

## CASE COMMENTARY

# TOWARDS THE REASONABLE ACCOMMODATION OF RELIGIOUS FREEDOM

*Mba v Mayor and Burgesses of the London Borough of Merton* [2013] EWCA  
Civ 1562

*Peter Smith\**

## SUMMARY

The Court of Appeal's decision in Mrs Mba's case is notable because: (a) it rejects the qualitative evaluation of her Sabbatarian belief as a "core component" of Christianity in assessing for the purposes of domestic anti-discrimination legislation the proportionality of her employer's requirement for her to work Sundays; (b) it continues to keep minimal the size of the group required to show group disadvantage; and (c) per Elias LJ and Vos LJ, it finds the assessment of group disadvantage to be incompatible with Article 9 when the ECHR is engaged. The case represents the continued move from a group to an individual focus, and is welcome: it better protects personal religious freedoms. The logical conclusion is for domestic law to oblige employers to reasonably accommodate religious rights via a *sui generis* legal mechanism.

## INTRODUCTION/CASE SUMMARY

Celestina Mba worked as a care worker in a children's home, the Brightwell. She was rostered by her employer, the London Borough of Merton, to work on Sundays, in line with her contractual obligations of employment. She did not wish to work on Sundays for reasons connected to her religious beliefs as a Baptist Christian. After a final written warning (against which she unsuccessfully appealed) Mrs Mba resigned from her employment. She subsequently brought a claim alleging constructive unfair dismissal and discrimination against the council.<sup>1</sup>

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<sup>1</sup> *Mba v Mayor and Burgesses of the London Borough of Merton* [2013] EWCA Civ 1562.

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An employment tribunal concluded that although indirect discrimination<sup>2</sup> had occurred on the grounds of her religion, the policy, criterion or practice (PCP) applied by her employer in compelling her to work on the Sabbath was justified as a proportionate means of achieving a legitimate aim, the provision of round-the-clock care to disabled and other children at Brightwell.<sup>3</sup> It noted that:

“[W]e also need to weigh in the balance the discriminatory impact of the PCP upon [Mrs Mba]. We accept that the PCP impacted on her genuinely and deeply held religious belief and observance...However, in terms of the degree of disadvantage to her, we bear in mind the following particulars:

- (i) [The council] did make efforts to accommodate her in this respect for two years;
- (ii) [The council] was in any event prepared to arrange the shifts in a way that enabled her to attend church to worship each Sunday; and
- (iii) Her belief that Sunday should be a day of rest and worship upon which no paid employment was undertaken, whilst deeply held, is not a core component of the Christian faith... As much is as accepted in terms as... Bishop Nazir-Ali’s witness statement..., where he states that some Christians will not work on the Sabbath. To approach the matter in this way does not involve a secular court impermissibly adjudicating in evaluative terms upon religious beliefs..., as opposed to simply proceeding on the basis of evidence before it as to the components of the Christian faith.”

The Court of Appeal, in assessing the tribunal’s reasoning on proportionality, considered the first two of the factors cited by the tribunal as irrelevant, and deemed its reasoning an error of law in relation to the third: whether not working on a Sunday was a “core component” of Mrs Mba’s

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<sup>2</sup> Direct discrimination was not an issue.

<sup>3</sup> Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 3 reads: ‘(1) For the purposes of these Regulations, a person (‘A’) discriminates against another person (‘B’) if — (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but — (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons, (ii) which puts B at that disadvantage, and (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.’

faith.<sup>4</sup> In doing so, it reversed the finding of the Employment Appeal Tribunal.<sup>5</sup>

The Court considered that the correct approach to weighing the employee’s religion or belief in a proportionality assessment – the exercise of balancing the discriminatory impact on a protected religious practice or belief against the objectives of an employer – is neither strictly qualitative (“evaluating how *important* the belief is, so that it may be described as ‘core’”) nor quantitative (“how *many* people who are adherent to the faith believe in that particular aspect or requirement of it”).<sup>6</sup> The bench was split, however, on the relationship between the two positions and whether the numerical popularity of a religion or belief assisted the employer or employee.

For Maurice Kay LJ, it was enough to ask whether a genuine religious belief was held by the claimant, following *R (Williamson) v Secretary of State for Education and Employment*.<sup>7</sup> Provided it was shared by “some”<sup>8</sup> Christians (a test in favour of the employer) then that was sufficient for group disadvantage under the reg 3(b)(i). There was no need to consider quantity for the purposes of the proportionality assessment under reg 3(b)(iii) as, in any case, the popularity of a belief cut both ways: a minority belief could be interpreted as more or less deserving of protection.<sup>9</sup>

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<sup>4</sup> The expert evidence of Bishop Michael Nazir-Ali was adduced to prove that, whereas many do not, some Christians follow closely the Fourth Commandment: ‘Remember the Sabbath day to keep it holy. Six days shalt thou labour, and do all thy work: But the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work.’: See *Mba* (n 1) [1], [13].

<sup>5</sup> *Ms C MBA v The Mayor and Burgesses of the London Borough of Merton* [2013] ICR 658. Material parts of the Employment Appeal Tribunal decision are cited therein.

