Reasonable Adjustments vs. Indirect Discrimination: are all Protected Characteristics Equal Under the UK Equality Act 2010? A Review of Religious and Disability Discrimination in Employment Cases

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REASONABLE ADJUSTMENTS vs. INDIRECT DISCRIMINATION: ARE ALL PROTECTED CHARACTERISTICS EQUAL UNDER THE UK EQUALITY ACT 2010?

A REVIEW OF RELIGIOUS AND DISABILITY DISCRIMINATION IN EMPLOYMENT CASES

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Abstract: *This article argues that religious manifestation, like disability, requires an individual model of discrimination aimed at inclusivity rather than formal equality. It compares the current legal framework for assessing religious discrimination in the workplace (indirect discrimination) to the disability law framework (reasonable accommodation) and argues that while indirect discrimination is well suited to group discrimination, it does not lend itself to manifestation of belief which by nature requires a different form of equality that takes into account individual differences. The reasonable accommodation approach used for disability discrimination places a duty on the employer to take steps to remove any barriers preventing individuals from taking part in society, and as such, consists of treating individuals differently rather than aiming for strict/formal equality. We argue that the reasonable adjustment duty used in disability discrimination should now be extended to manifestation of belief in the employment sector. This would encourage employers to proactively remove barriers faced by religious minorities whose religion or belief mandates a particular practice or dress code. As a result, an employer would be forced to take a pro-active approach to removing any barriers faced by religious minorities. In turn this may prevent individuals having to compromise between following their conscience or the rules set out by the employers.*

1. Introduction and Background

Both religion and disability are listed as protected characteristics under section 4 of the Equality Act 2010 (EqA 2010) alongside age, gender reassignment, marriage and civil partnership, race, sex and sexual orientation. All of the above characteristics are protected against direct and indirect discrimination, harassment, and victimisation. In addition, section 20 of the EqA provides for the duty to make reasonable adjustments. However, this duty is unique to disability discrimination and does not apply to any of the other protected characteristics. It provides that where a disabled person

is put at a substantial disadvantage (by an employer or service provider) in comparison to another person who is not disabled then a reasonable adjustment must be considered to avoid substantial disadvantage caused by a provision, criterion or practice (PCP) or lack of auxiliary aid.[1] Disabled persons therefore are not treated equally but rather differently. Disability law, contrary to the other characteristics, is based on a more individualised approach to discrimination which is aimed towards inclusivity as opposed to equal treatment.[2] While in Europe, the concept is unique to disability, it has long been suggested that it should also apply to cases of religious discrimination in an employment context as a more effective approach than the current framework of indirect discrimination,[3] which focuses on a group approach and as such largely ignores individual characteristics. There has been a fair amount of literature on the topic in recent years and opinions are divided as to whether adopting the disability discrimination model to religious cases would make any difference to the status quo. To date, UK equality law does not impose a requirement of reasonable accommodation in religious discrimination cases, but the concept is used in both the US and Canada (Manitoba Province) in relation to religion.[4]

This article seeks to bring a fresh perspective to the debate as to whether the disability law model should also apply to religious discrimination cases. This will be achieved by engaging in a cross disciplinary and comparative dialogue which will seek the input of disability law in order to ascertain whether a transposition is both workable and advisable. After a brief history of the concept of reasonable accommodation (section 2) and an overview of the literature (section 3), section 4 will compare religious and disability

1 K. Jackson and L. Banerjee, *Disability Discrimination Law and Case Management,* (London: The Law Society, 2013). See also chapter 6 of the Employment Statutory Code of Practice (2011) on the Equality Act 2010 for a list of considerations that may be taken into account to remove the substantial disadvantage caused by a provision, criterion or practice.

2 This approach is also reflected in the 2006 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html [accessed 04 June 2022] which promotes the use of reasonable accommodation. On the impact of UNCRPD on UK law see further, Equality and Human Rights Commission (EHRC) (2017) *The United Nations Convention on the Rights of Persons with Disabilities. What Does it Mean for You?* London: EHRC, https://www.equalityhumanrights.com/sites/default/files/the-united-nations-convention-on-the-rights-of-persons-with-disabilities-what-does-it-mean-for-you.pdf [accessed 04 June 2022].

