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# The 'reasonable accommodation' of religion: Is this a better way of advancing equality in cases of religious discrimination?

Elisabeth Griffiths

## Abstract

Freedom of religion and the manifestation of religious belief can clash with working life in a number of ways, including time away from work for religious observance, conflicts over religious clothing and jewellery in an employer's dress code or a request for a variation of duties based on a particular religious belief. Guidance issued by the Equality and Human Rights Commission following *Eweida and others v. UK* [2013] 57 EHRR 8 seems to suggest that employers in Great Britain should consider the 'reasonable accommodation' of religion in the workplace and, in particular, how an individual chooses to manifest that religious belief. Subsequently, there has been much debate about whether this is a better way of dealing with religious discrimination cases than the current complex legal framework of direct and indirect discrimination in the Equality Act 2010. Section 20 of the Equality Act 2010 already allows for reasonable adjustments to be made to working practices and the physical working environment for disabled employees. Should this duty be expanded to include religion and what would be the consequences and impact of such an accommodation or adjustment on the employment relationship?

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## Keywords

Religious discrimination, equality, reasonable accommodation, disability discrimination, reasonable adjustment, indirect discrimination, religion or belief, employment relationship.

## Introduction

The Equality Act 2010 brings all ‘protected characteristics’<sup>1</sup> together into one piece of legislation, all separate ‘silos’ (Solanke, 2011) but in theory equal before the law, no one more important than the other. However, some protected characteristics which may have an impact on one’s ability to do a particular job at particular times, such as pregnancy, age or disability are subject to special rules. Other protected characteristics, such as sex, race, sexual orientation and religion or belief, have less impact on one’s ability to do a particular job and should largely be ignored by an employer unless that employer is seeking to rely on a particular work requirement having regard to the nature of the work.<sup>2</sup> Nevertheless, the issues that have arisen from well-publicized religious discrimination cases<sup>3</sup> demonstrate that, although the private religious belief per se does not necessarily affect the ability of a person to do a job, the manifestation of religion may impact on the way in which, or the extent to which, that person is prepared to carry out their employment contractual duties.

The law on religion or belief is relatively recent and, as suggested by the Equality and Human Rights Commission (EHRC) Research report on religion or belief, the law in this area ‘addresses complex issues in a context where there is considerable difference of opinion as to how the law should be framed and applied’ (Edge and Vickers, 2015: 3). It is fair to say that much has been written in the United Kingdom about religious discrimination in the workplace in the last 5 years. The debate is gathering pace and one aspect ripe for further consideration is the extent to which the personal freedoms surrounding religious beliefs and the manifestation of those beliefs should be recognized in the public space of work, particularly when those religious beliefs conflict with the employer’s desire to run an efficient, profitable business or with the personal freedoms of other employees and customers/service users.

This article will re-examine whether religion too should be subject to special rules, either through a duty of reasonable accommodation or adjustment,<sup>4</sup> or as suggested in the EHRC Research report, a separate right to request an accommodation similar to the right to request flexible working (Edge and Vickers, 2015: 50–57). This article will examine whether a positive duty of reasonable accommodation of (or ‘reasonable adjustment’ for) religion could have a constructive impact on cases of religious discrimination in the workplace and whether this might be preferable to the current negative duty of ‘do not discriminate’ which can pitch one protected characteristic against another. In examining the potential impact of reasonable accommodation of religion on the employment relationship, this article will scrutinize arguments for and against the reasonable accommodation principle and will also consider what employers should take into account when assessing whether an accommodation is beneficial and, most importantly, ‘reasonable’.

## Religion as a 'protected characteristic' and the current legal framework

Religious beliefs held in private are often invisible in the public domain of work and usually have no bearing on a person's capacity to work. However, some religious employees live their lives, including their working life, through their religion and this can manifest itself in a variety of ways. Some manifestations, particularly of minority religions in Great Britain, are more obvious in the public space of work because of the requirements of a particular way of dressing, such as the wearing of a hijab or niqab, a Sikh turban or a Jewish Kippah, or a particular way of thinking which can conflict with work requirements, the structure of the working day or contractual duties. Finkin (2002) argues that when we enter the workplace and interact with others, we must contract away some of our privacy and autonomy. Nonetheless, he goes on to suggest that if we give up so much of ourselves that we cease to be persons, then it must fall to the law to decide what is 'alienable and what is not' (Finkin, 2002: 633). This idea of contracting away our privacy and autonomy at work was brought to the forefront of the debate in the well-publicized decision in *Eweida and others v. UK* [2013] 57 EHRR 8 (*Eweida and others*), which brought the domestic legislative framework on religion or belief into question and highlighted how difficult it is for some employees to give up so much of themselves and their religious convictions when they enter the workplace. The decision in *Eweida and others* also drew attention to a more explicit notion of reasonable accommodation of religious beliefs in the workplace. The EHRC Research report on religion or belief published in October 2015 (Edge and Vickers, 2015) takes forward the EHRC's religion or belief strategy and reports, among other things, on the balancing of rights and explores the concept of the reasonable accommodation of religion in the workplace and the law as it currently stands. With this context in mind, the equality law on religion or belief and the duty of adjustments in a work context will be explored in detail below.

