Response to the Call for Written Evidence by the Joint Committee on Human Rights

The state's positive obligation to secure employees' rights to manifest their religion or belief (*Eweida and others v UK*)

Dr Matthew Gibson, Lecturer in Law
Liverpool Law School
University of Liverpool

1. The four applications in *Eweida and others v UK* exemplify the sorts of tensions that are liable to emerge between employees with a religion or belief and their employers. At the root of these tensions lies the difficulty in balancing the employer's right to control their workplace against the employee's right to manifest their religion or belief at work. The successful application by Ms Eweida demonstrates that the UK still faces a challenge in striking the correct balance so as to protect the religion or belief rights of employees. Notwithstanding the unsuccessful applications by Ms Chaplin, Ms Ladele and Mr McFarlane, these other cases also provide insights into how best to achieve this balance.

2. The key points addressed in this written evidence can be summarised as follows:

    - Under United Kingdom (UK) anti-discrimination law, the domestic courts currently take a restrictive view of employees' rights to manifest their religion or belief in the workplace. This approach was a feature of the applications in *Eweida and others v UK* and has been viewed as problematic.
    - The UK's positive obligation to protect such rights might be better satisfied by the creation of an employer duty of 'reasonable accommodation' in UK anti-discrimination law. In this regard, the corresponding Canadian model of reasonable accommodation is particularly instructive.
    - Application of the Canadian model to UK cases reveals how such a policy could facilitate pragmatic changes to employer accommodation practices at little or no cost.

In UK anti-discrimination law, what are the problems associated with the approaches taken by the domestic courts to employees' manifestations of religion or belief at work?

3. Over the past 10 years the UK has made concerted efforts to enhance protection of religion or belief for employees. The *Equality Act 2010* (*EqA 2010*) now provides protection against both direct and indirect discrimination in employment on grounds of religion or belief. Whilst many anti-discrimination cases brought by individuals have been claimed under the heading of 'religion', a number have been claimed under 'belief'. This latter heading is defined widely to include 'philosophical belief' which, in turn, includes non-religious beliefs such as humanism and atheism.

4. Increasingly, these anti-discrimination provisions have provided a popular legal backdrop against which to frame clashes between employees with a religion or belief

and employers. Typically, the claims are fought by those employees as indirect discrimination cases. Usually, indirect discrimination represents the *only* available anti-discrimination claim route. Indeed, in such cases it is rare that there is evidence of direct discrimination.

5. The vast majority of employee claims for indirect religion or belief discrimination have failed. These claims have predominantly featured three types of complaint: the first involves disagreement about to the extent to which the employee can fulfil their duties according to their beliefs about sexual orientation;[1] the second concerns the employee's wish to modify personal appearance in accordance with their religion or belief;[2] and the third relates to the conflict between an employee's obligation to attend religion or belief observance and their scheduled work duties.[3]

6. Arguably, a significant reason for the failure of these cases relates to the UK courts' interpretation of the tests for determining indirect discrimination, in particular assessment of: (i) whether the employer's actions placed the employee at a disadvantage; and, even if they did (ii) whether the employer can justify those actions as a proportionate means of achieving a legitimate aim.

7. At the domestic stages of *Eweida* it was noted that the claimant was the *only* employee who had complained of British Airways' (BA) prohibition on the wearing of symbols above uniforms. The courts interpreted the need for Ms Eweida to establish a disadvantage (stage (i) in paragraph 6 above) as including a need to show *group* disadvantage. Ultimately, as there was no evidence that any *other* person had been placed at a disadvantage, there was no identified group disadvantage and therefore no need to consider whether BA's prohibition was justified as proportionate (stage (ii) in paragraph 6 above). The Court of Appeal in *Eweida* also rejected any notion that group disadvantage could be satisfied by alluding to hypothetical persons who, were there to be any, would also have been disadvantaged. The requirement for group disadvantage was also confirmed at the domestic stage of *Chaplin*, citing *Eweida*.

