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ARTICLE

Religious belief and the employment rights of medical staff

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Abstract

This paper will consider the legal provisions governing the protection of religion and belief at work. It makes specific reference to the concerns of health professionals, and in particular the issue of conscientious objection. It starts with an outline of the legal provisions governing conscientious objection under the Abortion Act 1967 and Human Fertilisation and Embryology Act 1990. It then looks at the generally applicable laws relating to religious belief and employment and examines their application to conscientious objection. It assesses the recent case from the European Court of Human Rights, Eweida and others v UK [2013], and the implications of this case for staff who have conscientious objections to aspects of their work. It suggests that recent developments in the case law create an obligation on employers to consider accommodating such objections unless there are good reasons not to. The paper then moves on to consider other common requests for accommodation of religion at work, particularly the law relating to dress codes and time off for religious observance. The rights of non-religious staff who are employed within religious medical foundations are also considered. Finally, it argues that the concept of proportionality is crucial to determining the correct parameters of any protection for religion at work, and considers factors peculiar to the medical context which may affect the proportionality assessment.

Introduction

Freedom of religion is well established as a fundamental human right in international and domestic law, and the extent to which that freedom should be enjoyed in the context of the workplace is a matter of significant current debate. Legislation protecting against religious discrimination was introduced at the end of 2003,[1] and a steady stream of case law has followed, in-

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1 The Employment Equality (Religion and Belief) Regulations 2003.

volving accommodation of religious dress codes,[2] time off work for religious observance,[3] and the extent to which religious staff can be exempted from certain tasks because of a religiously inspired conscientious objection.[4] The cases have been heavily contested as they raise fundamental questions about the nature of religious belief, the interaction of religious freedom with rights to be free from religious discrimination, and the extent to which these rights should be protected in the workplace. The general position regarding religious freedom and the workplace is that religious freedom does not give rise to absolute rights, and so limits placed on religious freedom in the work context can be justified when necessary to protect the rights of others.[5] In what follows the rights of medical staff to exercise religious freedom in the context of work are discussed, and the role of proportionality in determining the scope of these rights is assessed.

Medical staff and conscientious objection

Members of medical staff may request to be removed from carrying out some types of work because they are incompatible with their religious beliefs. For example, staff may request not to be involved in any work that is linked to abortion, or gambling, or other behaviour they believe is wrong. In the case of abortion or participation in embryo research, there are special provisions for conscientious objection, covering all staff involved with these procedures.

The Abortion Act 1967 and Human Fertilisation and Embryology Act 1990

With regard to abortion, section 4(1) of the Abortion Act 1967 states:

'no person shall be under any duty...to participate in treatment authorised by this Act to which he has a conscientious objection.'

Section 38 (1) Human Fertilisation and Embryology Act 1990 contains provisions in similar terms:

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2 *Azmiv Kirklees Metropolitan Borough Council* [2007] ICR 1154.

3 *Mba v London Borough of Merton* [2013] EWCA Civ 1562.

4 *Ladele v Islington Borough Council* [2009] EWCA Civ 1357; heard with *Eweida (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* Judgment 15 January 2013.

5 For a full discussion of these issues, see L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2008) Hart Publishing, Oxford.

'No person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty, however arising, to do so.'

