request for absence. If there are no volunteers, it may be more difficult to require accommodation. However, again this may depend on the circumstances. It may not necessarily be disproportionate for an employer to reschedule the believer's hours if the length of time requested is short and infrequent, if the number of staff who can cover for the believer is large, or if the believer is prepared to offer an alternative task to make up. For example, if an occasional Sunday shift has to be covered, and there are fifty staff who could work, it may not be disproportionate for a religious member of staff not to be required to provide work, especially if that individual is prepared to undertake an alternative (an equally unpopular) task at a different time.

3. Lifestyle Requirements

Another way in which religious issues may arise at work occurs in the particular context of religious ethos employers. Where employers have an ethos based on a religion or belief, they may wish to impose on members of staff requirements relating to lifestyle. This may extend to matters normally viewed as areas of private life such as divorce, remarriage, or sexual morality all of which could be relevant in demonstrating good standing and loyalty to the religion.

Apart from impinging on the private lives of staff, a requirement relating to lifestyles outside of work may disadvantage those of other faiths

36. It could be direct discrimination if an employer allows some religious individuals time off and not others, and the reason for the different treatment is religion.

or of no faith. Any such requirements may potentially meet a legitimate aim of enabling the religious employer to ensure loyalty to the religious ethos, but such requirements will also need to be proportionate. Where an employee has chosen to work for a religious employer, it is arguable that it is proportionate for the employer to make demands in terms of loyalty and lifestyle. Matters that in other contexts would clearly be private may be relevant in a workplace where staff have opted to share their personal and religious lives; part of having a religious ethos at work is that matters that to outsiders would be viewed as personal and private are shared.

G. Proportionality and Justifying Religious Discrimination

The Regulations raise some complex problems regarding the space that should be given to religious interests at work. This is largely due to fact that a number of competing interests are engaged. For example, the rights apply equally to those with no religion, and so the accommodation of religion or belief can simultaneously undermine the negative freedom of religion and belief of another; religious discrimination can be suffered by religious individuals, but it may also be practiced by them, for example where religious groups or individuals wish to employ those of the same religion as themselves, protecting religious interests at work may involve discrimination on other grounds such as sex, sexual orientation, or marital status.

Within the Regulations, these difficulties are addressed by providing a general non-discrimination duty, while providing exceptions where necessary and proportionate to meet a legitimate aim, either in the form of Genuine Occupational Requirements, or as justification for what would otherwise be indirect discrimination. Any restrictions on the non-discrimination principle (occupational requirements and justifications for indirect discrimination) are subject to the requirement that they be proportionate. Thus, the work of determining how to balance competing interests on any particular set of facts will be undertaken by assessing proportionality. The question of whether the Regulations provide appropriate protection against religious discrimination will depend on whether such proportionality is correctly assessed.

We would suggest that a number of factors are relevant to the determination of proportionality including the status of the employer; the existence of a right to freedom of religion for all parties; and socio-economic factors. Broader questions about the role of religion in the modern workplace, and the question of whether courts are seeking to promote religious tolerance or a broader concept of multiculturalism may also be relevant.

1. The Status of the Employer

The treatment of religious discrimination at work may vary according to whether the employer is in the public sector or private sector. The boundaries between the two are not always clear, but where the employer can be viewed as part of the public sector there may be additional factors that affect the question of the proportionality of any restrictions on non-discrimination rights.

With regard to public sector employment, the state may have an interest in being religiously neutral among religions, at least in the context of its role as employer in the public service (if not in relation to its acceptance of an established church). To this extent, it may wish to encourage a degree of religious neutrality in public sector workplaces, by discouraging overt manifestations of religion. Thus, it may be arguable that for public sector employment some potentially indirectly discriminatory restrictions, for example relating to dress codes, could be justified.