3 See for instance K. Alidadi, 'What's in a name? Juxtaposing Indirect Discrimination and Reasonable Accommodation on the basis of Religion in the European Workplace,' in (February 2020) *Harvard Human Rights Journal Online*, https://harvardhrj.com/2020/03/whats-in-a-name-juxtaposing-indirect-discrimination-and-reasonable-accommodation-on-the-basis-of-religion-in-the-european-workplace/ [accessed 25 March 2022].

4 On the US and Canada see further E. Bribosia and I. Rorive, 'Reasonable accommodation beyond disability in Europe', in (September 2013) *European Commission*, file:///C:/Users/bacqu/Downloads/DS0214017ENN.en.pdf [accessed 25 March 2022].

discrimination models in cases of employment. Section 5 will then provide some reflections as to the feasibility and merits of a transposition.

2. The Emergence of Reasonable Accommodation

The concept of reasonable accommodation is intended to ensure that any barriers preventing those who cannot fully take part in society due to an inherent characteristic such as disability, race, sex, age or religion are removed. 'Reasonable accommodation' or 'reasonable adjustment'[5] first emerged as a legal concept in the US with title VII of the Civil Rights Act 1964 which provides for a duty to reasonably accommodate an employee's religious belief, observance and practice unless it can be evidenced that undue hardship would be placed on the business.[6] From 1990, the concept of reasonable accommodation was used in the Americans with Disability Act 1990 and expanded to Europe but only in relation to disability law.[7] Canada is the only country which developed it into a wider concept, extending to other forms of discrimination under section 15 of the Charter of Rights and Freedoms 1982 which guarantees equality based on protected grounds.[8] Canada has extended reasonable accommodation to ethnic origin, age, family status, gender and pregnancy. The Canadian Charter, unlike most of its counterparts, provides for substantive rather than formal equality[9] encouraging the state to take positive actions to address inequalities which may arise from individual needs and differences rather than assuming that everyone should be treated the same.[10] As a result, the duty to accommodate forms part of federal, provincial and territorial anti-discrimination legislation. Just as in the US, the duty to accommodate stops when the duty holder would suffer undue hardship as a result of the accommodation.[11] Someone who works in an off-licence shop. for instance, but later decides that they no longer want to handle alcohol due to their religion is unlikely to succeed in a discrimination claim if they are subsequently dismissed from the role. To use the North American framework, their employer is likely to suffer 'undue hardship' as a result of the accommodation as they would

5 While the term 'reasonable adjustment' is the preferred terminology used for disability discrimination (as per the *Equality Act* 2010), 'reasonable accommodation' is usually the preferred terminology for religious discrimination. For the purpose of this article both terms are used interchangeably.

6 U.S. Equal Employment Opportunity Commission (EEOC), https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 [accessed 9th March 2022].

7 Alidadi et al above n. 3 p. 64.

8 Library of Parliament (Canada), Revised by Robert Mason, Julia Nicol and Julian Walke, (1 December 2020), Publication No. 2012-01-E, https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201201E#txt1 [accessed 9 March 2022].

9 *Ibid*., at p. 2.

10 *Ibid*.

11 B. Bittker, S. Idleman and F. Ravitch, *Religion and the State in American Law*, (New York: Cambridge, 2015) Ch. 11.

effectively be paying someone who is not able to do their job and therefore the accommodation is unlikely to be held reasonable.

In contrast to the US or Canada, Europe has limited the use of the concept of reasonable accommodation to disability law although some countries have de facto accommodation by way of religious exemptions.[12] In the UK, the concept emerged with the need to address discrimination amongst disabled people and the social responsibility to deal with these. This led to the Disabled Persons (Employment) Act 1944 which improved employment opportunities for disabled individuals[13] and influenced attitudes in relation to employing disabled individuals. Like disability, it can be argued that religion due to its nature would benefit from a more individualised approach. It has long been suggested that reasonable accommodation should be extended to cover religious freedom within the employment sector.[14] Religion, by its nature is an elusive concept which is subject to personal interpretation and as such does not lend itself to a one size fits all approach. Aiming for formal equality is unlikely to prevent indirect discrimination as all religions and beliefs are different and subject to individual interpretations. A 'no head cover' policy for instance would disadvantage certain groups whose religion mandates a specific type of dress while others would not be affected. The only way to guarantee non-discrimination therefore is to allow for an exemption to such policy which amounts to making an accommodation. While indirect discrimination is well suited to group disadvantage, reasonable accommodation provides a more individualised solution to challenging religious discrimination and achieving equality.