Religion is protected both within domestic law and at a European level as a matter of equality law and human rights law. This article will concentrate on the application of equality law through the Equality Act 2010 as it applies to England and Wales.<sup>5</sup> Prior to the Equality Act 2010 religion was protected by the Employment Equality (Religion and Belief) Regulations 2003 (SI 2003/1660) to comply with Directive 2000/78/EC, which established a framework for equal treatment in employment (the Employment Equality Directive). The Equality Act 2010 now provides the framework for legal protection by means of direct and indirect discrimination, harassment and victimization. Religion is one of the nine protected characteristics in section 4 of the Equality Act 2010 and is further defined in section 10 as meaning any religion or lack of religion. Belief (or lack thereof) is also protected alongside religion and applies to any religious or philosophical belief. The definition of religion and belief is identified in the EHRC Research report as warranting further assessment, but that is outside the scope of this article (Edge and Vickers, 2015: 12–21).

The Human Rights Act 1998 is also relevant to claims of religious discrimination as it gives further effect to the protections given by Article 9 of the European Convention on Human Rights (ECHR) in the context of domestic legislation. The right to internal freedom of thought, conscience and religion cannot be restricted, but external freedom

to manifest one's religion or belief can be subject to limitations which are necessary to protect, among other things, the rights and freedom of others (Articles 9(1) and 9(2) ECHR).

Under section 13 Equality Act 2010, direct religious discrimination occurs when an employer treats an employee less favourably than it treats or would treat others because of a protected characteristic, such as religion. The comparator model for direct discrimination involves individuals in the same or similar circumstances as the claimant and, other than the occupational requirement exception,<sup>6</sup> there is no defence to such claims. Most cases on the manifestation of religious belief in England and Wales involve indirect discrimination under section 19 Equality Act 2010. Indirect discrimination occurs when a neutral provision, criterion or practice has a disproportionate impact on a relevant group defined by a protected characteristic, religion in our case. The comparator model in indirect discrimination therefore involves groups rather than individuals (Khaitan, 2015). It is intrinsic to the concept of indirect discrimination that there is a protected group that has been put to a particular disadvantage. If an employee successfully proves a disadvantage on account of membership of that group, an employer can go on and defend cases of indirect discrimination by stating that the provision, criterion or practice is a proportionate means of achieving a legitimate aim. Indirect discrimination is a complex concept and the problems are exacerbated by the variety of ways in which it might apply to religious employees. The difficulties of pursuing direct and indirect religious discrimination claims will be explored in more detail below within the context of recent case law. Claims of harassment and victimization because of religion are not relevant to this particular discussion and will not be examined further.

The duty to make reasonable adjustments was first introduced in England and Wales by the Disability Discrimination Act 1995. The duty is now found in sections 20–22 of the Equality Act 2010, which harmonized the previous provisions. In the context of employment, the duty of reasonable adjustments involves the employer taking any reasonable step, or combination of steps, necessary to remove a disadvantage experienced by the disabled person which, if taken, would enable the disabled person to work. The duty comprises three requirements, the first requirement in section 20(3) being the one most appropriate for cases of religious discrimination: A duty arises when a provision, criterion or practice of the employer puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, and the employer is required to take such steps as are reasonable to have to take to avoid the disadvantage. Section 21 goes on to state that a failure to comply with that duty is an act of discrimination against the disabled employee. The intention of a reasonable adjustment is for the employer to respond sensitively to the needs of the individual employee on a case-by-case basis and remove barriers which are preventing that disabled employee from participating in the workplace. As disability is multifaceted, the duty of reasonable adjustment too encompasses a range of responses.

When assessing the reasonableness or otherwise of the adjustment in question, it is clear that it is an objective assessment and chapter 6 of the Employment Statutory Code of Practice on the Equality Act 2010 sets out factors that should be considered and particular steps that would be effective in preventing the substantial disadvantage caused by a provision, criterion or practice (Equality and Human Rights Commission, 2011).