8. The need to demonstrate group disadvantage seems to raise broader questions about *individual* religion or belief rights at work under indirect discrimination. These questions relate to the level of importance that should be attached to the ability to pursue individual religion or belief convictions in the workplace. Cases like *Eweida* reinforce the fact that individuals may wish to seek protection of the religion or belief rights at work in isolation. Indeed, it is generally accepted that legal protection of religion or belief may be predicated on a regard for individuals. A reason for this is that such protection affirms inherent human dignity and recognises that a person's religion or belief is closely tied to the very essence of being human. Consequently, there is a link between protection and individual autonomy – in particular, the ways in which people with a religion or belief choose to organise and live their lives. The

[1] For example, see *McClintock v Department of Constitutional Affairs* [2008] I.R.L.R. 29, *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 and *McFarlane v Relate Avon Ltd*. [2010] EWCA Civ B1.
[2] For example, see *Azmi v Kirklees Metropolitan Council* [2007] I.R.L.R. 484, *Harris v NKL Automative Ltd*. [2007] UKEAT 0134_07_0310, *Eweida v British Airways PLC* [2010] EWCA Civ 80 and *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009.
[3] For example, see *Cherfi v G4S Security Services* [2011] Eq. L.R. 825.

extent to which this should be realised in the workplace is likely to be an on-going issue.

9. Where disadvantage can be shown, it is still necessary to establish that an employer's actions were justified as proportionate. It may be said that the UK courts have taken a strict approach to determining proportionality in claims of indirect religion or belief discrimination by employees. Examples of this include the 'specific situation' rule which appears to have been influential in the domestic proportionality analyses in *Azmi*, *Ladele* and *McFarlane*. This rule suggests that where a religious individual voluntarily submits to a contract of employment which places them in a specific situation (the employment itself), the possibility of that individual simply leaving to take up an alternative job elsewhere may be relevant in the proportionality balance.

10. There exist other examples of limits on proportionality, particular the issue of how far an employer must have taken steps to allow (or 'accommodate') the employee's religion or belief manifestation at work. It is apparent from *Azmi* that the courts grant employers a significant degree of latitude in such situations. As a result, the employer may satisfy the proportionality test by offering a very restrictive form of accommodation. There is no obligation to accede to less disadvantageous accommodation options which are preferred by the employee. This judicial reasoning may have an effect on the possibility for positive and constructive dialogue between employers and employees regarding religion or belief issues at work.

11. A final dilemma stemming from the courts' proportionality assessments concerns the potential emergence of a so-called 'hierarchy' of rights between religion or belief and sexual orientation (both protected characteristics under the *EqA 2010*). Such a hierarchy may have operated in cases like *McClintock*, *Ladele* and *McFarlane*. In these cases, the domestic courts decided that the balancing exercise between the two competing equality imperatives should be determined by protecting sexual orientation equality even if this were to jeopardise equality on grounds of religion or belief. In these sorts of cases, it may be asked whether the courts mounted a satisfactory defence of the subordination of religion or belief interests. Linked to this, there is an even more fundamental question: does the proportionality analysis in indirect discrimination actively *frustrate* the possibility of a sufficiently transparent framework in which to understand and justify such subordination?

Could the UK's positive obligation to protect religion or belief at work be better satisfied by the creation of an employer duty of 'reasonable accommodation' in anti-discrimination law?

12. The aforementioned UK cases have posed problems for individuals of faith wishing to manifest their religion of belief at work. A different way of dealing with these sorts of employment disputes would be for the UK to create an employer duty of reasonable accommodation. This could feature as an alternative anti-discrimination claim route in the *EqA 2010* through which employees could seek accommodation of their religion or belief at work. Discrimination would occur where an employer failed to comply with a duty to reasonably accommodate an employee with a religion or belief. This would apply across the 'religion or belief' characteristic so as to protect religious and non-religious beliefs. Arguments about extending reasonable accommodation to other protected characteristics are outside the scope of this written evidence. However, it

will be noted that reasonable accommodation already features as a 'reasonable adjustments' duty in domestic anti-discrimination provisions relating to disability.

13. The doctrine of reasonable accommodation is viewed as a species of anti-discrimination law: as such, it would suit inclusion in the *EqA 2010*. It is capable of protecting deeply held religious or non-religious beliefs at work whilst avoiding the need to compromise the legitimate ways in which employers may wish to control their workplace. It is similar to indirect discrimination in that it aims to remove the discriminatory effects that may obtain from equal treatment. In this way, as with indirect discrimination, it is concerned with attempts to achieve *different* treatment for *different* classes of individuals, such as those with a religion or belief.

