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Freedom of religion is well established as a fundamental human right both internationally and within Europe, and yet the extent to which that freedom should be enjoyed in the context of the workplace is the subject of continued debate. In this chapter, I will consider the main areas of tension that have arisen concerning religion and belief in the workplace, and how they might begin to be resolved.

In outline, there are two main areas of contention: one is the issue of the religious worker in a secular organisation, and the extent to which the individual employee is protected by the law prohibiting religious discrimination. Questions which arise include: to what extent can religious individuals expect an organisation to accommodate their religiously motivated requests such as for a uniform to be adapted, or for time off during work time for prayers? In considering such questions, one has to consider how to weigh any competing interests such as an employer’s interest in business efficiency or in remaining religiously neutral. An additional issue arises in cases where two equality grounds are in tension, for example the interests of gay and lesbian service users to be given an equal service, and the interests of those with religious objections to providing that service. The question of how to manage such tensions is discussed below.

A second issue that arises in the context of religious freedom at work is the extent to which equality law should be used to limit the freedom of religious organisations. Questions concern the role of religious organisations as employers, and the extent to which they should be bound by equality norms. For example, should employers with a religious ethos be allowed to hire staff in accordance with that ethos; does any such right apply to all staff, or only certain categories; and should equality law intervene when such hiring practices result in discrimination on other grounds such as sexual orientation? Again, these questions are discussed below. First, some preliminary questions about the interaction of religion with the workplace are considered. The main legal provisions are then outlined. Although legal protection for religion at work can be seen in many states, the European example is used below, to illustrate the areas of tension which arise surrounding religion and belief at work.

For a discussion of the duty to accommodate religion at work, see Alidadi 2012; Gibson 2013; and Loenen 2012.
Protecting religion at work

A preliminary question that arises when considering the interaction of religion and the workplace is why the work relationship, traditionally viewed as a private contractual arrangement between master and servant, should be a forum in which religion has any traction at all. After all, the main aim of employers is the running of efficient and profitable businesses; and employees give up a degree of autonomy when they enter the workplace, in return for a wage. Why then should religious employees expect their religious interests to be accommodated at work at all? 2

A full discussion of this question is beyond the scope of this chapter, but in brief can be answered as follows. First, religious freedom itself requires broad protection as an important part of our human rights framework. It is recognised under Article 9 ECHR as one of the foundations of a democratic society, and as one of the ‘most vital elements that go to make up the identity of believers and their conception of life’. 3 While the protection of religious interests is therefore relatively easy to justify, the additional question of why it should merit any protection in the context of the workplace is perhaps more complex: it is arguable that where there is a conflict between religion and other work-based interests the latter interests should prevail. This is because there is no enforceable right to a job, and so any conflict between rights that occur at work can be resolved by the religious individual resigning. 4 Nonetheless, it is suggested here that such an approach fails to provide adequate protection for religious interests.

Of course, freedom of religion does not entail a right to demand employment on any terms, or that employers accommodate all religious practice: the right to freedom of religion in Article 9 ECHR is not absolute, but is only protected where it is proportionate to do so. Yet, it remains the case that if adequate protection is to be afforded to religion, then some protection should be available in the work context. The first reason for this assertion is that for many workers it is not possible to separate religious practice from their work; some religious practices such as dress codes or practices of prayer apply to individual’s whole lives and cannot simply be dropped during working hours. Moreover, it is often minority religious practices that are less easily compatible with standard working rules, so that a refusal to accommodate religious practice at work can have very unequal impact as between different religious groups. For example, the normal working week and working year in Europe accords with standard Christian practice to allow time off for religious observance on Sunday and at Christmas and Easter. Other religious groups who wish to have time off for religious observance at other times will require some adaptation of that normal working time.

Secondly, there are sufficient objective benefits attached to working life that mean that religious interests should be given some degree of protection, so that those benefits can be enjoyed equally regardless of religion. For example, work provides the main income stream for most people, enabling them to house, clothe and feed themselves and their dependants. As well as the economic benefits of work, work also brings non-financial benefits: work is the medium through which many people gain self-respect and a sense of participation and inclusion in society (Schultz 2000). These many benefits of work for the individual mean that any inequality as between religions related to the enjoyment of work is particularly concerning. Yet, it is clear

2 See Vickers 2008 for a more detailed discussion of these issues.
4 See, for example, the approach of the ECHR in Ahmad v. UK (1981) 4 EHRR 126, Stedman v. UK (1997) 23 EHRR CD168.
that there is significant inequality in this regard: those of minority religion report higher levels of religious discrimination in the workplace than majority faiths (Weller et al. 2013). This means that there is a strong equality-based reason for allowing for some protection of religion at work. This is not to say that religious interests should take priority over other interests, merely that they should not be ignored and should take their place alongside other interests as worthy of some protection at work.

