Eweida & ors: what it means for religion in the workplace

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Four Christians, nine domestic judgments and 12 interveners before the ECtHR. The outcome? Three of the four applicants lost their cases. Playing a numbers game, the decision was a defeat for the protection of religious freedom in the workplace. In reality, the judgment significantly reinvigorates Article 9 of the Convention.

A reminder of the facts

Nadia Eweida was suspended without pay for four months by British Airways for breaching its uniform policy. She had visibly worn a small cross whilst working on the check-in desk. BA then changed its dress code to permit some religious and charity symbols, including Ms Eweida's cross, and she returned to work. Her claim in the ET for religious discrimination was rejected and her appeal to the EAT and then the Court of Appeal failed.

Shirley Chaplin was a nurse who had worn her confirmation cross on a small chain around her neck for 30 years of employment with the NHS before being told she must remove it. The hospital argued that the item of jewellery was a risk to health and safety. After refusing to take the cross off, Ms Chaplin was moved to a temporary non-nursing position. She lost her ET claim for religious discrimination.

Lillian Ladele was a registrar of births, marriages and deaths employed by the London Borough of Islington. When the Civil Partnership Act 2004 came into force she was designated as a civil partnership registrar. Ms Ladele had a Christian conscientious objection to taking an active part in forming same-sex unions, but Islington insisted that under its 'Dignity for All' policy staff were prohibited from discriminating against others.

Islington took disciplinary action against Ms Ladele and told her she must sign a new job description agreeing to provide civil partnership services. The ET upheld her discrimination and harassment claims but the EAT reversed this and Ms Ladele's appeal to the Court of Appeal failed.

Gary McFarlane, a former pastor, worked as a relationships counsellor for Relate. He began training as a psychosexual therapist and was asked by his employer if he would have a problem giving specific advice to improve the sexual relationship of a same-sex couple. Relate concluded from Mr McFarlane's answers that because of his Christian beliefs he was not prepared to do so and he was dismissed for gross misconduct. His ET claim was unsuccessful, as was his appeal to the EAT.

The articles of faith

All four individuals appealed to the ECtHR, arguing that the UK had failed to protect their rights under Article 9 and/or Article 14 of the Convention. Article 9 provides that everyone has the right to freedom of thought, conscience and religion, including freedom to manifest religion or belief in worship, teaching, practice and observance, subject only to such limitations as are prescribed by law and necessary in a democratic society. Article 14 in turn guarantees that the rights under the Convention will be protected in a non-discriminatory manner.

The outcome

Ms Eweida was successful, winning her case by a majority of five judges to two; Ms Chaplin had her case unanimously rejected; Ms Ladele lost her claim by a majority decision of five to two; and Mr McFarlane had his claim unanimously rejected.

With regard to Ms Eweida, the ECtHR took the view that BA's corporate image was not a sufficient reason to have interfered with her right to manifest her Christian beliefs by wearing a discreet cross. The decision in Ms Chaplin's case was different, principally because she was prevented from wearing her cross for health and safety reasons – reasons which, it was

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held, the employer was in a better position to assess than an international court.

Whilst Ms Ladele and Mr McFarlane had also suffered interference with their rights under Articles 9 or 14, the interference was justified because the reason for it was the desire of the employer to protect the rights of others – the rights of homosexual clients. The ECtHR reiterated that it affords a wide discretion to member states to choose how to balance competing rights.

Strengthening Article 9

The UK Government argued that behaviour which was motivated or inspired by religion or belief but which was not a generally recognised form of practising a religion would not be covered by Article 9. That was firmly rejected by the ECtHR. The court concluded that, whether generally recognised or not, Ms Eweida's and Ms Chaplin's desire to wear a cross visibly as a symbol of their faith had attained a 'level of cogency, seriousness, cohesion and importance' that constituted a manifestation of religion or belief. The same was true for Ms Ladele's and Mr McFarlane's desire to obey Christian teaching on same-sex sexual relationships.

The UK Government also argued that an employee placed in a difficult position because of their faith does not suffer an interference with Article 9 because they remain free to resign and practise their religion elsewhere. The ECtHR emphatically rejected this approach too and, in so doing, declined to follow its own previous decisions. The court preferred a new stance that 'rather than holding that the possibility of changing job would negate any interference with the [Article 9] right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate'. The ECtHR explained its u-turn by accepting that religion and belief had been getting a raw deal when compared with the protection given to other rights, such as the Article 8 right to respect for private life and the Article 10 right to freedom of expression.