The relevant factors include the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment and the type and size of the employer. The duty can encompass a wide variety of adjustments.<sup>7</sup>

When examining the current legislative framework, it is clear that in its basic form, anti-discrimination law in England and Wales is designed to facilitate notions of formal equality. The focus of direct and indirect discrimination is on comparable treatment (or comparable impact) or disparate treatment (or disparate impact) of individuals in the same or broadly similar situation. However, anti-discrimination law can often fail to treat people as individuals (Eidelson, 2013). It groups people together according to their sex, race, religion, sexual orientation and so on. It is largely negative in design: do not discriminate; 'do not take account of my sex, age, race, sexual orientation, disability or religion when making a decision about me in the workplace'. Focusing on equality of treatment therefore forces employers to ignore the individual's personal characteristics. Collins (2003) argues for three kinds of deviation from the formal equal treatment principle. First, different treatment is required when treating like with like would almost certainly result in unfairness, such as in cases of pregnancy or disability. Secondly, equal treatment might also result in unjustifiable indirect discrimination. In such cases, equal treatment would disadvantage disproportionately a protected group and that cannot be objectively justified. Thirdly, positive discrimination is sometimes required to rectify historical inequalities. The focus of formal equality is 'like treatment', but if disadvantage results from like treatment, then what should be treated as relevant? For religious individuals in the workplace, while the religion per se should be subject to like treatment or notions of formal equality, the particular manifestation of a religious belief may benefit from different treatment to enable religious individuals, particularly those of minority religions in Great Britain, to participate fully in the labour market. For example, an employer directly discriminating against Muslims in the workplace can be tackled using formal equality principles, but a female Muslim who wants to wear a niqab in the workplace may require an individualized accommodation of a particular dress code if she is to fully participate in the labour market. However, this is somewhat controversial given that the accommodation of a manifestation of a religion or belief may itself impact on the rights and freedoms of others.

## The public sphere of work and religion: The case law

Case law has demonstrated the controversial nature of particular, sometimes highly individualized, manifestations of certain religions by religious individuals in the context of working for non-religious employers and has demonstrated that these manifestations can clash with the requirements of the employer and may even discriminate against other employees or service users. Most cases involving manifestations of religious belief in the workplace occur because of the application of a dress code or uniform policy, time off to observe religious holidays or acts of worship, proselytization by a religious employee, or opting out of work duties for religious reasons. A number of commentators have written about the reasonable accommodation of religion or belief in the last few years. To name a

few: Gibson (2013) has considered recent case law using models of religious reasonable accommodation drawing from Canadian jurisprudence; Wintemute (2014) has proposed accommodating religious beliefs from a human rights perspective and the RELIGARE project examined reasonable accommodation in six European countries (Bader et al., 2013). However, the issues have not been addressed from the point of view of domestic reasonable adjustments. There is some scepticism as to whether or not using the domestic disability model of reasonable adjustment would be appropriate. This was highlighted during workshops in the context of the EHRC Research report on religion or belief (Edge and Vickers, 2015: 72–74 and 76–78). This section of the article will attempt to consider this viewpoint and examine recent case law from the standpoint of disability reasonable adjustments, while reflecting on the situation of religious reasonable accommodation more generally.

Azmi (*Azmi v. Kirklees Metropolitan Borough Council* [2007] IRLR 484) raises the complex issue of religious clothing at work. Azmi was a teaching assistant who was ultimately dismissed by her employer because she refused to remove her niqab while at work. The case gave rise to claims of direct and indirect discrimination, harassment and victimization. For our purposes, the interesting points are raised in the direct and indirect discrimination claims. The direct discrimination claim was dismissed by both the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT). There was much debate about the correct comparator for the direct discrimination claim, but it was agreed that the comparator was another person not of the Muslim faith who had a face covering. It was decided that because the comparator would also have been asked to remove the face covering when teaching the children, there was no direct discrimination. There was, however, indirect discrimination in this case as the requirement to wear clothing that does not cover the face or a considerable part of the face and which interferes with the employee's ability to communicate properly with the children was a neutral provision, but women of the Muslim faith who choose to wear a niqab would be disadvantaged and Azmi had herself been disadvantaged. Yet, the employer was justified in their requirements because of the support needed for the particular children taught by Azmi.

The proportionality requirements in the justification defence for indirect discrimination do in theory address issues of reasonable accommodation, but for Azmi, there is the possibility that a specific request to accommodate the niqab or a duty of reasonable adjustment could have made a difference to the outcome of the case, as it is not clear why some of the alternative suggestions for accommodation were refused during the consideration of the employer's justification defence ([2007] IRLR 484: paras 73 and 74). As Azmi was providing assistance rather than taking the full class as a teacher, she could have been screened with her target group away from the rest of the class when working with a male teacher or the target group could have been removed to a separate room where Azmi could have removed her veil when speaking directly with the children who required her specific support. It is agreed, however, that this possibility does depend if such a room was available and whether or not this would result in unreasonable disruption for the children, but this is not clear from the decision. Allowing the niqab to be worn in the classroom with a screen when Azmi was working with male teachers would have removed the disadvantage as perceived by Azmi, because she would have remained

in employment and the economic cost for the employer would be fairly minimal. Time-tabling Azmi to work with only women would be more problematic and using additional hand gestures may not have overcome the lack of visual direction required to effectively communicate with the children. The argument heard in the ET and EAT about whether wearing the veil itself was a belief and therefore requires protection from direct discrimination was dismissed entirely but arguably requires greater scrutiny (Pitt, 2013). Not all Muslim women wear the niqab, but many do and in this particular situation they would be entirely excluded from that particular workplace and others like it.