Disability requires different treatment, not just equal treatment, allowing for substantive rather than formal equality.[15] Formal equality stresses the need that '…likes should be treated alike…despite irrelevant differences in their circumstances.'[16] Adopting this approach to disability discrimination would effectively result in unfairness and unjustifiable indirect discrimination.[17]

[12] This is the case in the UK where Sikhs have, since 1976, been exempt from wearing crash and safety helmets and allowed to wear turbans when riding a motorcycle or on a building site. See section 6 of the Deregulations Act 2015.

[13] S. Bunbury 'Unconscious bias and the medical model: How the social model may hold the key to transformative thinking about disability discrimination.' in (2019) *International Journal of Discrimination and the Law* 19(1):26-47.

[14] See for instance M. Gibson, 'The God Dilution – Religion, Discrimination and the Case for Reasonable Accommodation' in (2013) 72 *Cambridge Law Journal* p. 578, E. Griffiths, 'The 'reasonable accommodation' of religion: Is this a better way of advancing equality in cases of religious discrimination?', in (2016) *International Journal of Discrimination and the Law*, 16(2–3), pp. 161–176 and Alidadi et al. above n. 3.

[15] A. Lawson *Disability and Equality in Britain: The Role of Reasonable Adjustments* (Oxford: Hart, 2008).

[16] *Ibid*.

[17] Griffiths above n. 14.

There is, after all, a second part to the above Aristotelian maxim which provides that dissimilar cases should be treated differently in proportion to their difference.[18] It is clear that adopting a substantive equality approach in cases of disability discrimination is more appropriate as it looks beyond equal or identical treatment.[19] Rather, it focuses on accounting for people's differences and historical disadvantages. As Lawson puts it: '[inequality on the grounds of disability] therefore requires difference, resulting from factors such as disability to be acknowledged, and to elicit different treatment where identical treatment would cause disadvantage.'[20] With so many disabilities, it makes it extremely difficult to address inequalities that exist among disabled people.[21] It can be argued that a similar individualised approach should be adopted in religious discrimination disputes where '… 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.'[22] This positive form of discrimination is both permissible and necessary with disability.[23] As a result, the proposed adjustment may mean treating the disabled person more favourably than others if it is necessary to remove the substantial disadvantage.[24]

While in theory, transposing the disability model to cases of religious discrimination in employment is attractive, the literature on the subject is divided and to date the proposal has not gained enough momentum to be implemented into UK legislation. The next section provides an account of the literature in the UK.

3. Overview of the literature in the UK

The literature on reasonable accommodation to manifestation of religion and belief is spread over a number of complex areas of laws and several jurisdictions. Scholars have made various suggestions which include adopting the Canadian or US model of reasonable accommodations instead

18 Hermann Chroust & David L. Osborn, 'Aristotle's Conception of Justice,' in (1942) 17 *Notre Dame L. Rev.* 129 available at: http://scholarship.law.nd.edu/ndlr/vol17/iss2/2 [Accessed 01 April 2022]

19 Lawson above n. 16.

20 *Ibid*. In some instances, no matter how many adjustments are made, disabled individuals in the employment sector will never be on a level playing field in comparison to non-disabled individuals.

21 See further Bunbury above n. 13.

22 Griffiths above n. 15., p. 165.

23 See *Archibald v Fife* [2004] UKHL 32 for further discussion.

24 Lawson above n. 15.
In *Archibald v Fife* above n. 24 it was held that Mrs Archibald should have been transferred to another post without having to undergo competitive interviews as the aim was to end the substantial disadvantage.

of using the current indirect discrimination framework[25] or adopting the already existing reasonable accommodation model which is used for disability.[26] Most studies, though, have concluded that creating a separate duty for employers to make reasonable accommodation is not necessary. This paper on the other hand, puts forward an individual model of discrimination aimed at inclusion which mirrors the disability model and places a duty on an employer to accommodate religious manifestation unless the limitation can be justified by the needs of the business.