If all sets of interests are to be given adequate protection, those of the employer and those of the employee, then a balance needs to be struck between them. This is achieved by requiring that any restriction on religious interests be proportionate, in the light of the other competing interests. In assessing whether it is proportionate to protect religious interests, one assesses whether the accommodation required serves a legitimate aim and whether there is proportionate relationship between the means used and the aim one is trying realise, given the existence of competing interests. This involves considering a complex range of factors, including whether the employer’s aim can be realised using alternative means which impinge less on the religious interest.

There are several interests that may conflict with religion at work, and which will need to be balanced in this way, such as the economic interests of the employer and the equality interests of service users, customers and other employees. Other interests which may be engaged are the rights of non-believers to be free from the influence of religion, employee rights to privacy and freedom of speech. In each case, the interaction of the competing interests must all be taken into account in assessing the proportionality of any suggested protection of religious interests. For example, an employee who has religious objections to working on an equal basis with women would need to be able to show that his religious interests outweighed the interests of gender equality if he were to succeed in having his religious views protected. Similarly, a religious employer that was unhappy about employing a gay man would need to show that his religious interests prevailed against the equality interests involved.

An additional factor to take into account in assessing proportionality is that the employer, as well as the employee, may be entitled to some respect for autonomy. Both the European and US legal systems recognise that companies as well as individuals can enjoy the right to freedom of expression. In some cases, protection of employees’ religious interests could clash with the right of the employer to portray the image to the public that it would wish. For example, an employer that wishes to project a secular image may not wish its employees to attend work in religious dress. Equally, a respect for employer autonomy may also mean that religious groups should be able to enter employment relationships, in order better to organise or facilitate religious activity, by appointing someone to act as a religious official, or by appointing catering or administrative staff, to improve the group’s ability to fulfil its manifestation or practice of religion. In other cases, religious individuals may wish to work with others of the same religious persuasion, grouping together to supply goods and services without any specific religious link. For example, a group of Christians may wish to run a café or a group of Muslims may wish to open a book shop. In these cases, the employment is not the result of the need for support for religious activity, but is a secular activity, carried out by a religious group. In each case, the activity is motivated by religion, and although not directly involved in the manifestation of belief, it is the result of the outworking of religious commitment. As with the other interests discussed here, these are not absolute rights and need to be weighed against other interests.

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In sum, religious interests are sufficiently important to individual dignity and autonomy to warrant protection within the workplace, but they need to be balanced against other competing interests such as the economic interest of the employer and the equality interests of staff and service users. In the following section, the way in which legal responses to these issues have been framed will be discussed.

**Brief outline of legal provisions**

Various frameworks operate for the protection of fundamental rights relating to religion. Human rights provisions focus on religious freedom for individuals and groups; while religion and belief is often a protected characteristic in equality and discrimination legal regimes. The complementary nature of these forms of protection for religion and belief can be illustrated by the European legal framework in which religion is protected by both Article 9 ECHR and the EU Equality Directive 2000/78, and which is the focus of what follows.

Freedom of religion, thought and conscience is protected under Article 9 ECHR. Article 9 recognises that freedom of religion has both an individual and a collective dimension: the right is to manifest religion ‘either alone or in community with others’, so that the right applies to religious groups as well as to religious individuals. In the context of workplace, the right to religious freedom can therefore apply to religious employers who may wish to impose faith requirements on their staff. The right also applies to religious staff, and has tended to be engaged with regard to manifestations of belief; in particular, the wearing of religious symbols, time off work and conscientious objection to certain work tasks.