We need to be careful not to suggest that the decision in Azmi means every similar case would result in the same conclusion, as the work context will be crucial. While a teaching assistant who can remove her target group from the classroom so her face can be uncovered to allow appropriate interaction with the children might be allowed to wear the niqab more generally in the classroom and around the school, a classroom teacher taking a class with a male teaching assistant would potentially struggle to interact appropriately with the pupils if her face was covered throughout the day. However, a right to request an accommodation or a duty of reasonable adjustment in this particular scenario may have enabled a more open dialogue about the issues and resolution at the workplace level (Edge and Vickers, 2015: 53). There may still have been litigation as to the meaning and extent of reasonableness, but some of the alternatives in this case were arguably reasonable.

Eweida (*Eweida v. British Airways Plc* [2010] EWCA Civ 80) is less problematic from a reasonable adjustment or reasonable accommodation point of view. If Nadia Eweida had had a right to request an accommodation for her religious jewellery in the workplace or British Airways had had a duty to consider a reasonable adjustment of allowing her to wear her religious jewellery when redrafting the uniform policy, then this case may well have been resolved amicably in the workplace and there would have been none of the highly charged publicity on the issues in the media. When examining the reasonable adjustment duty, the employer of course could have argued that Eweida had not suffered a 'substantial disadvantage' in comparison to non-religious individuals because of the uniform policy. As substantial means more than 'minor or trivial'<sup>8</sup> the threshold is relatively low, and as this was a deeply held religious conviction by Eweida, she could arguably have crossed that threshold. Allowing the necklace as part of the uniform policy would have removed the disadvantage, it was a relatively easy, practical step to take, the cost was negligible and the policy could be (and subsequently was) easily modified to allow a discrete necklace to be worn.

Nevertheless, this case does highlight one of the difficulties with the current legal framework for indirect religious discrimination claims. A particular manifestation of a religion can be singular in nature: not all Christians believe, for example, that wearing a cross is a key component of their religious belief. Under the current legal framework, such cases will always fail because group disadvantage cannot be demonstrated (Pitt, 2011). At the Court of Appeal (CA) stage, Eweida's claim did indeed fail because she could not point to a group of religious individuals who felt similarly disadvantaged by her employer's uniform policy. Eweida had always worn this particular necklace with a cross, but prior to the change in uniform policy, this had been hidden; it only became an issue once the cross became visible after the change in uniform policy. Due to her desire



to wear this particular necklace, she was herself disadvantaged by the uniform policy, but the CA concluded this was a solitary disadvantage. British Airways had offered to accommodate Eweida by moving her to a post where there would be no public contact and therefore no formal uniform requirement, but this was not acceptable to Eweida and would of course have hidden the religious symbol away. There did not seem to be any legitimate reason why British Airways could not accommodate the jewellery other than the argued for 'corporate image'. Although there was some discussion in the case about justification, it did not matter as there was a finding of no indirect discrimination due to the perceived solitary nature of Eweida's personal jewellery preference. A duty of reasonable adjustment or right to request a reasonable accommodation would have allowed for this solitary disadvantage to be rectified without the need to demonstrate group disadvantage.

Shirley Chaplin, a nurse (Chaplin v. Royal Devon and Exeter Hospital NHS Foundation Trust [2010] ET 1702886/2009), was moved to a desk job after refusing to remove her crucifix, which she had worn for 30 years at the time of the ET ruling in 2010. Like Nadia Eweida, Chaplin could not demonstrate group disadvantage but, importantly, the employer argued that they were justified in their uniform policy on the grounds of health and safety, and the ET held that this was entirely reasonable given the work context. If Chaplin had had a right to request an accommodation of her particular manifestation of her Christianity, then it is likely that the outcome would have been the same. There are important differences between Chaplin and Eweida, as argued by Wintemute (2014), and the work context is crucial in the assessment of reasonableness (Wintemute, 2014: 237–240). The National Health Service Trust had asked other religious individuals to adapt their religious clothing because of the perceived health and safety risk to patients, while British Airways had adapted their uniform policy to accommodate other religious clothing. It is important, however, that a tribunal continues to scrutinize the health and safety justification defence to ensure that it is not exaggerated by employers. On the issue of religious clothing and religious symbols more generally, Wintemute argues 'that public sector employees who wear religious clothing or symbols to work (as in the UK, Canada or the USA) are doing nothing more than making their cultural differences visible, and giving their workplace the same visible diversity as the street or public transport' (Wintemute, 2014: 235). He goes on to say that, in accommodating religious dress, the employer is not 'endorsing' the religion in the workplace. This observation could also be applied to the private sector employer.