Although these exemptions are not limited to religious objections, they will clearly apply to those with religious objections to the respective procedures. There have been few cases involving these conscientious objection provisions, although some debate has arisen in the context of the Abortion Act about the scope of the term 'treatment'. In particular, the question has arisen as to whether the exemption covers only the medical process of abortion, or broader activity related to the medical provision of abortion? For example the law would clearly cover a clinician who objected to carrying out the medical procedure, but equally clearly a number of other medical professionals are likely to be involved in the medical care of the patient. In *Janaway v Salford Health Authority*[6] it was held that the secretary who refused to type a referral letter regarding an appointment for advice on abortion was not covered by the terms of section 4. The activity was insufficiently related to the medical procedure to be viewed as 'treatment'. Since the decision in *Janaway* the decision has been taken to mean that the section 4 exemption applies only to those directly involved in the provision of the termination, and does not cover those more indirectly involved. More recently, however, in the Scottish case of *Doogan v Greater Glasgow and Clyde Health Board*[7] the Inner House of the Court of Session considered the question of whether the exemption would cover nursing staff involved in the care of patients, albeit not during the performance of the abortion procedure. The two midwives involved in the case had exercised their right to conscientious objection under the Abortion Act for many years, and it was accepted that they did not participate in the treatment of patients on the labour ward for terminations. Over a number of years, due to changes in the organisation within the hospital, and some hospital closures, the numbers of patients on the wards following terminations had increased. As a result, the claimant midwives sought confirmation that they would not be required to be involved in the care of patients at any stage of the termination process, including supervising or supporting other staff involved in the process, or providing patient care. At first instance, the Court held that the word 'treatment' was limited to those activities which directly bring about the termination of the pregnancy. Follow-up care of patients on the ward was therefore not covered by the exemption. However, the Court of Session took a more generous view of the exemption and held that it did cover the sort of involvement raised in the case. They contrasted the position of the secretary typing a letter, who could not be said to be involved in the treatment, with those involved in pre- and post-operative care. This decision is

6 *Janaway v Salford Health Authority* [1989] AC 537.
7 [2013] CSIH 36.

awaiting appeal to the Supreme Court, but at this point it would seem that the exemption for abortion covers a broad spectrum of treatment related to terminations, whilst not covering activities which could be termed ancillary to the termination. In any event, it should be noted that the exemption does not apply in the context of medical emergencies. Moreover, an obligation remains on medical staff who conscientiously object to abortion to refer patients seeking the procedure to other staff who provide the treatment.

In sum, then, medical staff can exercise a right to conscientious objection to being involved with the medical treatment of abortion patients. However, they must be willing to refer patients to other personnel who may then provide the service. This means that a person with a strong moral objection to all abortion, to the extent that they view referral as unconscionable, will not be covered by the exemptions provided in the Abortion Act. Such staff, together with staff whose involvement with abortion services is too indirect to amount to 'participation in treatment' will instead have to look elsewhere if seeking some legal protection of conscience.

Religious discrimination and conscientious objection

In cases of religious objection to tasks other than abortion or activities related to the Human Fertilisation and Embryology Act, refusal of staff requests to be excused from some aspects of work will be governed by the provisions of the Equality Act 2010. A refusal by an employer to accommodate a request to be exempt from some work tasks could potentially be discriminatory on grounds of religion and belief, if the refusal is unjustified.

The Equality Act 2010 protects against direct and indirect discrimination on grounds of religion and belief. Direct discrimination arises where less favourable treatment occurs 'because of' religion or belief.[8] For example, a refusal to employ a person because of their religion would amount to direct religion and belief discrimination. If an individual with a religious objection to a task were to be treated less favourably than a person with a non-religious objection, this could amount to direct discrimination, but much more likely to occur is a refusal to accommodate any objection, religious or otherwise. Such a case would need would treated as a potentially indirectly discriminatory one.

Indirect discrimination occurs where an apparently neutral requirement would put persons of a particular religion or belief at a particular disadvantage

8 Equality Act 2010 s 13.

compared with other persons. It can be justified where there is a legitimate aim for the requirement and the means of achieving the aim are proportionate to that aim.[9] Examples include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. Any such requirements must be justified as a proportionate means to meet a legitimate aim.

These rules would apply in the case of a worker seeking to be excused from performing a task due to a conscientious objection based on religion or belief. Any requirement to do a task to which the employee objects on religious grounds is potentially indirectly discriminatory: the employer is requiring the employee to engage in certain conduct and the employee's religious beliefs put him at a disadvantage because he cannot do so. However, any such requirement can be justified, where proportionate. The concept of proportionality is thus central in setting the parameters of the protection of religious beliefs in the employment context.