What the case means in practice

The ECtHR's decision will require some adjustment to the approach taken by domestic courts to indirect discrimination in religion or belief cases under the Equality Act 2010.

First, the ambit of Article 9 is wider than before. It is not for the employer or the state 'to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed' – if an employee raises an issue in the workplace which genuinely stems from their religion or belief, Article 9 is likely to apply.

Second, it appears that the requirement for a claimant to show that a group sharing their protected characteristic was, or would have been, put at a disadvantage can no longer stand in cases where Article 9 is engaged. On the one hand this protects an employee who is unique in the workplace in holding certain religious beliefs, but on the other it expects a lot of an employer to accommodate an employee who claims to manifest their faith in an esoteric way. Further, without offering anything in its place, the removal of group disadvantage undermines the philosophy behind indirect discrimination as described by the Court of Appeal in *Eweida*.

Third, it is more likely now that if an employer chooses not to accommodate the religion or belief of an employee and instead disciplines or dismisses the employee, it will be found to have interfered with the individual's right to religious freedom and will have to justify its decision.

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Fourth, as a consequence, in most cases there will be full scrutiny by a court of whether the decision to discipline or dismiss was a proportionate means of achieving a legitimate aim. The scrutiny of the employer's justification will be more intense than was previously the case, arguably bringing religion or belief back into line with the treatment of other protected characteristics, where the burden on the employer to justify prima facie discrimination is high (see (*R (Elias)*). However, where there is evidence that the behaviour of the employee relying on freedom of religion or belief encroaches on the rights or freedoms of others, a wide discretion will be given to the employer.

Fifth, employers considering a decision not to accommodate religion or belief should be slow to suspend or move the employee in question. The solution adopted by BA of offering Ms Eweida a back-office role was rejected by the ECtHR, even though BA promised she would lose no pay. Instead she should have been permitted to remain in her customer-facing job pending BA's review of its uniform policy.

Sixth, the ECtHR pointed out the need to show greater appreciation of 'the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others [in the workplace]'. An employer will need to be cautious if it wishes to censor an employee's desire to communicate their belief in a respectful and appropriate manner.

Opinion

The judgment in this case recalibrates the right to freedom of religion in the workplace, bringing it more closely into line with the protection afforded to other fundamental freedoms. The court began its decision by reasserting that the pluralism of a democratic society depends upon freedom of religion, before firing a warning shot to the three British courts which had failed in their 'positive obligation' to safeguard Ms Eweida's rights.

However, for those who believe that positive improvements in the protection of the rights of homosexual employees and clients need not entail discrimination against employees who hold to orthodox religious teaching about same-sex relationships, the decision represents a missed opportunity. Such religious teachings are long-standing and widely held across the world's major religions. Article 9 requires a mature and inclusive solution if it is to safeguard the pluralism so cherished by the ECtHR.

It is a sad fact that Ms Ladele had, according to the ET, suffered intolerable harassment from her colleagues, yet found no protection from the ECtHR. Many would agree that replacing discrimination against a group sharing one protected characteristic with discrimination against a group sharing another is not a desirable outcome.

The Equality and Human Rights Commission along with eight of the other 12 interveners in the case referred to the model of 'reasonable accommodation', applied in the US and Canada, which offers an alternative to the approach taken by the ECtHR. Reasonable accommodation requires the employer to work harder to retain within its workforce employees with strong religious beliefs so long as an individual's religious practices do not detrimentally affect service provision or unduly affect an employer.

Given the margin of appreciation offered by the judgment in this case, there is scope for employers to choose to accommodate employees with deeply rooted conscientious objections to particular aspects of their employment. In a dissenting judgment, two of the ECtHR's judges noted that in Ms Ladele's case other local authorities had managed to accommodate employees with similar beliefs to Ms Ladele without detriment to their overall service and suggested that, in their view, Islington should have done the same 'given the cogency, seriousness, cohesion and importance of her conscientious objection'. In their view, Islington's treatment of Ms Ladele amounted to a failure to practise 'the tolerance and the "dignity for all" it preached'.

KEY:

Convention	European Convention on Human Rights
Eweida & ors	*Eweida & ors v The United Kingdom* [2013] EHCR 37
Eweida	*Eweida v British Airways plc* [2010] ICR 890
R (Elias)	*R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213