Publicspirit
Spirited debate on faith and public policy

Reasonable accommodation for religion in employment and provision of services?

Frank Cranmer

Under the terms of the Equality Act 2010 and the earlier legislation, there are two kinds of discrimination in employment:

- ***Direct discrimination: where an employer treats someone who has a 'protected characteristic' – one of which is religion or belief – less favourably than others are treated (or would be treated) because of that characteristic.***
- ***Indirect discrimination: where an employer applies a 'provision, criterion or practice' (PCP) to someone which discriminates against that person's protected characteristic.***

As to religion, a PCP is discriminatory where: –

1. it applies to persons with whom the claimant does not share a religion or belief;
2. it puts, or would put, persons with whom the claimant does share a religion or belief at a particular disadvantage compared with the others;
3. it puts, or would put, the claimant at that disadvantage; and
4. the employer cannot demonstrate that the PCP is a proportionate means of achieving a legitimate aim.

Direct discrimination is illegal, except possibly on grounds of age; but *indirect* discrimination can be permissible if the employer can demonstrate that there was an objective justification for the PCP applied to its employees. But to prove that, the employer must show that there was no reasonable, less discriminatory alternative to the course of action pursued.

But it is complicated. First, until recently the courts took the view that, to be protected, a belief had to be mandated by the religion in question: a purely private belief did not qualify. That was rejected by Strasbourg in *Eweida & Ors v United Kingdom* [2013] ECHR 37, when the Court held that there was 'no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question' [82]. Strasbourg also rejected the traditional 'like it or leg it' defence: that an employee unhappy with his or her working

conditions could resign and go elsewhere: 'the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate' [83]. That said, the extent to which a court will choose to regard an act and the underlying belief as connected *in any particular set of circumstances* will be critical.

Secondly, there is no definitive guidance as to what constitutes a 'group' for the purposes of demonstrating group disadvantage. In *Chatwal v Wandsworth Borough Council* [2011] UKEAT 0487/10/0607, decided before *Eweida*, a baptised Sikh claimed that he could not clean the communal refrigerator at work because his religion forbade him to touch meat. Mr Recorder Luba said that deciding whether there was a group of Sikhs who shared Mr Chatwal's religious belief about touching meat 'was not helped by the fact that there is no consensus in law as to how large (or small) this cohort of others or "group" must be in order to suffice.' Which means that, as criteria go, it cannot be a very useful.

How this has played out in practice can be seen in some recent cases.

- In *Mba*, where a devout Sabbatarian Christian care assistant at a local authority children's home resigned because of her objection to working on Sundays (from which, she claimed she had previously been excuse), the Court held that she had not been constructively dismissed because the requirement to work on certain Sundays was a proportionate means of achieving an indisputably legitimate aim [24]: the kids in the children's home had to be looked after 24/7.

- In *Bull*, in which an avowedly-Christian couple refused a double room in their hotel to a couple in a civil partnership, while Lady Hale was 'more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases', [47] nevertheless, she concluded that Mr and Mrs Bull could not 'get round the fact that United Kingdom law prohibits them from doing as they did' [51] – so they lost.

- In *Fhima,* on the other hand, when a car rental firm refused to reconsider its decision not to employ an observant Jewish woman who could not work during *Shabbat* but who offered to work every Sunday and from 5pm to midnight on Saturdays in winter instead, the Employment Tribunal held that the requirement discriminated unfairly against observant Jews: it was *Ms Fhima* who had offered a reasonable accommodation – which had been unreasonably refused.

Which leads to the wider issues of reasonable accommodation generally.

Reasonable accommodation: conflicting views

"there is no definitive guidance as to what constitutes a 'group' for the purposes of demonstrating group disadvantage."

The CORAB Report raised the issue at 1.11: 'Ought the legal concept of reasonable accommodation … be introduced into UK legal systems?' analogous to the duty to make rea-

sonable adjustments for disabled employees: a shift from making a negative claim of discrimination to claiming a positive right – and without the need to demonstrate *group* disadvantage.

This is not new. In 2011, the Equality and Human Rights Commission consulted on the possibility of intervening at the proceedings on *Eweida & Ors*, and asked whether 'some concept akin to reasonable accommodation should be incorporated into UK human rights law'. Though responses were mixed, the Commission nevertheless made a submission to the ECtHR in which it stated at paragraph 30 that 'United Kingdom case law currently fails adequately to protect individuals from religious discrimination in the workplace'.[1]

Lady Hale returned to the matter in a lecture to the Law Society of Ireland in 2014, when she asked, 'Should we be developing, in both human rights and EU law, an explicit requirement upon the providers of employment, goods and services to make reasonable accommodation for the manifestation of religious and other beliefs? And even *vice versa*?' She noted that, to protect freedom of religion and belief, the law had to treat all religions and beliefs equally then had to work out how far it had to make special provisions or exceptions for particular beliefs, how far it should require employers and goods and service providers to accommodate them, and whether providers or employees needed a conscience clause.

Academic opinions are divided; and while I can see merit in exploring it further, I can also see considerable difficulties: the claimant, the employer, the claimant's colleagues and the customers or service-users may all have different, competing rights. For example:

- in *Azmi*, a devout Muslim teaching assistant wished to wear a *niqab* at work, while her school believed it would 'prevent full and effective communication being maintained' with the children: either she could wear it or she could not – there was no obvious middle course.

- In *Cherfi*, a Muslim security guard was refused permission to attend midday Friday prayers at a nearby mosque because his employer thought it might lose the contract if a full complement of security staff was permanently on site – and had offered various alternatives, such as Saturday or Sunday working, which he had refused.

Or how do you offer any kind of accommodation in the recent Great Ulster Bake-Off, aka *Ashers Baking*?

The EHRC has just published updated guidance on religion and belief in the workplace, together with an evaluation of the current law, *Religion or belief – is the law working?* It recommends specifically that no change be made to the broad definition of the protected characteristic of religion or belief in the Equality Act and – crucially for the present discussion – that a duty of reasonable accommodation should *not* be introduced. In short, it concludes that the Equality Act and the Human Rights Act 2008

[1] I should like to thank Dr David Perfect, of the EHRC, for drawing this to my attention. I had erroneously assumed that, given the mixed nature of the responses to its consultation, the Commission had decided not to intervene.

provide sufficient protection for individuals with and without a religion or belief.

Coincidentally, the EHRC report came hard on the heels of a report from the think-tank *ResPublica*, *Beyond Belief: Defending religious liberty through the British Bill of Rights*, that came to the opposite conclusion. Its author, James Orr, argues that there has been '[a] steady erosion of the fundamental freedom to live according to beliefs held on the grounds of thought, conscience, and religious belief' and wants the Government to introduce its much-heralded 'British Bill of Rights' including a specific duty of reasonable accommodation.

Conclusion

So who is right: the EHRC or CORAB and *ResPublica*?

I admit to being fairly suspicious of the proposed British Bill of Rights, at least until I see the terms of the promised consultation document. But, on balance, I am not yet convinced that the argument made has been most out. It always come down to the need to balance competing rights; and there is always the possibility that reasonable accommodation for religious practice might produce another set of problems that we cannot yet predict. Perhaps Lucy Vickers' suggestion of a 'third way' – a right to make a request that the employer would be obliged to consider but would not be bound to grant – might be an acceptable compromise. But as Lady Hale said in Dublin, 'The story has just begun.'

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