Where carrying out the task in question is a significant aspect of the job, it is very likely to be justified as proportionate. To take an obvious example, it is likely to be proportionate to refuse a request from a nurse working in accident or emergency, or in blood transfusion services to be exempt from working with blood products, as such work is central to the job. However, where the contested duties are more tangential, it may be that employers should try to accommodate the request. A proportionate response might be to allow voluntary swaps of tasks, or to redeploy the individual, especially where this can be done without disadvantage or disruption to others.

Difficulty in this area can arise in two particular areas: first, significant numbers of staff may want the same accommodation. Second, the reason for the conscientious objection may itself be discriminatory.

On the first issue the law is non-directive. In effect, this becomes a management issue rather than a legal one. What is required legally is that treatment that causes disadvantage to a religious group must have a legitimate aim and be proportionate to that aim. Effective delivery of a service and effective staff management may amount to a legitimate aim, meaning that accommodation of a request to be exempt from a particular task will be justified. For example, managers cannot let staff opt out of a task where this makes the service inoperable; equally, where an unpopular task falls all the time on a small group, expecting staff to swap duties will be impracticable. In such cases, to refuse re-

9 Equality Act s 19.

quests for accommodation would be proportionate because of the needs of the service, or to maintain 'staff morale'.

On the second issue, where the reason for the objection is itself discriminatory on other grounds, the law is clear, following the case of *Ladele v Islington Borough Council*.[10] Although the case did not arise in a health context, it is not difficult to imagine similar issues arising in a medical context, and the same principles would of course apply. Ladele worked as a registrar of Births, Deaths and Marriages for a number of years, before being designated a Civil Partnership Registrar under the Civil Partnership Act 2004, qualifying her to carry out civil partnerships for same sex couples. This caused her difficulties as she believed that participation in registering civil partnerships would be contrary to her religious beliefs, as it would involve promoting an activity which she believed to be sinful. She sought to be excused from carrying out civil partnerships on this basis, but permission was refused. The Council insisted that under its 'Dignity for All' policy, all registrars should be able to carry out all types of ceremony. Ladele was eventually disciplined and threatened with dismissal for refusing to carry out this part of her job. The legal case turned on the question of justification. The Court held that the refusal to accommodate Ladele's request to be exempt from carrying out civil partnerships was justified as the employer was entitled to rely on the dignity for all policy. It needed to offer a service to all service users regardless of sexual orientation and Ladele's views on marriage were not a core part of her religious beliefs. A similar outcome was reached in *McFarlane*[11] in which a counsellor was dismissed for refusing to provide sexual therapy to same sex couples. Again, the less favourable treatment experienced by McFarlane was justified.

These cases were recently heard together with two others at the ECHR in *Eweida and others v UK*.[12] These cases were brought under Article 9 ECHR which provides protection for freedom of religion, thought and conscience. Article 9 recognises that freedom of religion has both an individual and a collective dimension: the right is to manifest religion 'either alone or in community with others', so that the right applies to religious groups as well as to religious individuals. In the context of workplace, the right to religious freedom can therefore apply to religious employers who may wish to impose faith requirements on their staff. The right also applies to religious staff, and has tended to be engaged with regard to manifestations of belief; in particular, the wearing of religious symbols, time off work and conscientious objection to certain work

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10 *Ladele v Islington Borough Council* [2009] EWCA Civ 1357; confirmed in *Eweida (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* Judgment 15 January 2013.

11 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 771; confirmed in *Eweida and Chaplin v the United Kingdom* Application nos. 48420/10 and 59842/10.

12 *Eweida (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* Judgment 15 January 2013.

tasks. Article 9 does not create an absolute right to manifest religion or belief: it allows for religious manifestations to be restricted where necessary to protect other interests.