Recent debate over the extent to which the rights under Article 9 can apply in the context of work (or whether, in contrast, the right to religious freedom is protected via the freedom to leave one’s job) was resolved in *Eweida and Others v. UK* where the ECtHR held that ‘where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate’. It would seem, then, that the Court has now accepted, in the context of Article 9, that work-based restrictions on a person’s exercise of religious freedom can amount to a *prima facie* infringement of the right. Nonetheless, even if the *prima facie* case may be made out, claimants will still need to show that any interference with Article 9 is the result of a manifestation of religion, and that it cannot be justified as proportionate and for a legitimate aim.

At the same time, religion and belief is protected at work by the provisions of Directive 2000/78, which protects against direct and indirect discrimination, harassment and victimisation on grounds of religion or belief. Direct discrimination occurs where a person is treated less favourably on grounds of religion and belief and would include where employers refuse to employ religious staff altogether, or employ those of one religion on more favourable terms than those of a different religion. Although direct discrimination cannot be justified, where, because of the nature of the occupation or the context in which the work is carried out, a religion or belief constitutes a genuine occupational requirement for the job in question, and it

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7 (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) Judgment 15 January 2013.
8 *Eweida* at para. 83.
is proportionate to impose that requirement, any resulting discrimination will be lawful.\textsuperscript{9} An additional and rather wider exception exists where the employer is an organisation with a religious ethos, such as hospitals or schools run with a religious ethos. In these cases the religious ethos employer can require that members of staff are loyal to that ethos.\textsuperscript{10} This is the case even though sharing a religious belief may not be an essential requirement for carrying out the core duties of the job. Any such requirement must not entail discrimination on any other ground.\textsuperscript{11} This preserves freedom for the religious schools, hospitals and other religious foundations that are fairly common across parts of the EU\textsuperscript{12} to continue to require loyalty from their staff towards the religion.

Indirect discrimination occurs where an apparently neutral requirement would put persons of a particular religion or belief at a particular disadvantage compared with other persons. It can be justified where there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary.\textsuperscript{13} Examples include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. Any such requirements must be justified as a proportionate means to meet a legitimate aim.

It is worth noting that the development of protection for religious freedom at work is a fairly recent phenomenon. Religious equality was only introduced in most member states in response to the need to implement the 2000/78 Directive in 2003; and until 2013 it was unclear whether the ECHR’s protection for religious freedom applied to the workplace at all. Given its fairly recent introduction, it is perhaps not surprising that some tensions can still be identified as courts attempt to assess the correct parameters for the legal protection of religion at work.

**Manifestation of religion at work**

It is the manifestation of belief which is most likely to give rise to conflict in the workplace, and to be the cause of interference by the employer. For example, a work uniform may interfere with a religious employee’s right to manifest her religion. Similarly, the employee who requires time off for religious observance, or who wishes to be exempted from certain duties may claim to be manifesting religion. Debates have arisen in this context involving all these issues: uniforms; time off for religious observance; and conscientious objection to particular tasks. These will be dealt with in turn.

A preliminary issue that has arisen in several issues is the question of whether the practice in question is indeed a manifestation of religion. The difficulty for employees has been that if the activity is merely ‘religiously motivated’ then it will not be a manifestation of religion, and the employer will be under no obligation to accommodate it. The question of whether a practice such as religious dress code is a manifestation of religion, has caused difficulty for many staff seeking to have their religious practice accommodated at work. Until recently, that question was

\textsuperscript{10} Equality Directive 2000/78 Article 4(2).
\textsuperscript{11} Article 4(2). Any requirement as to religion or belief must constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. Note that unlike for the general exception in Article 4(1), the requirement does not have to be ‘determining’.
\textsuperscript{12} E.g. faith schools in the UK, and religious hospitals in Germany.
\textsuperscript{13} Article 2(2)(b).
determined fairly restrictively, but in Eweida et al v. UK\(^\text{15}\) the Court took a more flexible approach and stated that there must be a sufficiently close and direct nexus between the act and the underlying belief, but that there is no requirement to establish that the religious practice is mandated by the religion in question.\(^\text{16}\) After Eweida it now seems clear that many of the accommodations sought by employees such as the meeting of dietary requirements, time off for religious observance, and uniform codes can be viewed as manifestations of religion, and thus potentially protected.