However, it is equally arguable that the state has an interest in encouraging equal participation in the workforce for a range of religious groups, particularly those practiced by otherwise marginalized groups, in order to encourage participation in employment. Moreover, it is important for the state to reflect in its employment practices that citizens are equal and valued, regardless of religion; thus it is arguable that it is important for the public sector to accommodate religious practices in order to demonstrate public commitment to non-discrimination principles. This is particularly the case where the overwhelming majority of staff work in the state sector, for example education and health care. The fact that whole sectors of employment could be barred to members of particular religions if no religious protection is allowed is an important factor to be taken into account in assessing proportionality.

Yet, the fact that a public sector employer represents the state may also limit the extent to which religious interests can be protected, because of the equal interest the state has in upholding the dignity and equality of others on grounds of gender, race, sexuality, and other grounds. Thus, although public sector employers may need to provide a level of protection to religious interests in order to uphold the public policy of promoting diversity, this will not extend to protecting religious interests at the expense of other equality interests to which the state is equally committed.

In contrast, the private sector may not have the same need to promote religious equality at work, but equally, it may not share the need to uphold other social policies within the workplace. Some employment relationships may resemble private family arrangements, such as employment of a nanny or domestic cleaner, or employment in a small family business. Where this

is the case, it may be that genuine occupational requirements to be of a particular religion are more likely to be proportionate, or for indirect discrimination to be justified. This may also apply to religious employers who are employing staff to serve the needs of the religious group, such as cleaning staff, or administrative staff, or employing a helper for a church toddler group. Where a private religious employer offers greater interaction with the public, for example selling goods to the public, then the question of whether the imposition of genuine occupational requirements are proportionate may be decided differently.

2. The Right to Freedom of Religion

The right not to be discriminated against on grounds of religion or belief coexists with a right to freedom of religion. Where these are in conflict, some resolution must be found. However, the right to freedom of religion is not absolute, and in some cases it may be proportionate to restrict religious freedom at work, as freedom of religion is, in the last resort, protected by the right to resign. For example, a religious individual who refuses to work with women would become virtually unemployable in the modern world. However, his religious freedom is not infringed by his failure to find work, and employers do not have a duty to accommodate such beliefs. His belief is protected by his freedom to decline to be employed.

Where religious employers wish to recruit to key religious posts on the basis of religion, and this interferes with other equality rights, the right to freedom of religion as enjoyed by the religious organization should also be considered. However, it may only be proportionate to allow religious interests to prevail where to do otherwise would significantly restrict the ability of the religious organization to fulfill its religious functions. For example, to require the Catholic Church to ordain female priests would significantly interfere with the freedom of religion of the Catholic Church, as it would offend against a fundamental tenet of belief of the group. For most organizations, even those with a religious ethos, however, discrimination on other grounds is unlikely to be proportionate.

3. Socio-economic Factors

In assessing proportionality, socio-economic factors may also be relevant, such as the relative disadvantage of any groups involved. If one of the aims of anti-discrimination legislation is to tackle disadvantage and

social exclusion,[37] it may be appropriate to take this into account in assessing proportionality. For example, it is well known that religious discrimination can significantly overlap with race discrimination, and so it may be that practices associated with religions largely practiced by members of minority ethnic groups should be given greater accommodation than practices of other religions, to reflect the potential for double disadvantage to be suffered by member of these groups. Thus, if it is acknowledged that Muslims have suffered disadvantage in access to the job market, it may be proportionate to require a greater level of protection for their religious practices than for religious groups such as Christians for whom such generalized disadvantage cannot be shown.

However, factors such as historic or social disadvantage can cut both ways: it may favor protection of a minority religious group, as well as protection for women or lesbian and gay people who have also been subject to disadvantage. Thus, although potentially useful to consider socio-economic or socio-political issues in assessing proportionality, this will not necessarily provide clear-cut answers to some of the conflicts that may arise.

4. Religious Tolerance v. Multiculturalism

A full understanding of the scope of protection against religious discrimination can only be gained when the Religion Regulations are read together with the regulations protecting against discrimination on other grounds; for while there is nothing in the Religious Regulations prohibiting religious employers from creating single faith workplaces, any resulting discrimination on other grounds will remain unlawful. Thus, for example, a conservative Christian employer that requires all staff to sign up to a conservative Christian creed is likely to indirectly discriminate on grounds of sexuality. A legal system based on tolerance might allow such conservative groups space in which they can operate legally to uphold their beliefs within the workplace, even though it may result in discrimination against others.[38] In contrast, the Regulations appear to take a more multicultural approach in which acceptance of different lifestyles is maximized, and the freedom of religious groups to exclude others is limited to employment for the purposes of an organized religion. In other cases, any clash between discrimination rights is likely to be resolved in favor of sexual orientation and other equality rights.

