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Further UK developments on freedom of religion

Neil J Foster

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Two further UK cases illustrate the difficulties faced by courts in that country in drawing appropriate limits between the rights of employers and the rights of believers to exercise freedom of religion.¹

Freedom of religion in the workplace- Eweida

The difficulties and uncertainties faced by professing Christians in the current UK context are further illustrated by the latest appeal, in Eweida v British Airways PLC [2010] EWCA Civ 80 (12 Feb 2010). Ms Eweida, a committed Christian, worked for BA in a customer service area. BA had a policy that no jewellery was to be visible. Ms Eweida wanted to display a small cross around her neck. She claimed that BA’s refusal to allow this was discriminatory.

The claim was rejected by the Employment Tribunal, and then again on appeal to the EAT.² It was of course a claim of indirect discrimination, as a general policy was applied to all visible jewellery (although it is worth noting that other items of “religious” attire, such as a hijab, a turban and a skull-cap had been allowed to be worn by other staff).

The EAT upheld the original Tribunal finding that there had not been indirect discrimination, on the somewhat curious basis that the claimant had not been able to demonstrate that there were any other Christians who wanted to wear a visible cross who had not been able to do so. Curious, in the sense that most people would not regard it as crucial to an act of discrimination of this sort that there be more than one person involved. But the EAT read reg 3(1)(b) of the Equality (Religion or Belief) Regulations 2003 as meaning that a disadvantage that the claimant had suffered “must be a disadvantage suffered by others who share her religion or belief” (see [11]).

With respect, this seems an unlikely intention to attribute to the drafters. The wording of the regulations explicitly says that the relevant criterion “puts or would put persons of the same religion or belief as B at a particular disadvantage” (emphasis added.) Surely the hypothetical “would” allows the court to imagine a class of Christians who want to display a common symbol of their faith visibly, rather than requiring a stream of witnesses to that effect?

Nevertheless, the Tribunal was clearly of the view that “the relevant disadvantage must be one which is shared by a group”- [16]; and in the end the Appeal Tribunal agreed. “It must be possible to make some general statements which would be true about a religious group”- [60]; “BA did not act in a way which amounted to indirect discrimination because there was no evidence that a sufficient number of persons other than the claimant shared her strong religious view that she should be allowed visibly to wear the cross”- [77].

Perhaps at this stage it is worth a comment on one point. Both the EAT and later the Court of Appeal stressed that Ms Eweida’s was the only formal complaint about not being able to wear a cross that had been received. With respect, this seems fairly disingenuous. If there is such a policy, then it might be

¹ For previous discussion see my paper, ”Freedom of Religion and Discrimination- Two important UK cases” (2009) available at http://works.bepress.com/neil_foster/24/.

² See the appeal UKEAT/0123/08/LA, 20 Nov 2008, Elias J presiding.

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expected that many employees, even those who would otherwise strongly prefer to wear a visible cross, would not even make such a request, for fear of annoying their employer. Even if there were no formal disciplinary process following such a request, many pressures on employees (including rostering and whether or not future promotion is available) may make them not wish to “rock the boat”. Probably the only way of ascertaining whether or not there were other such employees was to conduct an anonymous survey of some sort; the case shows no evidence that BA ever volunteered to do this.

The other interesting point about the EAT decision is the discussion around the question whether, if the requirement not to display the cross had been held to be indirectly discriminatory, BA would have been able to justify the requirement as a “proportionate means of achieving a legitimate aim.” The EAT upheld the Tribunal’s ruling that in fact BA’s blanket ban on all visible jewellery was not proportionate, in that it did not distinguish between jewellery simply worn for cosmetic purposes and that which had a religious significance - see [19]. Their decision was assisted by the fact that after the dispute arose, the policy was amended to allow approved forms of religious or “charitable” symbols to be displayed.

Some unsatisfactory aspects of the EAT decision were corrected in the Court of Appeal. Sedley LJ noted at [13] that the Appeal Tribunal were probably wrong to have concluded as they did that the “purpose” of indirect discrimination law is to deal with “group discrimination”. But the judgment supports the view that under the relevant regulations, there must be “some identifiable portion” of the workforce, rather than merely a single individual, which is subjected to a disadvantage - [15]. While discussing the difficulties of applying such a view at [18], the judgment does not take what one might have thought to be the obvious view that since the interpretation is almost unworkable, it cannot have been intended. Instead, Ms Eweida’s claim is seen to fail on what looks like a forensic mishap, the failure to call 2 or 3 colleagues with similar views.