As put by Cranmer in 2017 'this idea of RA is not going to go away any time soon.'[27] The literature has so far focussed on the area of employment because most of the UK anti-discrimination claims are in the employment sector and it is the most developed area in the US and Canada.[28] In 2013, the European Court of Human Rights' decision in *Eweida and others v. UK*[29] became a focal point for the debate on reasonable accommodations as a number of third-party interveners in the case drew the attention of the court to the US and Canadian practice.[30] In 2014, Lady Hale, former President of the UK Supreme Court, sparked the debate by asking '…should we be developing, in both human rights and EU law, an explicit requirement upon the providers of employment, goods and services to make reasonable accommodation for the manifestation of religious and other beliefs?'[31]

The EHRC also considered the use of reasonable accommodation[32] but later concluded that 'a separate duty would not lead to substantial change in the level of protection for religion or belief, as the impact of the duty would depend on the courts.'[33] Indeed, as with disability, there is no certainty in relation to how employers and courts would assess reasonableness. Research

25 See for instance Gibson above n. 14, p. 578.

26 See for instance K. Henrard, 'Duties of reasonable accommodation on grounds of religion in the jurisprudence of the European Court of Human Rights: A tale of (baby) steps forward and missed opportunities', in (October 2016) *International Journal of Constitutional Law*, Volume 14, Issue 4, 1, pp. 961–983. See also E. Howard, 'Indirect Discrimination, Reasonable Accommodation and Religion' in D. Cuypers and J. Vrielink (eds), *Equal is not Enough*, vol 3 (Cambridge: Intersentia 2016).

27 F. Cranmer, 'Reasonable Accommodation for Religion in Employment and Provision of Services' in (2017) 179 *Law & Justice – Christian Law Review* p. 187.

28 Gibson above n. 14 at pp. 588-589.

29 (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) 27 May 2013.

30 *Ibid* at para [78].

31 Hale, Lecturer on Freedom of Religion and Belief delivered to the Law Society of Ireland https://www.supremecourt.uk/docs/speech-140613.pdf [accessed 30 March 2022].

32 See P. Edge and L. Vickers, 'Review of equality and human rights law relating to religion or belief', *Equality and Human Rights Commission Research report* 97 (2015), https://www.equalityhumanrights.com/sites/default/files/research-report-97-review-of-equality-and-human-rights-law-relating-to-religion-or-belief.pdf [accessed 09 March 2022].

33 Equality and Human Rights Commission, Religion or belief: is the law working? https://www.equalityhumanrights.com/sites/default/files/religion-or-belief-report-december-2016.pdf [accessed 09.03.22].

demonstrates that academics and practitioners are divided as to whether the adoption of reasonable accommodation would have a significant impact on religion and belief in the workplace. In line with the EHRC findings, many scholars alongside Vickers are of the view that 'the creation of a separate and explicit duty to reasonable accommodation would not materially change the level of protection available for religion or belief in the workplace.'[34] The National Secular Society has gone further and criticised the suggestions altogether as it would give religion and belief a special status which may be interpreted as privileging religion over other protected characteristics.[35]Admittedly, if the duty is extended to religious discrimination claims, it would be hard to justify not extending it to other protected characteristics such as sex, age, gender or race.[36]

Despite those claims however, there is evidence in the literature to support adopting a 'reasonable accommodation' model in religion and belief cases similar to the 'reasonable adjustment' duty model used within disability law. Gibson, for instance, has argued that 'reasonable accommodation provides a more transparent framework than indirect discrimination' in understanding why one right may be higher than the other in the proportionality balance[37] and suggests that the Canadian model should be applied to the UK. For Gibson, reasonable accommodation is more subtle than indirect discrimination because it does not use the comparator test but instead focusses on the omission.[38] Currently, the burden is first placed on the employee to show that they have been put at a disadvantage not just as an individual but as part of a group sharing the same beliefs.[39] The employee also has to show that the PCP in question causes them difficulties in comparison to others who are not part of that group.[40] This as, highlighted by Vickers, can indeed be an issue for those who have 'individualised beliefs not shared by others.'[41] A no head-covering policy for instance could indirectly discriminate against Muslims, Sikhs and Jews unless there is a justification which is proportionate to the aim of the employer in placing the limitation.[42]

34 L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Bloomsbury: 2016) p. 268.

35 S. Evans, 'The unreasonableness of 'reasonable accommodation', (16 Oct. 2015) https://www.secularism.org.uk/opinion/2015/10/the-unreasonableness-of-reasonable-accommodation [accessed 30 March 2022].

36 Although some of those characteristics already benefit from accommodations. Women for instance are allowed to benefit from a period of maternity leave. People of retirement age are allowed to claim a pension while there are measures in place to address racial inequalities.

37 Gibson above n. 14 pp. 588-89.

38 Gibson *ibid*.

39 See EqA 2010 s. 19(2) b in relation to group disadvantage.

40 *Ibid* 19(2) c.