**Uniforms**

In the employment context, one of the most common tensions that can arise between the needs of a business and the religious requirements of staff relate to dress codes.\(^\text{17}\) In particular, some workplaces impose restrictions on the wearing of religious symbols such as headscarves or turbans, to accord with a workplace uniform. Alternatively, dress codes could require female staff to have their arms on show, or to wear a skirt, both of which could breach religious dress codes. Where an individual manifests her religion or belief by the wearing of symbols or particular types of clothing, this can be viewed as a manifestation of religion, which can only be limited where it is proportionate to do so in the pursuit of a legitimate aim. A uniform imposed by the employer can also be treated as an example of neutral practice, which has an indirectly discriminatory effect, and which can only be lawful if justified as a proportionate means of achieving a legitimate aim. In either case, the imposition of a dress code will need to be justified by an employer.

The case of Azmi v. Kirkles Metropolitan Borough Council\(^\text{18}\) may usefully illustrate how the justification of a dress code may take place. Azmi was a teaching assistant who wanted to wear the niqab or face veil when in the presence of male colleagues. She was dismissed for refusing the employer’s request to remove the niqab when assisting in class. She was unsuccessful in her claim of direct and indirect discrimination.\(^\text{19}\) The court accepted that there was *prima facie* indirect discrimination as the refusal to allow a face covering put Azmi at a particular disadvantage when compared with others. However, the court held that the indirect discrimination was justified. The restriction on wearing the niqab was proportionate given the need to uphold the interests of the children in having the best possible education. The school had investigated to see if the quality of teaching was reduced when Azmi wore the face covering and came to the conclusion that it was; they had also investigated whether it was possible to rearrange her timetable to enable her to assist only in classes with a female teacher and found that this was not possible. In this case the interest in maximising the children’s educational experience justified the dress code, despite its disadvantageous effect on Azmi as a female Muslim teacher. However, it is quite possible that in other cases some accommodation of religious practice may be required, in order to avoid the disadvantage which restrictions on religious attire can cause to religious individuals in the workplace.

\(^{14}\) Arrowsmith v. UK [1978] 3 EHR 218.
\(^{15}\) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) Judgment 15 January 2013.
\(^{16}\) At para. 82.
\(^{17}\) For a general discussion of the law relating to the wearing of religious symbols at work in a number of EU states, see van Ooijen 2012.
\(^{18}\) [2007] ICR 1154.
\(^{19}\) She also claimed victimisation and was successful due to inadequacies on the part of the employer in dealing with her case.
A similar approach, based on balancing competing interests can be seen in the case of Eweida and others v. UK. Two of the cases in this combined appeal involved dress code issues. Eweida was a member of the check-in staff for BA who was refused permission to wear a cross over her uniform, as this was in breach of their uniform policy. Chaplin was a nurse who was required to remove the cross that she wore on a chain around her neck, for reasons related to health and safety. The chamber of the ECtHR, accepted that her religious rights were engaged, and the restriction therefore had to be justified by the employer. In the case of Eweida, the employer’s interests that were served by the ban related to its right to project a particular corporate image. As noted above, the right of companies to freedom of expression is recognised and this can include the right to portray a secular image to the public. However, in this case, the Court held that it was not proportionate for this reason to outweigh the employee’s right to manifest religion. Factors of relevance in reaching this decision were that other religious dress codes such as headscarves and turbans were accommodated without any negative impact on the employer, and also that the company had rapidly changed their dress code to accommodate Ms Eweida after she had made her claim. This factor was used to argue that the requirement related to corporate image was not very strong. In contrast, in Chaplin’s case the Court held that the interests of the employer in maintaining health and safety standards were sufficient to outweigh the employee’s interest in manifesting her religion at work.

These cases illustrate well the practical application of the approach advocated above, which suggests that a reconciliation needs to be sought between the competing interests of freedom to manifest religion at work and the freedom of the employer to regulate the workplace. As was suggested, it is insufficient to rely on the argument that religious freedom is protected by a right to resign; instead, courts need to take a balancing approach to deal with any conflict. The standard of review of this justification can vary between jurisdictions, but nonetheless the approach remains one of balancing the competing interest in the search for a fair balance between the interests of religious individuals and the interests of employers. This balancing exercise remains to be carried out in the light of the residual right to resign that operates when religious rights are exercised at work: as noted above, the ECtHR in Eweida confirmed that the possibility of resignation should be weighed in the balance when considering whether or not the restriction is proportionate.