In addition there is a decidedly worrying tone to his Lordship’s comments. He goes out of his way to note that Ms Eweida seems to have been very forceful in putting her views, and his comments seem to be strongly influenced by his disapproval of her “adversarial” attitude - see the negative comments at [3], [25] (“a sectarian agenda”), [28] (“a single employee who after 6 or 7 years of compliance with the dress code has decided that it is no longer compatible with her beliefs”), [33]-[34]. With respect, these matters do not seem to bear on the real issues. In fact, they are positively misleading. The long-standing dress code had involved a high-necked uniform. It was the new uniform that had provoked the issue. The comment at [33] that Ms Eweida refused (“on whose advice we do not know”, suggesting of course some person of ill will attempting to provoke litigation) BA’s “accommodating offer” to move her to another position implies that she should have been prepared to accept what she saw as discriminatory behaviour. In the end, his Lordship ruled that in fact BA would have been justified in doing what they did, even if their actions had been found to have been discriminatory against Christians as a group - [37].

The slighting comment that the visible wearing of the cross was only a “personal preference” rather than being “called for” by her religious beliefs elides some very important issues about the extent to which a right of freedom of
religion protects positions taken which are motivated (if not positively demanded) by a person’s religious beliefs. It seems that if the JFS court’s emphasis on the need for a careful weighing of the impact on the individual believer, in comparison with that on the employer or others, had been taken into account, the blanket ban on all jewellery would have been viewed as a disproportionate response to whatever the problem was that the policy was dealing with.3

The curious addendum in para [40] notes that the new Equality Bill treats indirect discrimination on all grounds in a way similar to the wording of the regulations in issue here. But what does this comment mean?

[40]...But it is to be noted that the same definition is used for all the listed forms of indirect discrimination, relating to age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. One cannot help observing that all of these apart from religion or belief are objective characteristics of individuals; religion and belief alone are matters of choice. This case has perhaps illustrated some of the problems which can arise when an individual (or equally a group) asserts that a provision, criterion or practice adopted by an employer conflicts with beliefs which they hold but which may not only not be shared but may be opposed by others in the workforce. It is not unthinkable that a blanket ban may sometimes be the only fair solution.

Is his Lordship seriously suggesting that an appropriate response to difficulties of freedom of religion and freedom of expression in the workplace would be avoided by a “blanket ban” on all expressions of religious faith in the workplace? Or perhaps he is suggesting a “blanket ban” on employing anyone with religious beliefs? Both suggestions are equally outrageous, but neither seems clearly excluded by the tone of the judgment.

What Ms Eweida claims to have suffered may have been not the worst kind of religious discrimination. But her religiously based views (even if mere “preferences”) were surely entitled to serious consideration. It can only be hoped that a better interpretation of the relevant regulations can be found, which avoids the odd result that discrimination is acceptable if only practiced against one person.

_McFarlane v Relate Avon Ltd [2010] EWCA Civ B1 (29 April 2010)_

This decision of Laws LJ in the English Court of Appeal is a short judgment refusing leave to appeal from the earlier decision of the Employment Appeal Tribunal at [2009] UKEAT 0106_09_3011 (30 November 2009). It raises again the important question of whether someone who adheres to traditional Biblical Christianity should as a matter of law be given any consideration when their

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3 An odd aspect of the judgment of Sedley LJ is that the purpose of the policy, surely a key aspect of any decision about “proportionality”, is almost completely ignored. The only comment comes in para [31]: “They considered that the aim of the uniform code was undoubtedly legitimate- a finding which requires no explanation”. We are not told whether the code was designed based purely on “image”, or for safety reasons, or as a way of ensuring that employees could not communicate any religious or political views that they had- all of which are possibilities, but all of which would have required differing responses, presumably.
religious views conflict with what is required by their employer.  

Mr McFarlane is a “relationships counsellor” who was employed by Relate. His job required him to provide counselling to couples whose relationships were in difficulty. One aspect of his work was “psycho-sexual therapy” which involved detailed advice about sexual behaviour. He had requested that he not be assigned same-sex couples to provide this sort of counselling to, on the basis that as a Christian he objected to homosexual intercourse as sinful.4

He was summarily dismissed from his position. He mounted a claim against Relate for remedies relating to his dismissal, on the basis (inter alia) that he had been discriminated against indirectly on the basis of his religion, and that his dismissal was unjustified.