It is ostensibly easier to make a claim of religious indirect discrimination if one can demonstrate that a particular way of dressing or a particular way of thinking is required by the religion rather than a mere individual preference. The issue of core beliefs was highlighted in the case of Mba (Mba v. Mayor and Burgesses of the London Borough of Merton [2013] EWCA Civ 1562). The majority of British workplaces are constructed around the Christian calendar, observing Christian holidays such as Easter and Christmas, and Sunday being the traditional day of rest. Some workplaces, however, do require Sunday working. In Mba, a sincerely held belief that Sunday is a day of worship and not for work brought an employee into conflict with her employer as to her required working hours. The relevant provision, criterion or practice in the indirect discrimination claim was the requirement that staff work Sunday shifts as rostered. Having accepted the

employer's aim to provide comprehensive care to those in its care home as legitimate, the ET then had to balance the discriminatory impact of the provision on the employee and ascertain whether it was a proportionate means of achieving the legitimate aim. The claim of indirect discrimination was rejected by the ET, and appeals to the EAT and the CA were subsequently dismissed. The CA ([2013] EWCA Civ 1562), in rejecting Mrs Mba's appeal, highlighted the issue of the diversity of beliefs within one faith. Not all Christians will be Sabbatarians. Some will work Sundays, some will not, and the appeal centred on this diversity of beliefs and whether or not something had to be a core component of a particular faith for it to be protected. The decision again also raises the problem of group disadvantage required for claims of indirect discrimination as opposed to an individual or solitary preference for the manifestation of a religious belief. Rather than excluding Sabbatarians from such workplaces, an employer could consider making an accommodation for such beliefs when working time is rostered.

Perhaps the most controversial issue in the debate about the accommodation of religious beliefs in the workplace involves the refusal to serve same-sex couples highlighted in case law. Due to their particular interpretation of Christianity, both Lillian Ladele and Gary McFarlane held the view that same-sex partnerships were contrary to God's law. The CA in both Ladele (*Ladele v. London Borough of Islington* [2009] EWCA Civ 1357) and McFarlane (*McFarlane v. Relate Avon Ltd* [2010] EWCA Civ 880) dismissed appeals against EAT decisions that the employers had not discriminated against these individuals on the basis of their religious beliefs. Ladele was employed by the London Borough of Islington as a registrar of births, deaths and marriages, and her refusal to register the civil partnerships of same-sex couples under the Civil Partnership Act 2004 eventually led to her dismissal. McFarlane was required to provide counselling services for same-sex couples and was eventually dismissed for stating that he would comply with Relate's policies on counselling same-sex couples without any intention of doing so.

Employees such as Ladele and McFarlane are entitled to believe, however offensive that view may be to some that, in accordance with their particular interpretation of Christianity, same-sex relationships are wrong. Accommodating the views of such individuals in the workplace is problematic given the potential for direct discrimination against others because of their sexual orientation. Accommodating the stance taken by Ladele and McFarlane would eventually lead to them refusing to serve same-sex couples in direct contravention of their contractual requirements and equality law. Once Islington Borough Council decided to appoint all of their registrars as Civil Partnership registrars, any accommodation of Ladele's religious beliefs would lead to direct discrimination against same-sex couples, as she would undoubtedly have refused to officiate on such an occasion. Arguably McFarlane put himself in harm's way as, once he decided to train as a psychosexual counsellor, he must have known that he would be conflicted over counselling same-sex couples. An accommodation may have been a practical step to take and at relatively little financial cost to the employer. Any substantial disadvantage caused to Ladele or McFarlane by their contractual requirements would have been removed if they had been allowed either not to officiate at civil partnership ceremonies in Ladele's case, or be excluded from counselling same-sex couples in McFarlane's case, but this would be unreasonable as the employer would then be facilitating direct discrimination because

of sexual orientation against others. By fulfilling their contractual requirements, neither Ladele nor McFarlane were actually endorsing same-sex relationships and a compromise on their part should arguably have been reached.

Again, both Ladele and McFarlane highlight the fact that religious belief is multi-faceted and its interpretation is arguably subjective, that religious practice can be very individual and may cause harm to others. Sedley LJ in *Eweida* highlighted the fact that all the other protected characteristics in the Equality Act 2010 are objective characteristics of individuals, but that religion and belief are subjective and entirely matters of choice ([2010] EWCA Civ 80 para. 40). Religious individuals would probably disagree with that assessment, but it is fair to say that how one decides to manifest one's particular religious beliefs is subjective and highly individualized and should not necessarily be accommodated by employers where to do so would cause direct discrimination against others.