The ECtHR decision in *Eweida and others* settled a number of contentious issues regarding the protection of religion and belief at work. First, the court confirmed that the protection of freedom of religion and belief includes its protection in the workplace. Second, the ECtHR confirmed that there was no need for a practice to be a mandatory requirement of a religion, nor for it to be universally held by members of the religion, for it to be protected. Thus, for example, if one member of staff has a conscientious objection based on religious grounds to undertaking a specific task, such as providing contraception advice, her claim will not be undermined by the fact that others of the same religion may not have such strong views. The question is whether there is a close nexus between the religious belief and the request for exemption, not whether the religious belief is shared with others, nor whether the belief is a core aspect of the religion. To this extent then, the approach of the ECtHR was broader than that of the UK courts.

However, despite these positive developments in the legal protection for religion at work, on the issue of whether the protection of the Convention applied in the two conscientious objection cases, the cases were unsuccessful. In respect of *Ladele* the ECtHR held that although religious rights can be claimed at work, nonetheless the employer was able to restrict the employee's manifestation of religion when it interfered with other equality rights. The court relied on limitation provided for in Article 9, allowing restrictions on the manifestation of religion where necessary to protect the right of others, here the right of the employer to pursue its 'dignity for all' policy. In reaching this conclusion, the Court recognised the importance of the rights of others, which need always to be weighed in the balance with the right to manifest religion; and here, the equality rights of others were particularly strong.

The outcome of the case seems very clear: religious conscientious objection in the context of the medical staff will not outweigh conflicting rights of others which may be harmed by allowing the objection, in particular any rights of patients to health care. Moreover, employers do not need to accommodate discriminatory requests for accommodation. For example, a request by a member of staff to be excused from offering care to a patient for reasons of sexual orientation or other protected grounds does not need to be accommodated.

However, it is arguable that the outcome is less unequivocal than this. This is because the ECtHR relied on the concept of the 'margin of appreciation' in reaching its conclusion. The 'margin of appreciation' allows a degree of flexibility to member states in their observance of the Convention and restrictions

will only be found to breach human rights norms when they fall outside this margin. In religion cases a fairly wide margin operates, reflecting the lack of consensus across Europe about how religion should be treated.[13] The reliance by the ECtHR on the margin of appreciation means that it was not clear whether employers *must not* accommodate requests to be allowed to opt out of work tasks or when to do so results in discrimination against others. The ECtHR did not rule that concern for sexual orientation equality would dictate that workers' beliefs on sexual orientation should never be accommodated by employers. It was making a much more limited decision: that for the state to allow the dismissal of Ladele was within a margin of discretion allowed to domestic courts in complying with the Convention. The restriction on religious conscientious objection to work tasks when they result in discrimination against others was thus more muted than might at first sight seem to be the case.

The decision in *Ladele* was not unanimous. Two dissenting judges held that issues of conscience are so important, that they should not be restricted by employers. However, this position must be untenable. Although one might welcome the ruling that the right to resign should not end all protection of human rights at work, this is not to say that the right to resign plays no role. It cannot be the case that a worker can apply for a job which they cannot do and then claim some absolute right based on conscience to be accommodated. It is thus self-evident that any right to conscientious objection must be subject to some degree of proportionality review.

In summary, the UK allows for a degree of religious conscientious objection at work, to the extent that a refusal of a request to be exempt from certain work tasks will be treated as potentially indirectly discriminatory on grounds of religion, and therefore only lawful as long as it is justified as a proportionate means of achieving a legitimate aim. In many cases, where a request can be readily accommodated a refusal may not be justified as proportionate. In this sense then, it has been accepted that the scope for reasonable accommodation is part of the proportionality assessment.[14] For example, a request by a member of nursing staff to be exempt from involvement in some forms of end of life care might be accommodated easily if working on in a clinical area where this treatment is very unlikely to be required, and if other staff can offer the care on the rare occasions when it is necessary. In such circumstances, it would be proportionate to accommodate the request. However, where accommodation

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13 Evans, *Freedom of Religion under the ECHR* (OUP, Oxford, 2001), at pp. 143–4.