His case, of course, is very similar to that of Lillian Ladele, who was dismissed as a marriage registrar for refusing to be involved in registration of same-sex partnerships.5 Here Laws LJ upholds the decision of the EAT, upholding the dismissal of the discrimination claim by the first instance Employment Tribunal decision, by reference to the Ladele decision.

But there are some other important features to this latest decision. In particular there is the fairly odd spectacle of a witness statement that was sent to the Court of Appeal by a former Archbishop of Canterbury, Lord Carey. The thrust of Lord Carey’s statement (some of which is quoted in the judgment of Laws LJ) was to suggest that a special panel of appeal judges be appointed which did not include (among others) the Master of the Rolls, Lord Neuberger, who had given the lead judgment in the Ladele case.6 It must be said, with the greatest of respect for Lord Carey, that this was an unwise decision. No tribunal will lightly accept that its most senior member is biased. In the circumstances it seems fairly clear that Lord Carey’s attempted intervention probably led to a more negative tone to the decision to refuse leave to appeal than would otherwise have been the case.

Nevertheless, there are some alarming features about Laws LJ’s judgment. In particular, at para [12], there is a full citation of Lord Neuberger’s comments at para [52] of Ladele, which I expressed grave concerns about in my previous paper. It seems this paragraph is going to continue to exercise a significant influence on future decisions in this area. As I pointed out, however, it is at almost every point a denial of the importance that has to be given under UK law,

4 There seems to be something of an apparent inconsistency here, in that presumably Mr McFarlane also believes that heterosexual intercourse outside marriage is sinful (though this does not appear from the various reports.) However, perhaps the view could be taken that couples could be counselled on appropriate heterosexual behaviour without endorsing its morality, but that any involvement in homosexual behaviour would amount to endorsing its legitimacy.

5 Ladele v London Borough of Islington [2009] EWCA (Civ) 1357. See my comment on the Ladele case and another case in the paper referred to above, at n 1.

6 Lord Carey’s witness statement (which can be viewed as a whole at http://timescolumns.typepad.com/gledhill/2010/04/carey-warns-of-civil-unrest-over-dangerous-antichristian-rulings.html) concludes with the following words: “The Judges engaged in the cases listed above should recuse themselves from further adjudication on such matters as they have made clear their lack of knowledge about the Christian faith.” The decisions referred to included the Ladele decision in the Court of Appeal.

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and the European Convention on Human Rights, to the exercise of freedom of religion. It assumes that “religion” is only concerned with attending worship services. It allows a policy decision to avoid “discrimination” as a general aim by a body, to over-ride the freedom of religion of employees where that freedom would have no practical impact on the enjoyment of rights by persons who are alleged to be discriminated against.

In this sense Ladele is indeed similar to McFarlane, and the cases are equally wrong. In the Ladele case there was no evidence at all that any same sex partners had been disadvantaged by Ms Ladele’s unwillingness to participate in registration- there were more than enough other officers who could have done the work, and no complaint was made about increased workload by other officers. In McFarlane there is no evidence that any same-sex couples who needed help were refused such help because of Mr McFarlane’s stance.

Yet just as the Council’s policy in Ladele was regarded as sufficient justification for dismissing Ms Ladele, here the general non-discrimination policy was held to be sufficient ground for dismissing Mr McFarlane, with no evidence of harm to anyone.

The decision would no doubt have rested there had it not been for Lord Carey’s comments. Laws LJ chooses to respond to the statement, partly at least on the ground that he takes it that reveals, as he says at [16], a “misunderstanding of the law”.

In what way, then, do Lord Carey’s comments misunderstand the law? One aspect of this misunderstanding is that he paints decisions of the court that find that there is “discrimination” as equivalent to a finding of disreputable behaviour and bigotry. He then charges that the courts are wrongly accusing Christians in general of being bigoted.

This, it must be said, is an odd stance. It is especially odd given that the decisions being complained about are not decisions where Christians are found to have “discriminated” as a matter of law, but decisions where tribunals have ruled that Christians themselves have not been discriminated against. Perhaps his Grace’s view is that the reasons Christians have been failing in their claims is that they themselves are viewed as behaving in a discriminatory fashion. But this is not really the way that the decisions have been expressed.