14. However, in contrast to indirect discrimination, which assesses different treatment based on a comparator test (see stage (i) in paragraph 6 above), reasonable accommodation eschews comparison. It focusses solely on an employer's *omission* to provide an accommodation to a *specific* employee. It is therefore more able to concern itself with the impact of *individual* detriment caused by an employer's failure to accommodate. There is no attempt to ensure equality of opportunity for the group to which the individual belongs (this is the domain of indirect discrimination). Rather, it attempts to afford an individualised approach to employee protection, framed as an individual right.

15. Accordingly, reasonable accommodation has the capacity to better underpin any calls to secure *individual* human dignity – this featuring as a founding concept in the legal protection of religion or belief interests. Moreover, its basis in different treatment ('substantive equality') links with our understanding of indirect discrimination, locating reasonable accommodation firmly in the anti-discrimination landscape.

16. Many jurisdictions already provide for such an employer duty of accommodation for religion or belief interests. Notably, Canada provides an instructive and well-known model of reasonable accommodation in employment[4] which is cognisant of either group or individual disadvantage. For present purposes, the relevant part of the model relates to the proportionality test for determining the threshold above which an employer does not have to make a reasonable accommodation. Canadian case law has determined that where reasonable accommodation would impose 'undue hardship' on an employer, it will not amount to discrimination for that employer to refuse to accommodate the employee.[5]

17. Undue hardship will only be present where accommodation of an employee was *impossible*.[6] The undue hardship (proportionality) test thus imposes a very high threshold on employers before it will be found that they do not have to accommodate. *Every* effort to accommodate the employee must be shown to have been made. This sets up a delicate proportionality balance between the employee's arguments for accommodation and the employer's legitimate reasons in resisting accommodation. Indeed, it contrasts quite starkly with the lower threshold of proportionality that

[4] This duty emerged in case law and is not statute-based. For the full model, see *British Columbia (Public Service Employee Relations Comm) v BCGEU* (the *Meiorin* case) [1999] 3 SCR 3 at paras. 54, 65 and 68.
[5] The undue hardship test emerged in *Ontario Human Rights Commission v Simpson Sears* [1985] 2 SCR 536. See para. 23.
[6] See *Meiorin* at para. 72.

appears to operate in domestic indirect discrimination. The Canadian approach possibly hints at a requirement to identify the maximum possible accommodation in a given dispute, indicating a preference for pragmatism. This may encourage greater accommodation discourse between employee and employer thereby facilitating a more constructive and productive dialogue.

18. The Canadian courts have reasoned that when considering the question of undue hardship, appropriate factors to consider in the employee accommodation enquiry comprise: financial cost, disruption of a collective (union) agreement, morale problems for other employees, inter-changeability of the workforce and facilities, the size of the employer and health and safety.[7] Critically, this list is not exhaustive: some cases may inevitably raise separate matters which fall outside this scheme. Consequently, and helpfully, the list can be tailored to the myriad contexts in which an employee may make an accommodation request at work.

What difference would application of a Canadian-style duty make to UK employment practices concerning accommodation of employees with a religion or belief?

19. It is submitted that, had there been a domestic reasonable accommodation duty placed on employers in relation to religion or belief, Ms Eweida would have been accommodated from the start.

20. Under the Canadian scheme, individual disadvantage would not have been a barrier to Ms Eweida's claim. Moreover, the predominant matter to which BA pointed in refusing accommodation was its internal uniform policy and company branding. Whilst this was undeniably a legitimate aim, BA's *volte face* in later allowing all faith symbols to be worn above uniforms demonstrates that accommodation was not impossible. Although BA had made alternative accommodation suggestions to Ms Eweida, under the Canadian system this would not necessarily have tipped the proportionality balance in favour of the employer. Evidently, efforts to modify the uniform policy could have been made at an earlier stage which would not have impacted upon its legitimate business needs. Consequently, there was no undue hardship. This is consonant with the majority view of the European Court of Human Rights in Ms Eweida's application.

21. Conversely, a reasonable accommodation duty would not have assisted Ms Chaplin in her claim. Canadian reasonable accommodation supports the views of both the domestic judiciary and the European Court of Human Rights in her case. Whilst individual disadvantage would have been recognised, on the facts it was impossible to show that Ms Chaplin could have been accommodated without contravening the legitimate aim of her employer's health and safety policy. Indeed, the rather exhaustive alternative accommodations which were raised by the employer serve to show that in this instance practically every other conceivable accommodation route had been considered. Clearly, Ms Chaplin's preferred accommodation could not exist without undermining the health and safety imperative. This would have amounted to undue hardship on her employer.