Despite the various debates in the academic literature and the case law, there is, of course, no specific duty of reasonable adjustments or reasonable accommodation available for cases of religious discrimination in Great Britain and nor is one being proposed. The issue, however, is not going away and a number of commentators have suggested that a duty of reasonable accommodation may well improve the law on religious discrimination (Alidadi, 2012; Gibson, 2013). The recent EHRC Research report also covers the issue of reasonable accommodation (Edge and Vickers, 2015: 50–56) in some depth. Having reviewed the current legal framework and the relevant case law, arguments for and against such a duty will now be reviewed.

## Should religion be 'reasonably accommodated' and what would reasonable mean?

A duty of reasonable accommodation may provide a more workable solution for cases of religious discrimination than indirect discrimination. The threshold requirement of group disadvantage for indirect discrimination and the complexities of proportionality required for the justification defence can be problematic for cases of religious discrimination. The need for group disadvantage in claims of indirect discrimination has been called into question by the European Court of Human Rights in *Eweida and others* by dissenting Judges Bratza and Thor Bjorgvinsson ([2013] 57 EHRR 8 para. 9) and the majority ([2013] 57 EHRR 8 para. 82), but the issue was not resolved in this case and there is no suggestion that the law on indirect discrimination will be changed.

Introducing a more general duty of reasonable accommodation was suggested by the Independent Review of the Enforcement of UK Anti-discrimination Legislation (Hepple et al., 2000), and although the issue formed part of the consultation on the single Equality Bill, the government made it clear in their response to the consultation that the duty of reasonable adjustments would not be extended to other protected characteristics.<sup>9</sup> Others have since commented that it would have been beneficial to consider whether disadvantages experienced by individuals with other protected characteristics, such as religion, could be tackled by a reasonable adjustment which would allow the employer a flexibility of response to the religious individual (Lawson, 2011: 369). Khaitan also suggests

that ‘there is no logical reason why reasonable accommodation should be limited to disability alone’ (2015: 76–77).

In February 2014, the European Network of Legal Experts in the Non-discrimination Field<sup>10</sup> published a thematic report recognizing that, although the United States and Canada do have a duty of reasonable accommodation beyond disability, the European Union has so far only developed this concept in relation to disabled individuals in the field of employment (Bribosia and Rorive, 2014).<sup>11</sup> In the United States, the duty is to accommodate religion unless to do so causes ‘undue hardship’: arguments related to economic cost, inconvenience and even complaints from other workers have been successful in invoking undue hardship (Vickers, 2008: 222). The steps considered in cases of religious reasonable accommodation in Canada also include cost, morale problems, as well as the size of the employer, health and safety and so on.<sup>12</sup> Gibson argues that adopting a Canadian model of reasonable accommodation would help ‘facilitate better judicial engagement with individual interests as balanced with competing factors’ and would enable religious individuals to feel less alienated by the law (Gibson, 2013: 616). Although the outcome in the case law would remain largely unchanged, Gibson does suggest *Ladele* may have been decided differently, but only really by allowing *Ladele* to discriminate against others ‘behind the scenes’ (Gibson, 2013: 606–607).

The duty of reasonable adjustments as applied to disabled individuals in domestic law is not without issue. The duty in employment is entirely reactive rather than anticipatory, responding to specific situations when disabled employees present themselves as ready and willing to work (Lawson, 2008). It is also limited in scope as the duty only arises when triggered by knowledge of the disability (Vickers, 2008: 221). This has the benefit of an individualized approach to disability discrimination, but it fails to tackle the kind of barriers that discourage participation of disabled people more generally. Indirect discrimination is used to tackle systemic, structural barriers to full participation but fails to tackle individual disadvantage. Prior to the introduction of indirect disability discrimination in the Equality Act 2010, there was a general failure to recognize how employees with disabilities as a group were marginalized by structural barriers in the workplace and attitudes within society (Lawson, 2011: 376). While unfortunately there is no anticipatory duty of adjustment for disabled employees,<sup>13</sup> the introduction of an anticipatory duty for religious individuals could potentially tackle structural and systemic religious discrimination, as an employer would have to anticipate aspects of his or her business that discriminate against particular manifestations of religious belief more generally (Lawson, 2011: 368–369) while also providing a much needed individualized approach where appropriate for those employees disadvantaged by the current framework of formal equality.