41 Vickers above n. 34 p. 167.

42 EqA 2010 s.19(2) d.

In contrast, in the US, employers are legally required to accommodate the religious practice of an employee or prospective employee unless they can demonstrate that the accommodation would cause them undue hardship.[43]

In the same spirit, the Council of Europe, in its Resolution 2036 of 2015 on Tackling intolerance and discrimination in Europe, refers to the reasonable accommodation of religious beliefs and practices as a 'pragmatic means of ensuring the effective and full enjoyment of freedom of religion'.[44] The British think tank ResPublica in 2016 also recommended the adoption of 'a duty on employers and service providers to demonstrate reasonable accommodation towards those that wish to express their religious convictions in public'[45] while Griffiths suggested that '… the benefits of a duty of reasonable accommodation to businesses and their employees could outweigh the arguments against providing more protection for religious individuals' and that '… such a duty could potentially facilitate better legal adjudication than the complexities of indirect discrimination claims.'[46]

Reasonable accommodation has also been considered as a way to further human dignity. Moon argues that as such it implies 'a need to be ready to adapt to the diverse situations of people from different backgrounds.'[47] This is very much in keeping with the current efforts in ensuring that the workplace is inclusive.[48]

4. Comparing religious and disability discrimination: Indirect discrimination vs reasonable accommodation

Despite religion and disability being equally protected under the EqA 2010, there are obvious differences in how both protected characteristics are handled. For both religion and disability claims, the first hurdle is to ensure that the practice falls under the respective definitions. While disability benefits from a legal definition,[49] there is no such definition for religion and belief.[50]

43 Title VII Civil Rights Act 1964 section 701(j).

44 Council of Europe, Parliamentary Assembly, Resolution 2036 in (2015), article 2, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21549 [accessed 30.03.22].

45 J. Orr, 'Beyond Belief: Defending religious liberty through the British Bill of Rights' in (November 2016) *Res Republica*, https://www.respublica.org.uk/our-work/publications/beyond-belief-defending-religious-liberty-british-bill-rights/ [accessed 30.03.22].

46 Griffiths above n. 14, p. 174.

47 G. Moon, 'Dignity Discourse in Discrimination Law: a better route to equality?' in (2006) 6 *European Human Rights Law Review* 625-626, p. 647.

48 On EDI in the workplace - see further ACAS publication, Improving, equality diversity and inclusion in your workplace: https://www.acas.org.uk/improving-equality-diversity-and-inclusion/checking-equality-diversity-and-inclusion [accessed 30 March 2022].

49 S.6(1) *EqA* 2010. For an interpretation of disability see *SCA Packaging v Boyle* [2009] UKHL 37.

50 On the impossibility of defining religion see further Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press 2018).

However, the courts have adopted a broad interpretation which includes both religious and non-religious beliefs, traditional and non-traditional religions[51] and which broadly follows the jurisprudence of the European Court of Human Rights (ECtHR). This has resulted in many inconsistencies but has also allowed flexibility which provides for a more inclusive approach that allows traditional and non-traditional beliefs to be respected.[52]

In terms of disability, once it has been established that the claimant satisfies the definition of disability, the employer is under a legal duty to make a reasonable adjustment.[53] Actual or imputed knowledge of the disability by the employer will immediately trigger the duty. Once the knowledge requirement is satisfied, an employer is legally obliged to take proactive steps to remove the substantial disadvantage by making a reasonable adjustment. When a dispute arises, it is ultimately the decision of the courts and tribunals to determine whether the adjustment is proportionate and reasonable. Deciding what is 'reasonable' however, is problematic as there are no clear guidelines apart from the Code of Practice[54] and the concept has not been defined in the EqA 2010. In *Environment Agency v Rowan*,[55] it was argued that the substantial disadvantage was caused by a PCP requiring Ms Rowan to work in the office. However, her employer took the view that the claimant's proposal to have a trial period of working from home was not appropriate. Rowan lost her claim of disability discrimination[56] as the Employment Tribunal had failed to clearly identify the nature and extent of the substantial disadvantage and the proposed step to work from home could not be considered as a reasonable adjustment.

With religious claims in comparison, the onus is on the claimant to demonstrate that they have been put at a substantial disadvantage. It must be established that the PCP puts a group of people who share the same characteristics (hypothetical comparator) at a disadvantage when compared with people who are outside of this group. For instance, a no head-cover policy would quite clearly place Muslim women, Orthodox Jews and practicing Sikhs at a disadvantage in comparison to others. However, there are cases where Tribunals have been more reluctant to find group disadvantage even though it is not necessary to show that a significant number of individuals within that particular group are affected. By nature, manifestation of belief is subject to individual and cultural interpretations.