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37. Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16 (2003).

38. *See*, *e.g.*, the position in Canada as discussed by Alvin J. Esau, *'"Islands of Exclusivity": Religious Organizations and Employment Discrimination*, 33 UNIV. BRIT. COLUM. L. REV. 719 (1993).

III CONCLUSION: TOLERANCE AND MULTI-CULTURALISM, PROPORTIONALITY, AND HIERARCHY

By way of conclusion, we should consider the difficulties of ensuring that the overall equality scheme in the domestic legislation remains coherent, while at the same time trying to achieve a protection for religious interests that meets the needs and subtleties of debate on religious issues. For example, if we interpret the Regulations to reflect a "correct" understanding of the requirements of multiculturalism, pluralism, or tolerance, might we create an alternative set of difficulties regarding equal treatment of different heads of equality. The various different types of equality regulations are now all phrased pretty much the same, and it is likely that courts will want to interpret them similarly, and certainly will be wary of creating an overt hierarchy of equality grounds. However, we might find that achieving an optimal level of protection for religion leads to interpretations that are not optimal for other heads of equality. For example we might feel that allowing economic justifications for indirect religious discrimination is acceptable, but that could lead to pressure to "level down" the protection available for sex discrimination where such justifications are rarely allowed.

In earlier writing,[39] Lucy Vickers has suggested as follows. It is not as yet clear whether the concept of justification in the context of religious discrimination will be interpreted to be consistent with the concept in the context of other grounds of discrimination. For example, economic cost will rarely justify indirect sex discrimination, and it is not clear whether such matters will be capable of justifying indirect religious discrimination. Similarly, customer preference cannot be used to justify sex or race discrimination; however, although customer preference per se may not justify religious discrimination, if this is recast as an attempt to deliver a service in a religiously neutral fashion out of respect for the negative freedom of religion of customers, then it may be viewed differently.

Yet, if different standards of justification are developed for different grounds of discrimination, this will lead to inconsistencies in treatment as between different grounds of discrimination within the domestic[40] and European jurisdictions.[41] The wording of the Employment Equality

39. VICKERS, FREEDOM, *supra* note 3, at ch. 5.

40. In the consultation paper produced as part of the Discrimination Law Review, the suggestion is made that a Single Equality Act should, as far as possible, have one set of definitions to apply to all grounds. *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, DISCRIMINATION L. REV. (Dept. Communities and Local Government, 2007).

41. For example, the ECJ has suggested that there should be uniform application of the various equality provisions across the EU. *See* Chacón Navas v. Eurest Colectividades SA, 2006 E.C.R. (involving the definition of disability).

Directive suggests that one standard is expected for all grounds, with the specific exceptions of age and disability for which special provision is made. The lack of a specific exception for the justification of religion suggests that a uniform approach to justification is expected.

Apart from the potential problem of "levelling down" in terms of the protection offered, the competing demands of the various grounds of equality may give rise to other difficulties. The use of the Religion and Belief Regulations to support requests for flexible working for staff has the potential to cause difficulties for employers in responding to competing rights based on other grounds of equality. For example, with regard to requests to accommodate different working hours as well as attempting to accommodate requests based on religion, employers also need to try to accommodate requests for flexible working made by working parents or carers.[42] Thus, an employee may ask not to work on Sundays for religious reasons. Another employee may ask not to work on Sundays for childcare reasons. Refusal to accommodate such requests could lead to indirect discrimination, on grounds of religion and gender respectively. Where an employer needs to have cover for Sundays, but not cover by all staff, they may be able only to accommodate a limited number of requests. However, it is not clear how such requests should be prioritized.