**Time off for religious observance**

The same balancing approach can be seen in the treatment of time off for religious observance. Earlier case law from the ECHR had refused cases involving staff who had not been given time off for attendance at prayers or for church, on the basis that religious freedom was protected by the right to resign. However, with the change to this approach heralded by Eweida it would seem that such claims would now be covered by both Article 9 and the EU Directive 2000/78. The application of this approach can be seen in the following two cases, leading to different outcomes, despite the initial similarities of the cases. The first case is Thompson v. Delaney and

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20 The case was brought in the UK as Eweida v. British Airways [2010] EWCA Civ 80. It was then joined with others in an appeal to the ECHR and heard as Eweida et al v. the United Kingdom (2013) 57 EHRR 213.
21 Eweida at para. 83.
23 Ibid.
Conscientious objection to work tasks

A third area of contention in the law on religious discrimination and work relates to conscientious objection to work tasks. Examples include staff who request to opt out of tasks such as selling alcohol or handling meat products. Such requests will be dealt with similarly to those relating to uniforms or time off work. Where proportionate, employers may refuse requests of this type, but a refusal when it would be easy to allow the request may be indirectly discriminatory. For example, it would be proportionate to refuse to accommodate a butcher who refused to handle meat; but a request from a butcher to be exempt from occasional requests to handle alcohol should probably be accommodated if other staff can cover the task.

More complex have been cases where the refusal of a task has been on grounds which themselves are found to be discriminatory. For example, cases have arisen in several jurisdictions involving marriage registrars who wish to be exempted from carrying out civil partnerships. These cases too are treated as cases of indirect discrimination; the requirement to carry out the civil partnership is a neutral requirement which causes disadvantage to the religious employee because he or she cannot comply for religious reasons. However, the courts have generally found the refusal to accommodate a request for exemption to be a proportionate means to achieve the legitimate aim of equal treatment on grounds of sexual orientation. For example, one of the cases heard with Eweida before the ECtHR was Ladele v. Islington Borough Council. Ladele worked as a registrar of Births, Deaths and Marriages for a number of years, before being designated a Civil Partnership Registrar under legislation introduced in 2004, qualifying her to carry out all types of ceremony. The legal case turned on the question of whether the employer could justify this requirement.

The Court held that the refusal to accommodate Ladele’s request to be exempt from carrying out civil partnerships was justified as the employer was entitled to rely on its policy (called ‘dignity for all’) to require all staff to offer services to all service users regardless of sexual orientation. In effect, then, the case is no different from other conscientious objection cases; the court will balance the interests of the religious employee in religious freedom against the equality interests of service users or colleagues. At the Court of Appeal in the UK, the court also recognised the employer’s interest in setting and then upholding its own workplace ethos (the Council’s ‘dignity for all’ policy).

Promotion of religion or belief in the workplace

In some cases, staff have been involved in the promotion of religion or belief in the workplace, including through the distribution of literature and prayers. Such activity can be viewed by the religious staff member as the manifestation of religion, or the exercise of religious freedom. However, other members of staff may object, seeing such activity as breaching the neutrality of the workplace, or even as amounting to harassment. As with the other manifestations of religions discussed above, any restrictions imposed by employers on such behaviour are likely to be found to be indirectly discriminatory unless they are justified. However, justification may be made out where the rights of others are interfered with.

For example, in Apelogun Gabriels v London Borough of Lambeth27 a worker claimed that he had been dismissed for distributing ‘homophobic material’ to co-workers. Gabriels had organised prayer meetings for Christian staff which were held (by permission) on council premises. He distributed a hand-out which contained verses from the Bible which were critical of homosexual activity to members of the prayer group, and some other co-workers. Other staff members found them offensive and complained. Gabriels was dismissed for reasons of gross misconduct and claimed that this dismissal was discriminatory on grounds of religion. The tribunal hearing the case found that the dismissal was lawful; the material was offensive to gay and lesbian people and although it had not been targeted at these staff, this nonetheless meant that any indirect discrimination involved in his dismissal was justified.

Summary

These cases illustrate the approach of UK domestic courts and the European Court of Human Rights in addressing the tensions that can arise between competing equality interests. In summary, religious staff are able to require that their religious practices or beliefs are accommodated at work so long as there remains a reasonable balance between the needs of staff and the needs of their employers. The various legal frameworks effectively allow religious staff to reconcile their religious needs with the demands of the secular workplace, using a proportionality framework to allow for the facts and the context of the case to be taken into account. Although this can make the outcomes difficult to predict, this approach does allow for careful analysis of the different factors which can be at stake in any particular case, such as the operational requirements of the business, health and safety concerns, or the equality needs of staff and clients.