51 See *Grainger plc v Nicholson* [2010] IRLR 4 (EAT) for the 'definition' of a philosophical belief.

52 Vickers above n. 34 chapter 5; See also R. Sandberg, *Religion, Law and Society* (Cambridge: Cambridge University Press, 2014) pp. 28-48.

53 EqA 2010 Sch 8 para 20 and s.20-22.

54 Employment Statutory Code of Practice available at https://www.equalityhumanrights.com/sites/default/files/employercode.pdf (accessed 29th June 2022).

55 *Environment Agency v Rowan* [2008] ICR 218 (EAT).

56 The ET had initially made a finding of disability discrimination for failure to make a reasonable adjustment.

While some religions mandate a particular practice or conduct, it is ultimately up to individuals to decide how to comply with a particular requirement. In addition, there are practices which are not strictly speaking mandated by a religion or belief but nonetheless followed by individuals. This was the case with the cross in *Eweida vs British Airways*[57] where the Court of Appeal endorsed the view of the Employment Appeal Tribunal and was unable to establish group disadvantage. It concluded that "... in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group."[58] The court endorsed the Employment Tribunal approach that the cross was a personal expression of faith rather than a religious requirement,[59] and as such, the Court of Appeal did not find it necessary to consider the claim under article 9 of the European Convention of Human Rights (ECHR).[60]

If however, the tribunal is satisfied that the belief in question is worthy of legal protection it must determine whether any limitation placed on the right to religious freedom is justified by the exigencies of the situation and proportionate to the aims. In *Azmi v Kirklees Metropolitan Borough Council*,[61] for instance, a bilingual support worker at a junior school had not been discriminated upon when she was not allowed to wear her niqab as the ban was in the best interests of the children. Azmi had not been placed at a disadvantage in comparison to any other person wearing a full-face cover.

Transposing the disability discrimination model to religious discrimination cases would allow for a positive rights model as opposed to the current indirect discrimination approach which places the onus on the claimant to demonstrate that the failure by the employer to recognise their religion or belief amounts to indirect discrimination. As discussed earlier, the disability law model in the employment context is 'proactive' because knowledge of the disability is sufficient to trigger a duty to make reasonable adjustments.[62] In practice, tribunals have adopted a broad approach in applying the EqA 2010 to determine a PCP. Case law has demonstrated that the '…concept of PCP is widely construed' and can amount to '…any policy, procedure,

57 [2010] EWCA Civ 80.
58 *Ibid* para [24].
59 *Ibid* para [37].
60 *Ibid* para [22]. Mrs. Ewieda later took the case to the European Court of Human Rights and won.
61 *Azmi v Kirklees Metropolitan Borough Council* UKEAT/0009/07/MAA; [2007] IRLR 484.
62 'The duty is only triggered in an employee and employer relationship when the 'disabled person concerned' is substantially disadvantaged because of the employer's behaviour, up until this point the duty is reactive' see further Bunbury above n. 13., p. 37 and Lawson above n. 15.

practice, requirement, management decision, provision, criterion, work-place rule or similar which applies at work. It need not be formal or expressed in writing. It can be a way of doing things, common practice which is expected of staff. It can be applied to everyone, some people, or even only to one person.'[63] In *Carreras v United First Partners Research* [64] for instance, the obligation to work extended hours was enough to amount to a PCP even though there was no contractual obligation to work extended hours. Provided the claimant satisfies the definition of disability,[65] therefore, substantial disadvantage is relatively easy to establish.

While it is generally accepted that age, disability, health and pregnancy can have a significant impact on one's capacity to perform their work duties, other protected characteristics such as sex, race, sexual orientation or religion are not generally seen as requiring any particular accommodations.[66] In modern pluralist societies however, religion and belief are important features of identity. For orthopraxy faith, which has a strong manifestation element, giving up ones practice in order to take up employment is not a realistic option. As put by Griffiths, manifestation of religious or non-religious belief may have a huge impact on someone's ability to do their job or to consider taking up a job in the first place.[67] At a time where equality, diversity and inclusion (EDI) are high on the agenda, it only makes sense for employers to allow for accommodations on any of the protected grounds as long as it does not conflict with the needs of the business. While it would be unreasonable ,for instance, to ask a butcher shop to make accommodations for vegans or vegetarian employees or for an off-licence shop to accommodate someone who on religious grounds refuses to sell alcohol, one would expect internal policies around dress codes, work schedule or food to not indirectly discriminate against those whose religion or belief may require an adaptation such as a head covering, a skirt instead of trousers,[68] a longer skirt, a particular day off work[69] or respect for any dietary requirements.