The manifestation of religious belief is potentially more like disability than sex or race are, because of the multifaceted nature of religious belief which, as we have seen, can often be interpreted by an individual believer in a variety of ways. Whether one believes that one should dress modestly in public or whether one believes Sunday must be a day of rest and is therefore wholly relevant to working hours, religious belief is complex and the requirements of indirect discrimination do not allow for a particular nuanced or individualized approach to the manifestation of religious belief. Disability is similarly multifaceted and complex and the requirement of group disadvantage for

indirect disability discrimination claims would similarly disadvantage disabled employees, as it is generally not easy to point to a group of disabled employees who are similarly disadvantaged by an employer's provision, criterion or practice. Disability requires a more nuanced approach and indirect discrimination alone would not wholly protect the disabled individual in the workplace. For disabled employees, treating disabled and non-disabled in the same way, without an individualized approach to the potential constraints of the person's disability in the workplace, would perpetuate disadvantage and, therefore, a reasonable accommodation of the disability allows for an individual disadvantage to be acknowledged and rectified. It embraces notions of substantive equality rather than formal equality, facilitating inevitable differences that exist between disabled individuals or groups of disabled individuals and sees beyond identical treatment which can result in inequality. This flexibility of response by the employer would be advantageous for religious individuals, whose particular manifestation of religious belief may also require a more individualized approach.

This flexibility of response, however, may lead to other problems, as the current protection for disabled employees is asymmetrical in nature, hence only disabled (not able-bodied) individuals being able to bring claims of disability discrimination. An employer can therefore treat disabled employees more advantageously than other employees who do not have a disability<sup>14</sup> and no corresponding claim can be brought by the disadvantaged able-bodied employee. For religion the protection is symmetrical in nature as the provisions protect religious individuals and non-religious individuals. So, if we take the situation in *Mba*, if a reasonable adjustment were made to Mrs Mba's workload so she did not have to work Sundays and a non-Sabbatarian or non-religious colleague were given extra work to cover Mba's Sunday work, that colleague could potentially bring a claim for direct discrimination if there was less favourable treatment because of his or her lack of religion. Vickers (2008: 222) also advances the argument that accommodation of individual religious beliefs could provide too much protection for religious interests. This may then disadvantage other employees who have to pick up the workload of the religious employee who is being accommodated by changing a working pattern.

The media portrayal of religious discrimination claims does nothing to advance the debate.<sup>15</sup> Religion is often portrayed as competing with other equality strands or is seen as exposing what is sometimes referred to as an 'emerging hierarchy' between protected characteristics in the Equality Act 2010, where the rights of religious individuals clash with the rights of others (Vickers, 2010). This perceived 'hierarchy' may be more likely to emerge if a duty of reasonable accommodation of religion were introduced, as certain adjustments may lead to other, more direct discrimination. Pitt (2013), for example, argues against reasonable accommodation of religion if to do so would privilege religion over other protected characteristics or facilitate individuals to hold discriminatory views on sex, race or sexual orientation.

Gibson, however, argues that, where there is a conflict between equality strands, religion and sexual orientation for example, 'one interest may inevitably trump another in the proportionality balance' of indirect discrimination, and he goes on to suggest that reasonable accommodation provides a more 'transparent framework than indirect discrimination in which to understand when and why such subordination occurs' (Gibson,

2013: 589). Nonetheless, a positive accommodation of workplace diversity, including religion, enables the employer to balance the many competing characteristics of its workers without individuals giving up too much of themselves, while fulfilling the requirements of their employment contract. The law can then be used to focus on disadvantage and exclusion and promote social inclusion, rather than alienation from mainstream society (Collins, 2003), which is particularly important where the religion is a minority religion in Great Britain. Similarly, an individualized approach to religious diversity in the workplace is suggested by Wintemute's proposal for a 'workable test for assessing justification', based on a liberal harm analysis which allows a middle path of accommodation where manifesting a belief causes no harm to others, and involves minimal cost, disruption or inconvenience (Wintemute, 2014: 223–253).

What is often missing from debates about reasonable accommodation of religious belief is how employers would assess reasonableness in practical terms and how it could best be achieved. Similar steps to the ones set out in Chapter 6 of the Employment Code of Practice on reasonable adjustments for disabled employees could be used. As has been done above, tribunals could assess the reasonableness threshold as it relates to the particular manifestation in question, balancing whether the accommodation would remove the disadvantage experienced by the religious employee against factors such as cost, health and safety considerations, the interchangeability of the workforce, the nature of the job, the extent of the responsibilities aligned to the job, and how easily they can be undertaken by someone else. In cases of religious discrimination, the 'reasonableness' threshold would also have to include an assessment of the impact of the accommodation on others, both from a direct discrimination point of view and also in terms of workload, so that the non/other-religious individual does not feel disadvantaged.