Further problems arising from the range of equality grounds that are protected, and the dependence on the concept of proportionality for their resolution, have been identified by Lucy Vickers in the following way in the concluding chapter of her book.[43]

> In practical terms, the benefit of an approach based on proportionality is that it allows for contextual interpretation which can take into account all the circumstances, including, for example, the socio-political context in which the discrimination occurs. However, this leaves the problem of consistency as between different stands of discrimination or equality law. In effect, having such a flexible concept at the heart of the protection for religious interests allows a hierarchy to develop as between grounds of discrimination. For example, as has been noted above, sex discrimination can rarely be justified on the basis of economic cost, and yet using the proportionality model advocated here might allow economic cost to justify indirect religious discrimination.
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> The creation of a 'hierarchy' of equality rights is something that was warned against in the Commission's 'Explanatory Memorandum' to the Directives.[44] It has also been suggested in case law from the ECJ that a

42. Section 80F Employment Rights Act 1996 (as inserted by the Employment Act 2002) and extended to those caring for adults by the Work and Families Act 2006.

43. Vickers, Freedom, *supra* note 3, at 227–29.

44. *Proposal for a Council Directive: Establishing a General Framework for Equal Treatment in Employment and Occupation* COM (1999) 565 final, 6.

unified approach to the treatment of equality concerns is desirable.[45] Hierarchies between different strands of discrimination can be difficult to justify, not least because they create particular difficulties in relation to multiple discrimination.

However, although hierarchies may develop as between different grounds, this may in fact not be too problematic. In fact, McCrudden has argued that the search for consistency and the removal of hierarchy may hinder the proper development of equality law. He argues that there is a danger in attempting to create 'false consistency'[46] as between grounds, as this can mask a range of differences between the different grounds. The theoretical justification for protecting against discrimination may differ, as well as the socio-political context in which the discrimination occurs. Levels of historical and current disadvantage, and levels of social exclusion experienced by the different groups, will also differ. To seek consistency and to rule out hierarchy would be to ignore these fundamental differences, and may lead to alternative disadvantages to replace those removed.

A number of suggestions have been made about ways in which the grounds of discrimination are inherently different, which may justify the development of a degree of hierarchy as between them. For example, it is arguable that some grounds (gender, race, sexual orientation) are truly irrelevant to a person's ability to undertake work, while other grounds are relevant some of the time, because they may either limit availability to do a job (pregnancy, religion) or may limit ability to perform a job (disability, age). Thus, treating different strands differently may be acceptable.[47] Other differences exist between the grounds in terms of whether the characteristics are biological differences (sex, age), ascriptive differences (ethnicity), or chosen characteristics (arguably sexual orientation and religion[48] although the question of whether these latter characteristics are chosen is clearly contentious.).[49] The fact that distinctions can be drawn between the different grounds does suggest that discrimination is not all equal, and that hierarchies may not only be inevitable but may also be acceptable.

Hierarchies are also likely to be inevitable given the variety which exists in the understanding of what is meant by equality. Equality has been understood to have a variety of meanings, including the individual justice model, the group justice model, equality as recognition of individual dignity, and equality as a means of addressing social exclusion.[50] The regulatory framework of the Directive does not reflect

45. *See* Chacón Navas v. Eurest Colectividades SA, (2006) C-13/05.

46. Christopher McCrudden, *Thinking about the discrimination directives*, 1 EUR. ANTI-DISCRIMINATION L. REV. 17 (2005).

47. M. Bell & L. Waddingon, *Reflecting on inequalities in European equality law*, 28 EUR. L. REV 349 (2003).

48. *See*, *e.g.*, Dagmar Schiek, *European Union: A new framework on equal treatment of persons in EC law?*, 8 EUR. L.J. 290 (2002).

49. *Id.*

50. *See* C. Barnard & B. Hepple, *Substantive Equality*, 59 C L.J. 562 (2000), Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16. (2003).