Even if the relationship between employer and employee is a contractual one, the contract is not a defence to any form of discrimination. However,

63 Jackson and Banerjee above n. 1, p. 44.
64 UKEAT/0266/15/RN.
65 *EqA* 2010 s.6(1).
66 Griffiths above n. 14 p. 162.
67 *Ibid*.
68 However, see the case of *Adewole v Barking, Havering and Redbridge University Hospitals NHS Trust* [2011] unreported, where the request by Adewole to wear a skirt instead of scrub trousers could not be accommodated by the NHS due to health and safety.
69 See for instance *MBA v The Mayor & Burgess of the LBM* [2012] UKEAT/0332/12/SM and *Thompson v Luke Delaney George Stobbart Ltd* 711FET 240/11(NI) (15 December 2011).

when someone has willingly entered into a contract to perform a duty and at a later stage claims that they can no longer carry on this function due to their religion, it may not always be possible for the employer to accommodate without compromising the needs of the business. In such a case, understandably it is unlikely that a Tribunal or court will find that indirect discrimination has occurred. In *MbA vs. Merton*[70] for instance, a refusal to allow the claimant to take Sunday off to go to Church was not found to be indirect discrimination as her contract stipulated that she could be required to work on Sundays.

The outcome of each case is difficult to predict as it is mainly a matter of facts which varies from case to case. The legal argument usually focuses on the nature and content of the employment contract and the extent to which the limitations are justified by the needs of the business. Health and safety for instance has often been invoked as a reasonable justification[71] as well as non-discrimination on the grounds of sexual orientation.[72] Employers therefore are more likely to take a proactive approach in relation to disability discrimination whereas in religious cases the approach is likely to be reactive.

5. Towards a reasonable accommodation of religion?

The complex nature of religion may be better suited to the individualised reasonable accommodation approach which is used in disability discrimination cases rather than the current indirect discrimination framework which places the onus on the claimant to show group disadvantage. As argued by Connolly, in cases involving religion, claimants will often seek different rather than equal treatment.[73] While it may not have a significant impact on the outcome of cases, it may contribute to a change of mindset for employers and potentially reduce the number of claims that end up in an Employment Tribunal. This is because the issue of accommodation would require an employer to take a proactive approach rather than a Tribunal having to determine the extent to which a claim can succeed on the basis of indirect discrimination. This results in a Tribunal panel having to consider if the religion or belief in question falls within the ambit of the 'definition' and then the extent to which the alleged limitation placed on religion or belief is justified. In practice, this is mainly a fact-finding exercise.

[70] *Ibid*.
[71] See for instance *Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust ET* 1702886/2009 (21 April 2010).
[72] See for instance the cases of *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 771.
[73] M. Connolly in Gibson above n. 14 p. 591.

In the recent case of *Sethi v. Elements Personnel Services Ltd*[74] for instance, the Employment Tribunal found indirect discrimination against the claimant contrary to ss. 19 and 39(1)(c) of the EqA 2010 when a specialist agency providing temporary staff for the hospitality industry failed to provide the claimant, who is a practicing Sikh, with employment due to a 'no beards' policy.[75] The Tribunal found that the 'no beards' policy amounted to a PCP and placed Sikhs (like the claimant) at a particular disadvantage in comparison to others. The justification invoked by the respondent that beards were not allowed for reasons of hygiene was not rationally connected to the policy which focused on personal appearance rather than hygiene. The Tribunal concluded that even if the policy was motivated by a hygiene reason, this could be addressed by requesting the applicant to wear a net over his beard. The Tribunal also considered whether the PCP was justified on appearance grounds and accepted that 'there is the necessary rational connection between a 'no beards' policy and the legitimate aim of maintaining high standards of appearance' but found that 'given the importance to Sikhs such as the Claimant of not cutting their facial hair, a 'no beards' policy is likely to amount in practice to a 'no Sikhs policy' and as such the policy was found to be disproportionate.[76]

Applying a disability model framework to this case would have shifted the burden on the employer to consider suitable accommodations or adjustments to the policy for those who are unable to shave their beard as a matter of conscience rather than having to rely on a Tribunal to make a finding of indirect discrimination. Not only was the claimant discriminated upon, but he had the added inconvenience and stress of having to appear before a Tribunal. The shift towards reasonable accommodation would have triggered the employer's reactive duty to accommodate the claimant and take proactive steps to find a workable solution, in this case, a requirement for beards to be covered with a net.