When applying these factors to the case law discussed above, it is clear that the introduction of a duty of reasonable adjustment for religion, or a right to request a reasonable accommodation for a particular manifestation of religious belief, may just be a symbolic gesture, as having examined the case law using these factors it is unlikely that there would be any great difference in outcome for individuals such as Chaplin, Ladele, McFarlane or Mba. In relation to cases involving uniform policies or dress codes, the outcome may be slightly different for individuals such as Eweida or Azmi, but not necessarily for all potential claimants, as the work context would be highly relevant. Recent research by the EHRC also suggested that there was a broad consensus by the research participants that a reasonable accommodation should be made on the basis of a person's religion or belief where there is no conflict with the equally protected rights of others (Donald, 2012). Although a specific legal duty of reasonable accommodation was not proposed to these research participants, there was a presumption in favour of the accommodation of religion, even if the operation of an accommodation was acknowledged as very fact-specific.<sup>16</sup>

In any case, the manifestation of religious belief in the workplace, like disability or pregnancy, may benefit from the introduction of special rules, even if those rules are largely symbolic. Perhaps, as suggested by the EHRC Research report on religion or belief, the introduction of a separate request for a reasonable accommodation of religion, especially if it relates to clothing, religious symbols or time off for religious observance,

may advance the debate on religion in the workplace (Edge and Vickers, 2015). The arguments for reasonable accommodation in this EHRC Research report are compelling and they include the creation of a clear structure for requesting an accommodation for religious individuals which could lead to disputes being resolved in the workplace rather than the ET; a more open dialogue about religion or belief in the workplace, which would potentially lead to greater satisfaction with the place of religion within the legal framework; and, importantly, such a duty would be available for the protection of individual beliefs as well as for groups of religious individuals more generally, therefore eliminating one of the recurring problems in claims of religious indirect discrimination (Edge and Vickers, 2015: 50–56).

Allowing employees to manifest their religious belief as long as no harm is done to others could improve employee well-being, improve a company's public image and help with the recruitment and retention of staff. If the particular manifestation of a religion is very visible, such as the wearing of the hijab or religious jewellery, then accommodation of that religious dress on an individual basis would allow for increased participation and economic advancement of those from certain minority religions, thus also enabling social inclusion (Collins, 2003).

## Concluding remarks

This article has examined whether a duty of, or a right to request, reasonable accommodation is a better way of advancing equality for religious individuals in the workplace than the current framework of indirect discrimination. It has done this by assessing recent case law against the domestic duty of reasonable adjustments, suggesting that religious belief, like disability, is multifaceted and complex, and indirect discrimination alone does not always address the difficulties faced by religious individuals in the workplace. A more individual and nuanced approach to the needs of religious employees is arguably a better way of achieving substantive equality and harmonizing some of the perceived conflicts that may exist between protected characteristics, most notably religion and sexual orientation.

It is submitted that the benefits of a duty of reasonable accommodation to businesses and their employees outweigh the arguments against providing more protection for religious individuals. Moreover, such a duty would potentially facilitate better legal adjudication than the complexities of indirect discrimination claims.

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## Notes

1. Section 4 Equality Act 2010: the following characteristics are protected characteristics – age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation.
2. Schedule 9 Equality Act 2010.
3. For example, see *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357, *Ewedra v. British Airways Plc* [2010] EWCA Civ 80, *McFarlane v. Relate Avon Ltd.* [2010] EWCA Civ 880.
4. ‘Adjustment’ is specifically used in the context of disability discrimination protection in the Equality Act 2010, but is used interchangeably within this article with ‘accommodation’ which is often used more specifically in the context of religion. For the purposes of this article, both expressions will mean the same thing.
5. The Equality Act 2010 also covers Scotland, with the exception of section 190 and Part 15. Religion and belief in Northern Ireland is covered in separate legislation.
6. Schedule 9 Equality Act 2010.
- 7 For example, in *Archibald v. Fife Council* [2004] UKHL 32, the normal requirements for a competitive interview were waived.
8. Section 212(1) Equality Act 2010.
9. The Equality Bill – Government Response to the Consultation, Cm 7454, 2008: 60–65.
10. Now replaced by the European Network of Legal Experts in Gender Equality and Non-Discrimination.
11. Article 5 of the Employment Equality Directive 2000/78/EC.
12. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 SCR 489.
13. There is an anticipatory duty of adjustment for disabled persons in Schedule 2 of the Equality Act 2010 for the provision of services and public functions and other non-employment areas (except housing).
14. *Archibald v. Fife Council* [2004] UKHL 32.
15. Bingham J (2004), ‘Christian Beliefs should be ‘accommodated’ under law’. *The Telegraph*, London, 20 March 2014. Available at: <http://www.telegraph.co.uk/news/religion/10712546/Christian-beliefs-should-be-accommodated-under-law-top-judge.html>
16. It should be emphasized that the sample in Equality and Human Rights Commission Research report 84 was small (only 47 respondents and 70% of those respondents were from the public sector, with 90% of the respondents being large organizations) and therefore not necessarily truly representative of England and Wales as a whole.

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