14 See Lady Hale: 'I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases. .... the overall proportionality assessment, must therefore consider the extent to which it is reasonable to expect the employer to accommodate the employee's right.' *Bull v. Hall and Preddy* [2013] UKSC 73 para 47.

could lead to management difficulties, as no-one else can fill the role, or the role is key to the job (for example a nurse in a hospice who objects to certain forms of treatment for the terminally ill) it is likely that a refusal will be proportionate. Similarly, where accommodation results in discrimination against others, for example a doctor who requests to be exempt from offering IVF to a lesbian couple, it is likely to be proportionate to refuse the request.

Medical staff, dress codes and time off for religious observance

In addition to issues of conscientious objection to work tasks, other common aspects of religious discrimination which can arise for medical staff relate to dress codes and time off for religious observance.

Dress codes

Medical staff routinely wear uniforms for work, and yet uniforms are a common potential cause of discrimination. Restrictions on the wearing of religious symbols such as headscarves or crosses can result in less favourable treatment on grounds of religion, and may require justification. Dress codes requiring female staff to have bare arms, or to wear skirts, can also breach religious dress codes and result in less favourable treatment, requiring justification.

The case of *Azmiv Kirklees Metropolitan Borough Council*[15] may usefully illustrate how the justification of a dress code may take place. Azmi was a teaching assistant who wanted to wear the niqab or face veil when in the presence of male colleagues. She was dismissed for refusing the employer's request to remove the niqab when assisting in class. She was unsuccessful in her claim of indirect discrimination. The court accepted that there was *prima facie* indirect discrimination as the refusal to allow a face covering put Azmi at a particular disadvantage when compared with others. However the court held that the indirect discrimination was justified. The restriction on wearing the niqab was proportionate given the need to uphold the interests of the children in having the best possible education.

Applied in the health sector, it is highly likely that a restriction on wearing a niqab would be justified, particularly for staff working with patients. The need for good non-verbal communication must be equally important in the case of

15 [2007] ICR 1154.

patient care as it is in the education setting. It is likely therefore that restrictions on face coverings would be proportionate and so lawful.

A second example of this approach can be seen in the second case heard in *Eweida and others v UK*.[16] Chaplin was a nurse who wanted to wear a cross on a chain around her neck. She was required to remove the cross for reasons related to health and safety. The chamber of the ECtHR, accepted that her religious rights were engaged, and the restriction therefore had to be justified by the employer. In Chaplin's case the Court held that the interests of the employer in maintaining health and safety standards were sufficient to outweigh the employee's interest in manifesting her religion at work.

The cases confirm that religious dress can be restricted where there is good reason to do so, but that good reasons do need to be present. In *Eweida* itself,[17] the court did not uphold a restriction on wearing a cross at work, as insufficient justification was provided: the employer's interest was limited to the protection of their corporate image, and this was found to be insufficient grounds to justify the restriction on religious freedom.

Time off for religious observance

The same approach to justification will be used in the treatment of time off for religious observance, such as time off for prayers during work time, or days off for religious festivals. In a work environment such as health, in which service has often to be maintained seven days a week, this can be particularly relevant. Again, a refusal of time off will put religious individuals at a disadvantage compared to those who do not need time off, and so it will need to be justified. The application of this approach can be seen in the following two cases, leading to different outcomes, despite the initial similarities of the cases. The first case[18] is where the claimant, a Jehovah's Witness, had been refused permission for time off work on Sundays, making it impossible for her to attend worship. Her claim of discrimination on grounds of religion and belief was upheld, the tribunal holding that the requirement to work on Sundays put her at a disadvantage because of her religion, and was not justified because there were other employees who could have covered the Sunday shift without difficulty. This case can be compared with *Mba v London Borough of Merton*.[19]

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16 *Eweida et al v the United Kingdom* [2013] 57 EHRR 213.

17 The case was brought in the UK as *Eweida v British Airways* [2010] EWCA Civ 80. It was then joined with others in an appeal to the ECHR and heard as *Eweida et al v the United Kingdom* [2013] 57 EHRR 213.