[7] See *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 SCR 489 at p. 521.

22. In relation to Ms Ladele, the Canadian model suggests that accommodation may have been permissible. This possibility accords with the views of the minority in the European Court of Human Rights concerning Ms Ladele's application.

23. The undue hardship (proportionality) balance in Ms Ladele's case revolved around her employer's public commitment to sexual orientation equality in the provision of services – as entrenched by the relevant legal guarantees. This was obviously a legitimate aim. However, the Canadian regime may signal that in such circumstances concerted efforts should *still* be made to determine the parameters of accommodation. This perhaps tends towards a more pragmatic approach than that currently afforded by the proportionality test in indirect discrimination. For example, the impossibility threshold may require employers to look more closely at the individual circumstances of a specific employee. In Ms Ladele's case, it is possible that accommodation might have depended on a range of factors such as how far she was involved in the initial administrative tasks of arranging civil partnerships, whether this involved her as a first point of contact for members of the public and how far other colleagues could swap duties with her. The main factor would be to avoid communicating to service users a refusal to provide that service – this would have affected her employer's legitimate aim.

24. Depending on the nature of Ms Ladele's role, together with the ability to swap duties with other colleagues, the chance of accommodation 'behind the scenes' may have become a reality. Indeed, the key factor appears to be whether there existed the option to swap duties discreetly with other employees – something which seemed practicable on the facts of Ms Ladele's case. The ultimate question becomes one of how far accommodation can co-exist with the legitimate aim of the employer. Behind the scenes accommodation, performed sensitively and carefully, would avoid abrogation of that legitimate aim.

25. This pragmatic emphasis in clashes at work between religion or belief and sexual orientation may represent one way in which such cases could be more thoroughly considered. Certainly, the promotion of pragmatism may be provocative where it supervenes over principle. However, in these sorts of disputes it could be that reasonable accommodation permits a greater balancing in matters where employees wish to resist pressures in matters of conscience. In recent times, these matters have almost exclusively concerned beliefs about sexual orientation, perhaps because religious thinking is less evolved in relation to this than other issues such as race or disability. Undeniably, issues of conscience in relation to *any* protected characteristic pose very thorny proportionality challenges. Of course, a reasonable accommodation duty in employment is merely one attempt at resolution.

26. The behind the scenes factors in Ms Ladele may not have operated so as to avail Mr McFarlane of an accommodation under the Canadian model. To be sure, there was evidence that employee reallocation was not practicable in Mr McFarlane's case. This would have presented a large problem – without the ability to reallocate Mr McFarlane elsewhere in the organisation, his employers would have faced the likelihood of compromising provision of services to service users on grounds of sexual orientation. That accommodation would have compromised internal and external policies prohibiting such discriminatory conduct, that prohibition amounting to a legitimate aim. In this situation it is difficult to see how other efforts could have

been made to accommodate without affecting that legitimate aim. As a result, accommodation would have been impossible thereby amounting to undue hardship.

27. Supporters of the Canadian reasonable accommodation doctrine contend that it provides a pragmatic and nuanced approach to tackling religion or belief disputes at work. They argue that it not only protects individuals (as opposed to groups) but also provides a more sophisticated proportionality assessment than that found in indirect discrimination.

28. The exercise above in relation to the applications in *Eweida and others v UK* explains how a domestic duty of reasonable accommodation might force employers and courts to engage more fully with all the relevant issues in a case. As a result, this may better determine the absolute maximum limits at which an accommodation could be afforded at no extra cost to the employer. Given that this written evidence has demonstrated that a reasonable accommodation duty could bring beneficial changes to employer practices, it is submitted that legislation introducing such a duty would be an appropriate response to the decision(s) in *Eweida and other v UK*. One way of achieving this would be via an amendment to the *EqA 2010*. There is stakeholder support for legal policy promoting reasonable accommodation of religion or belief at work from religious groups, whilst tentative support has also been received from employers, the Equality and Human Rights Commission and the Council of Europe. This is indicative of an open and welcoming approach to potential changes in the law.

29. The matters raised in this evidence are rehearsed more comprehensively in material to be published by the author in the *Cambridge Law Journal* in November 2013. A hard copy of the final draft of this work (entitled: 'The God "Dilution"? Religion, Discrimination and the Case for Reasonable Accommodation') is included with this submission.

Matthew Gibson

16th September 2013