Similarly, in *Fhima v Traveljigsaw Ltd*,[77] a job applicant was rejected by a car hire call centre when she specified during the interview that due to her religion, she would not be able to work on Saturdays but was happy to work on any other day of the week including Sundays. The company rejected her request on the ground that they were 'looking for people who are flexible enough to work on Saturday.' This led to a finding of indirect discrimination based on religion by the Employment Tribunal as there was no real business

[74] ET/2300234/2018.
[75] Sikhs are prohibited from cutting their hair. Hair is considered as something God given and which therefore should not be altered.
[76] See *Sethi* above n. 74 at para. 50-55.
[77] ET/2401978/2014 (unreported).

need for the PCP to be discriminatory.[78] Adopting the disability model in this case would have required the employer to proactively consider different working hours to accommodate her religion as long as the knowledge requirement had been satisfied. Here this would not have been an issue as the claimant had raised it during the interview.

The above two examples do not mean that employers can never place limitations on the manifestation of belief of their employees. There is ample evidence of unsuccessful claimants[79] but the duty to accommodate would encourage employers to consider religious needs of employees by making adjustments unless they are impractical and detrimental to the business.

From a theoretical standpoint, transposing the duty to make reasonable accommodation to religious discrimination may result in singling out religion from other protected characteristics. This implies that it is more important than sex, gender or race. While singling out disability can be justified due to its individual nature, religion is mostly perceived as a choice and therefore the general view is that manifestation of belief can easily be left at the door.[80] This however fails to acknowledge that for those who feel compelled to manifest their belief as a matter of conscience, this would result in being left with what Sandberg calls the 'impossible compromise'[81] between following their conscience or taking up employment. If we conceive religion as part of identity and as an innate characteristic of the self, there is no reason to give it less favourable treatment than disability. While race, sex, gender and age require an approach that aims towards formal equality, disability and religion are better suited to an approach that privileges a more substantive type of equality where differences are accommodated. Arguably this approach mirrors the disability law model where the claimant is treated differently in order to redress inequalities and strive for inclusion.

Conclusions and recommendations

Under the current framework of indirect discrimination, religious requirements are not proactively provided for until such point as an individual feels at a disadvantage and is prompted to bring a claim under the EqA 2010. Not only has the claimant allegedly been subjected to discrimination

78 Cluer HR, 'Respecting Religious Restrictions in Recruitment – A Few Pointers' (July 2015) https://www.cluerhr.co.uk/respecting-religious-restrictions-recruitment-pointers/ [accessed 30 March 2022].

79 See for instance *MbA v. LBM* above n.69 where the applicant lost her indirect discrimination claim when her employer could not allow her not to work on Sunday. In contrast to the above two cases the limitation was found to be justified as she worked in a care home for children.

80 See further S. Bacquet, 'Manifestation of Belief and the "Liberal" Law of Religion: Why It Is Time to Rethink the Status-Quo?' in (2022) 17 *Religion and Human Rights* 1–22.

81 R. Sandberg (ed.) *Religion and Legal Pluralism* (Farnham: Ashgate, 2015) pp. 1-17.

but they now have to demonstrate that the PCP in question will lead to group disadvantage. This puts an unnecessary burden on the claimant who is already at the receiving end of a possible discrimination claim. This means that the tribunal is left to determine the extent to which the PCP could be justified.

With the disability model on the other hand, although the duty is initially reactive in the employment context,[82] the employer is prompted to take a proactive approach which attempts to remove any barriers to participation in the workplace and consider any accommodations or reasonable adjustments in order to remove the substantial disadvantage.

This paper has demonstrated that equal treatment is not the panacea to all cases of discrimination and that in some cases, a different approach to advancing equality is required to achieve inclusivity and protect minorities. It is suggested therefore that a more individualised and pro-active approach to religious freedom within the employment sector would be beneficial in advancing religious freedom. This approach will contribute to an inclusive approach for all protected characteristics contained in the EqA 2010. After all, reasonable accommodation first emerged in relation to religion in the United States and should now be adopted in UK law.

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[82] The duty to make reasonable adjustment arises once the employer has knowledge of the need for accommodating the individual.