18 *Thompson V Luke Delaney George Stobbart Ltd* [2011] NIFET 00007 11FET (15 December 2011).

19 [2013] EWCA Civ 1562.

Here the claimant was a care worker who was also obliged by her employer to work on Sundays. In this case, the claimant was unsuccessful in claiming religious discrimination. The court was unanimous in deciding that the refusal to allow Mba time off on the Sunday was, on its facts, a proportionate response by the employer. The employer needed workers available every day, and there was no viable or practical alternative but to require her to be available to work on Sundays. Again, as with the dress code cases, the cases demonstrate an assessment of the proportionality of any restriction on religious practice imposed by work will require a full review of the facts.

The rights of medical staff working in religious foundations

A final area where religion and belief interact with the workplace involves the position of religious employers. Most medical staff will work in the National Health Service, but some may work in religious foundations, such as Christian medical practices, or religious hospices. Such employment raises questions about the extent to which religious employers can exercise their religious freedom via their employment practices. Issues which have arisen in this context include the extent to which religious employers can impose religious requirements on non-religious staff, in order to create religiously homogenous workplaces. Such requirements will usually involve some degree of religious discrimination against others, for example, requirements that staff share the religion of the employer, or be loyal to the religion's teaching. In some cases, the requirements will also result in discrimination on other grounds, for example, depending on the nature of the religious beliefs of the employer, a requirement for a staff member to be a conservatively observant Muslim or Christian could result in discrimination against gay staff.

Whilst the Equality Act 2010 allows some scope for employers to discriminate on religious grounds, this does not extend to allowing discrimination on other grounds.

The Equality Act provides an exception to the non-discrimination principle where the employer is a religious ethos organisation and where because of the particular occupational activities or the context in which they are carried out, a religious characteristic is a genuine occupational requirement, provided that the objective is legitimate and the requirement is proportionate. Under this exception, religious foundations such as hospices or medical practices that are run with a religious ethos, can require that members of staff are loyal to that ethos. This is the case even though sharing a religious belief may not be an essential requirement for carrying out of the core duties of the job.

The operation of these rules is illustrated by *Muhammed v Leprosy Mission*.[20] Here a Muslim finance administrator applied for work in a Christian charitable organisation. One of the criteria for the role was that the incumbent 'be a practising Christian committed to the objectives and the values' of the organisation. Mr Muhammed's application was unsuccessful, and he claimed discrimination on the ground of religion. The tribunal upheld the respondent's view that being a Christian was a genuine occupational requirement of the role, and that it was objectively justified to rely on this. In particular, it drew attention to the fact that Christian beliefs were at the core of the employer's activities and that employing a non-Christian would have a very significant adverse effect on the maintenance of that ethos.

However, the freedom for religious ethos organisations to impose religious requirements on staff is not without limitation. Any requirement must be 'occupational', and therefore must be linked to the job in question. It will be difficult to argue that all staff must share the religion unless the employer is very small and the religious ethos very strong. For example, if a medical practice were to be run along Islamic lines, it may be that one could require that the partners be Muslim, but it would be more difficult to argue this in relation to support staff. An understanding of the faith, and sympathy for its practice could be required, but it will be difficult to show that a shared faith is necessary for each and every member of staff, unless all staff participate in the religious purposes of the organisation for example by participating in common prayers or other religious observance. However, a mere preference for working with those of the same religion will be unlikely to be sufficient.

Moreover, if religious requirements lead to conflict with other equality rights protected by the Employment Act 2010 they will not be accepted: the fact that a requirement is religious will not act as a defence to any claim on other grounds of discrimination. Thus a religious requirement such as a requirement to be supportive of the Christian network *Reform*[21] (an organisation which opposes gay marriage) would result in indirect sexual orientation discrimination which would be very unlikely to be justified. In effect, then, where indirect discrimination results, the creation of a religiously homogenous workplace will not be lawful. For example, partners in a Christian medical practice who believe that homosexuality is incompatible with biblical teaching will not be protected if they refuse to engage a gay partner.