> a single coherent approach. For example, as a framework for achieving individual justice it fails on a number of fronts, such as its lack of a mechanism to deal with intersectional or multiple discrimination. In terms of group justice, the positive discrimination provisions may be useful, but the symmetrical model of protection created may reduce its potential to act as a strong tool in achieving group justice. However, it may be that no single understanding of equality can be complete, given the range of meanings it can have, and so different grounds of discrimination may fit better with different understandings of equality. Again, hierarchy may be both an inevitable and an acceptable response.
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> Assuming that it is acceptable to treat different grounds of discrimination differently, then it is unnecessary to provide for interchangeable interpretation of similar terms used in relation to the different grounds of discrimination. For example, indirect discrimination on any ground is acceptable where it is justified as proportionate in pursuit of a legitimate aim. If consistency is not required as between grounds, then an aim which is potentially justifiable for religious discrimination does not have to be similarly justifiable for sex discrimination. Thus, economic cost could justify indirect religious discrimination but not indirect sex or race discrimination.

Perhaps we might in final conclusion attempt draw together our thoughts about the more technical issues of hierarchy and consistency and, on the other hand, our broader reflections about tolerance and multi-culturalism. It is an almost archetypal attribute of legal revolutions, at least from the French Revolution onward, that they involve a re-prioritizing and re-ordering of fundamental human rights. The legal history of the United Kingdom reveals an almost continuous preference for and propensity to quiet revolutions. It will we think be apparent in retrospect that just such a quiet revolution, with regard to religious expression in the workplace, occurred in the "New Labour decade" from 1997 onward. There was a perceived need for a shift toward multi-culturalism both within the EU in general and within the United Kingdom in particular. The combination of the Human Rights Act of the 1990s and the various Equality Regulations of the early years of the new millennium produced radical movements up the hierarchy of human and equality rights in the workplace in respect of equality claims based on race, sexual orientation, and religion and belief. In particular this involved a raising of the legal status of religious equality such as had previously been attempted only under the pressure of extreme necessity in the embattled context of the troubles in Northern Ireland.

However much it can be said that this particular revolution was undertaken in a positive and considered way, it very soon started to become apparent that it might create new locations for the conflicts that are inherent in processes of striving toward multi-culturalism. This set of equality rights could not be moved so far up the hierarchy of human rights in the workplace and elsewhere without exposing and opening up certain tensions

between them. Flexible and creative approaches are perhaps starting to develop toward proportionality and hierarchy in respect of the "new generation" of equality rights in the United Kingdom, especially with regard to religion and belief and sexual orientation. This kind of flexibility and creativity will certainly be needed if religious expression in the workplace is to be successfully inter-related with gender equality, race equality, and sexual orientation equality.

However, an optimistic and patient view could be that flexible and creative approaches toward proportionality and hierarchy in respect of religious expression might provide ways of moving effectively from tolerance to multi-culturalism. Thus, the traditional "tolerance" stance with regard to religion and belief reflects often-unconscious assumptions that the religious equality rights of minority groups were low down in the hierarchy of equality rights, and that only limited responses to those equality rights were needed in order to respond proportionately to the claims that they embodied. There is now a, perhaps equally unconscious, search for a form of legal multi-culturalism in which those equality rights will not only move up the hierarchy, but will also find a secure and reasonably comfortable place in that elevated position. We should not be surprised if this turns out to pose great challenges in deciding about proportionality.

Those engaged in trying to meet those challenges in the context of religious freedom in the workplace might sustain themselves with Matt Finkin's reflection, about "*Menschenbild*" and the construction of the human being in employment law, that:

> Once we enter society, including the society of the workplace, we interact with others in which interaction we must, of necessity, give up, contract away, some of our privacy and autonomy. But, as Grotius put it, if some aspects of being a person cannot be sold without our ceasing to be persons, then it should fall to the law to decide what is alienable and what is not.[51]

In deciding, with regard to religious expression, what is essential to and inalienable on the part of each working person, we confront no simple contractual or legislative allocation between "the employee" and "the employer," but, rather, a profoundly complex adjudication about and between competing interests and claims within employing enterprises and in the labor market at large. We might permit ourselves the hope that the present symposium will slightly improve and sharpen the tools for that particular task.

51. *See supra* note 1, at 633.