27 (2006) ET Case No. 2301976/05.
Special provisions for churches and religious ethos organisations

The second area of tension that can arise in the context of religion and belief and the workplace involves the treatment of religious employers, and the extent to which they can exercise their religious freedom via their employment practices. Issues which have arisen include the extent to which they can impose religious requirements on staff, in order to create religiously homogenous workplaces. Such requirements will usually involve some degree of religious discrimination against others, for example requirements that staff share the religion of the employer, or be loyal to the religion’s teaching. In some cases, the requirements will also result in discrimination on other grounds, for example a requirement for a staff member to be a male Muslim or a heterosexual Christian. These cases involve the religious interests of employers, often groups of religious individuals, seeking to manifest their religion or belief in community with others through the medium of work, as set against the equality interests of staff.

Both Article 9 and the EU Directive 2000/78 allow some scope for employers to discriminate on religious grounds in order to uphold the religious ethos of an organisation. With regard to Article 9 the case is reasonably clear that the autonomy of religious groups should be respected; they should be able to determine their own leadership, for example. This means that courts would be loath to restrict a religious organisation in its choice of clergy and so religious requirements imposed on these types of staff, for example requirements that Catholic priests be Catholic, or indeed that they be male, would be likely to be lawful. Where the work is less directly involved in religious practice, religious requirements will be scrutinised more carefully. For example, in Obst and Schüth v. Germany the ECHR had to decide whether the dismissal of a broader category of church employee for breaching religious teaching was lawful. In both cases staff had been involved in extra-marital relationships, in Schüth a Catholic Church organist and in Obst the Director of European Public Relations for the Mormon Church. In both cases, the ECtHR recognised the right of the employer to require loyalty to Church teaching from these staff. However, they held that the religious interests of staff needed to be balanced against the rights of the staff in question, in terms of their privacy rights and rights to family life, but also in terms of other factors of relevance to the case, such as the ease with which they might find other work (the court reasoned that the organist would find it difficult to find other work; the PR Director less so). This fact-sensitive reasoning meant that despite the apparent similarity of the cases, the claim of the Catholic organist was upheld while the claim of the Mormon PR Director was rejected. The cases illustrate again that the rights to religious freedom of the employer were recognised, but needed to be balanced against other competing interests.

A similar process can be seen in the context of the EU Directive 2000/78, Article 4(1) of which provides an exception where, because of the particular occupational activities or the context in which they are carried out, a religious characteristic is a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. A slightly wider exception exists in Article 4(2) where the employer is a church or an organisation, the ethos of which is based on religion or belief. Under this exception, religious foundations such as hospitals run with a religious ethos, can require that members of staff are loyal to that ethos. This is the case even though sharing a religious belief may not be an...

29 Obst v. Germany (application no. 425/03) decision of 23 September 2010, Schüth v. Germany (application no. 1620/03) decision of 23 September 2010. The cases were brought under Article 8, but religion and belief pervade the reasoning of the court, so they are discussed here.
essential requirement for carrying out the core duties of the job. Any such requirement must not entail discrimination on any other ground.

The first level exception is not particularly controversial; the occupational requirement must be genuine and determining, so that discrimination is only really likely to be lawful in cases of those involved in teaching or promoting the religion, or in religious observance. It is noteworthy that Article 4(1) does not allow for the total exemption of churches from the protection of the Directive, but instead requires that any exceptions be proportionate. This means that exceptions that apply to Churches are subject to review by courts to ensure that they are objective and reasonable. Of course any such review will recognise the importance of autonomy for religious organisations in choosing their leadership. Thus requirements imposed by churches that priests or bishops be male are likely to be proportionate means of upholding religious freedom, despite their discriminatory effect on women.