So Laws LJ is correct to remind Lord Carey at para [19] that, in effect, “discrimination” is a legal construct, and that a finding of discrimination (particularly the complex issue of indirect discrimination) does not mean that such conduct “falls to be condemned as disreputable or bigoted”.

But Laws LJ goes on into much deeper waters when he engages with what he sees as a call from Lord Carey to support the doctrines of the Christian faith as such. It must be said that Lord Carey’s statement does indeed move in this direction at some points. At para 12 of his statement (quoted in para [17] of the judgment of Laws LJ) he says that “the highest development of human spirituality is acceptance of Christ as saviour and adherence to Christian values.” This is clearly an affirmation of Christianity as the preferable religion.

But in the rest of the statement Lord Carey is not really urging that members of the judiciary support the Christian faith as such; he is instead saying that recent decisions have, in his view, flowed from a misunderstanding of Christianity, and he even points out that it is likely that judges may well be even more mistaken about religions other than Christianity. (That, at any rate, is how I
read his comment at para 18 of his statement that “it is difficult to see how it is appropriate for other religions to be considered by the Judiciary where the practices are further removed from our traditions”.

The response of Laws LJ, however, is to the perceived claim that the judges ought to give preference to Christianity. In doing so his Lordship correctly points out the difference between the law protecting Christians’ “right to hold and express a belief” on the one hand, and on the other hand “the law’s protection of that belief’s substance or content”. In his Lordship’s view, the legal system cannot weigh in on the side of one faith or another.

With respect, this is perfectly reasonable. But it is a matter of concern that his Lordship felt it necessary to support his view of the “even-handedness” of the legal system, not (as could have been done) by reference to convention obligations or general principles of religious freedom, but by some offensive comments denigrating religion in general.

His Lordship’s remarks at [23]-[24] are worth noting:

23... But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be true; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice he accepts its claims.

24 The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary.

What is deeply offensive and concerning about these comments are that they were completely unnecessary for resolution of the issues in this decision, or indeed even for a calm and measured response to Lord Carey’s somewhat unwise comments. Far from simply maintaining a position of even-handedness on the merits of a religious point of view as opposed to a “secular”, his Lordship brings the full force of his office to bear in favour of a secularist perspective. All religious faith, of whatever description, is written off as worthy of any serious consideration, because it is “subjective”. It is “incommunicable”, not susceptible of “any kind of proof or evidence”. In other words, for the law to support such a view is “irrational”.

It is not entirely clear how Laws LJ has arrived at his view that all religion is subjective and not based on evidence. Is this now to be regarded as a matter of judicial notice? Is this a matter on which it would be possible to offer evidence? Suppose there were a religion that presented the claims of its founder by the early preachers producing evidence that he had risen from the dead;7 whose proponents went about in an attempt to “persuade” and “reason” with others;8


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where the founding documents of that religion indicated that if a particular historical event were found on analysis not to have happened, then the religion would be “in vain”? But perhaps this would not be sufficient to convince his Lordship, who seems effectively to “define” religious faith as completely a matter of private and incommunicable opinion.

It should perhaps be stressed that the present author agrees with the sentiment that the law of a modern “secular” state should not weigh in to support one faith as against another. In that sense Lord Carey’s comments are misconceived. But this is a view that can be supported as a matter of public policy, not because all religions are wrong (which is what Laws LJ’s views come down to, despite his attempt to preserve an illusion of even-handedness by the off-handed comment that “it may of course be true”), but because all religions should have a level playing field to present the arguments that they choose to make to persuade others of the validity of their position.

In the end, as his Lordship says, Mr Macfarlane’s case was decided the way it was because it was not relevantly different from the Ladele decision. For reasons put forward in my earlier paper, my view is that the Ladele decision is wrong, because it does not properly conduct the analysis of whether the action of dismissal is “proportionate” to the purely “internal” harm suffered by a body when some of its members do not share all its values. Unless members of the public are actually denied services they should be able to expect from a firm or government body, this sort of harm should not outweigh the interests of employees in being able to do their work while not violating their conscientiously held religious beliefs. While Lord Carey’s remarks are not all well-founded, one aspect of his Grace’s concerns is a reality- that if policies of this sort continue to be applied, conscientious Bible-believing Christians will be excluded from more and more areas of employment. In the end, it seems fairly clear that this will be to the detriment, not the benefit, of society at large.

Neil Foster

Senior Lecturer

Newcastle Law School

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9 1 Corinthians 15:12-19.