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20 *Muhammed v The Leprosy Mission International* ET/2303459/09.
21 See Reform.org.uk.

Proportionality and the health care context

The discussion above about the interaction of religious rights at work in the context of health care makes clear that in most cases, the final analysis of whether the a religious employee or a religious organisation can require accommodation of religion at work will depend on the question of proportionality. Dress codes and working hours can be altered, tasks can be avoided on religious grounds, and religious requirements can be imposed all where proportionate to do so.

The benefit of this proportionality based approach to the protection of religion at work is that it allows for detailed assessment of a wide range of factors, including a detailed factual examination, before judgment is reached. This allows for a nuanced examination of the facts, the context, the rights of others, and other options that may be open to the employer or employee.

In the context of an assessment of religious freedom in the context of health care staff, it is worth reflecting on the particular contextual issues that may be relevant to the assessment of proportionality. It has already been noted that issues such as the availability of other staff to swap tasks can be taken into account in the context of conscientious objection requests as well as requests for different working hours. Equally, the importance of good communication has been noted for clinical staff when considering requests for dress codes such as face coverings. Similarly, in the context of health care, as with the provision of marriage services, the need for the health services to be provided equally and without judgement to all, regardless of personal characteristics such as sexual orientation, will be extremely important. This will mean that it is very unlikely that a court would view as justified any request to be exempt from provision of medical care to particular client groups.

There are a number of other contextual factors which apply in the context of health care which may be particularly pertinent to the assessment of the proportionality of any request for religious accommodation. First, most health care workers will work within the NHS, a state employer. This will mean that, as a representative of the state, there can be assumed to be a commitment to equality. Indeed, under the Equality Act 2010 s 149 all public bodies are required to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different protected groups. It can be assumed then that in assessing the proportionality of any request to be allowed to exercise religious freedom at work, that the presumption might be tilted in favour of protecting religious equality.

The fact that most healthcare takes place within the public sector is also likely to have an impact on the proportionality assessment in other ways. For

example, it is also important for the state to reflect in its employment practices the full range of its citizenry, to reflect the message that all citizens are equal and valued. The virtual monopoly status of the NHS as the employer of health care staff is another important contextual factor to be taken into account in assessing proportionality. Indeed in *Muhammed v Leprosy Mission*,[22] the court took account of the fact that the Leprosy Mission was a small specialised employer, whereas Mr Muhammed had transferrable skills and could find accounting work elsewhere. In the health care sector the opposite will usually be the case. Most health care workers work in the NHS and it will be very difficult to find work for an alternative employer. There may therefore be a greater onus on the employer to accommodate religious practice than there would be for smaller less specialist employers. However, the size of the employer and its virtually monopoly status will only be one factor to assess when considering proportionality, and it will not mean that every request has to be accommodated.

Conclusion

The decision in *Eweida et al v UK*[23] is significant in many ways for staff who wish to exercise the freedom of religion at work. It confirms that religious freedom does have a place at work, but equally it confirms that this right is not absolute but needs to be balanced against the rights of others. In the context of health care staff, the competing interests can at times be finely balanced. Factors specifically related to the medical context include the need for a large employer such as the NHS to employ a wide range of staff from different ethnic, cultural and religious groups as part of its role as a public sector organisation; and the needs of patients for sensitive and inclusive health care. To these factors can be added the fact that health care professionals can face specific conflicts with religious conscience given their unique involvement in some contentious treatments such as abortion. In ruling on these issues, courts are involved in a balancing exercise as they seek to implement a legal framework underpinned by the concept of proportionality. The fact that legal protection is largely based on the concept of proportionality means decisions are likely to be largely context and fact sensitive. This can of course mean that outcomes are somewhat difficult to predict. Nonetheless, if courts are to find an appropriate level of protection for religious equality for medical staff, a fact sensitive review will be essential.

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22 *Muhammed v The Leprosy Mission International ET/2303459/09.*

23 *Eweida (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* Judgment 15 January 2013.