Article 4(2) provides a second, broader, level of protection for organisations with a religious ethos. This extends beyond the protection of organised religion to include religious employers such as religious hospitals, schools or businesses. It allows such organisations to require loyalty from staff to the religious ethos. Although religion does not have to be a defining characteristic of the job in these cases, it must still be a genuine, legitimate and justified requirement. For example, in Denmark, where a young person was dismissed from a cleaning job in the Christian Cross Army, a Christian humanitarian organisation, it was accepted that, under Article 4, a requirement that all staff must be members of the National Lutheran Church was no longer permitted.30 There was no genuine occupational need for cleaning work to be carried out by a member of the same religious group. In contrast, in Muhammed v. Leprosy Mission a Muslim finance administrator applied for work in a Christian charitable organisation. One of the criteria for the role was that the incumbent ‘be a practising Christian committed to the objectives and the values’ of the organisation. Mr Muhammed’s application was unsuccessful, and he claimed discrimination on the ground of religion. The tribunal upheld the respondent’s view that being a Christian was a genuine occupational requirement of the role, and that it was objectively justified to rely on this. In particular it drew attention to the fact that Christian beliefs were at the core of the employer’s activities and that employing a non-Christian would have a very significant adverse effect on the maintenance of that ethos.31 These cases illustrate that courts do have regard for the collective religious interests of religious ethos employers and allow them to uphold that ethos via their hiring practices, where it is proportionate to do so, as long as there is some religious element to the staff role, even where the work is not inherently religious in nature.

What the Directive also makes clear, however, is that while religious discrimination against staff in religious organisations may be lawful where it aims to uphold the religious freedom of employers, this is limited where discrimination on other grounds results. Article 4(2) states the use of the genuine occupational requirement by a religious organisation ‘should not justify discrimination on another ground’. For example, while a religious employer may be allowed to require staff to be Christian, it would not be allowed to require staff to be heterosexual in order to maintain the religious ethos.

30 The case arose before the transposition of the Directive, but the Church did admit that under the Directive, such discrimination against a cleaner would not be permitted. See Country Report, Denmark, European Network of Legal Experts in the non-discrimination field (hec, MPG, Migration Policy Group, 2006).
31 Muhammed v. The Leprosy Mission International ET/2303459/09.
These provisions, which enable religious employers to create religiously homogeneous workplaces as long as there is no discrimination on other grounds, help to resolve the tension identified above between maintaining religious freedom and upholding equality interests. In effect, religious employers are able to create workplaces that share a religious ethos, even where the work is not directly religious in nature. In this way, the freedom of religious groups is maintained. However, if discrimination on other grounds such as sex or sexual orientation results, such a practice will be in breach of the Directive. This limitation does not apply where the work itself is religious in nature, such as the employment of a priest. In such a case the religious requirement, may be justified as proportionate under Article 4(1), because the requirement is a determining feature of the job, and it is necessary to impose it because of the need to uphold religious freedom.

Conclusion

It was established above that adequate protection for the interests of religious groups and individuals will involve some level of protection at work. While it could be argued that religion is a private matter which does not survive entry to the workplace, such an approach relies on too functional a view of work and the work environment. Few see work as based purely on the economic transaction of the contract of employment. Instead, for most individuals, work is a forum in which a significant aspect of life is lived: it is where people meet others, engage with wider society, gain economic benefit, undertake personal and professional development, and to an extent where they express aspects of their personality. Viewed in this way, it seems clear that religion should not be excluded, and this has recently been confirmed in *Eweida v. UK*.

However, it has also to be recognised that protecting religion at work can lead to tension; tension between equality rights and tension between religion and other interests such as the economic interests of employers. The legal frameworks which are engaged with these issues have developed mechanisms to address these tensions based on the concept of proportionality. This approach involves careful and contextual analysis of the competing interests at stake in any case. It also involves engaging in a degree of metaphorical weighing and balancing of these interests, to ensure that any restrictions on religious freedom are imposed for a legitimate aim and are proportionate to that aim. Such an approach involves careful, fact sensitive decision making by the courts, taking into account and being responsive to the circumstances and context of each case.

Although this can be a cause for concern, because it can lead to difficulties in predicting the outcome of cases, nonetheless, such an approach remains the most effective way to uphold religious interests in the context of the workplace. If certainty were to be required, it would probably involve a return to a position of no protection; after all, the alternative, that is a certainty that religion will always be protected at work would never be granted because of the strength of the competing interests of employers to economic freedom, and to equality interests of staff and service users. Particularly given the context of a residual right to resign which ultimately protects religious freedom, it is submitted that this balancing approach provides the best solution to the tensions that inevitably arise in connection with the protection of religion in the workplace.

Bibliography