<sup>6</sup> *Mba* (n 1) [16]; *Ms C MBA* (n 6) [48].

<sup>7</sup> [2005] 2 AC 246 (HL) [22] (Lord Nicholls): ‘When the genuineness of a claimant’s professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: “neither fictitious, nor capricious, and that it is not an artifice”...But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its “validity” by some objective standard such as the source material upon which the claimant founds his belief on the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.’; Quoted at *Mba* (n 1) [13]. Religion or belief is a wide category: see *Grainger plc and others v Nicholson* [2010] ICR (EAT) 360: where an Employment Appeal Tribunal held that beliefs about climate change could amount to a protected belief.

<sup>8</sup> *Mba* (n 1) [18].

<sup>9</sup> *Ibid* [19].

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For Elias LJ (with whom Vos LJ largely agreed),<sup>10</sup> the Court should engage in a more sophisticated analysis. If Article 9 of the European Convention on Human Rights (ECHR) was not engaged then the “extent”<sup>11</sup> of the discriminatory impact as part of group disadvantage was relevant in the proportionality assessment also.<sup>12</sup> Convention jurisprudence, by contrast, required no consideration of the group disadvantage of the discriminatory measure because of its focus on the rights and freedoms affecting one person: *Eweida v United Kingdom*.<sup>13</sup> In tandem with the claim for indirect discrimination, Article 9 was engaged (albeit not directly enforceable in the employment tribunal) ostensibly because the respondent was a public authority although also, following *Eweida*, because of the positive obligation to safeguard the religious freedom protected under Article 9.

Yet, because the concept of group disadvantage does not exist in Convention jurisprudence, Elias LJ recognised there was a problem: there was no way to read the requirements of the Convention and domestic legislation compatibly, as the Court was obliged to do.<sup>14</sup> His criticism was significant: discrimination law cannot be read down to “ignore the need to establish group disadvantage” under reg 3(b)(i) when Article 9 was engaged. Instead, he read “the concept of justification [reg 3(b)(iii)] compatibly with Article 9 where that provision is in play. In that context it does not matter whether the claimant is disadvantaged along with others or not, and it cannot in any way weaken her case with respect to justification that her beliefs are not more widely shared or do not constitute a core belief of any particular religion”.<sup>15</sup> He observed that “paradoxically, if a belief is not widely shared, which is more likely to be the case where it is not a core belief of a particular religion, that is a factor which under Article 9 is likely to work in favour of the employee rather than against”.<sup>16</sup>

Despite these errors, the Court declined to quash the employment tribunal findings against Mrs Mba, and she lost her case.

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<sup>10</sup> Ibid [39].

<sup>11</sup> Ibid [33].

<sup>12</sup> The relevant part of Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1950, art 9(2): ‘Freedom to manifest one’s religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society...for the protection of the rights and freedoms of others.’

<sup>13</sup> *Eweida v United Kingdom* (2013) EHRR 8 [79]-[84].

<sup>14</sup> Human Rights Act 1998, s 3(1): ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’

<sup>15</sup> *Mba* (n 1) [35].

<sup>16</sup> Ibid [36].

The Court's refocus on protecting individual religious practice or belief takes indirect discrimination in English law further away from the identification of the "core component" of an infringed religious practice or belief as part of assessing proportionality in the justification test as applied previously by the Court of Appeal in *Islington London Borough Council v Ladele*.<sup>17</sup> Yet reading the Court's decision in *Mba* is not a wholly satisfying activity. Although the 2003 Religion or Belief Regulations have been superseded by the Equality Act 2010, the problems inherent in assessing proportionality in any defence to a claim of indirect discrimination remain the same.<sup>18</sup> Any proportionality assessment of the numbers of adherents to the religion or belief can assist either the employer or employee. The decision in *Mba* still leaves open the precise number of adherents – the meaning of "some" or "a few" – needed to satisfy the group disadvantage test under reg 3(b)(i): as the Employment Appeal Tribunal (EAT) has noted, there is "no consensus in law as to how large (or small) this cohort of others or 'group' must be in order to suffice".<sup>19</sup> Courts remain keen to refrain from evaluating the theological or philosophical importance of a religion or belief.

United Kingdom (UK) equality laws remain "extremely complex" in the view of at least one specialist.<sup>20</sup> To a certain extent, English discrimination law is stuck in a conceptual rut. Rather than adjudicating fairly between competing interests and protecting diverse values and freedoms, it has the potential to act as an expensive fetter on private enterprise and the public sector alike without reaching equitable decisions. Given these difficulties, what course should English law now take to protect religious rights and balance the needs of employers against those of employees?

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<sup>17</sup> [2010] 1 WLR 955 (CA) [52] (Neuberger MR); *Mba* (n 1) [15]: where the claimant's view of marriage was considered 'not a core part of her religion'.

<sup>18</sup> See Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc L J 280, 297 for criticisms of proportionality as applied in both contexts.

<sup>19</sup> *Chatwal v Wandsworth Borough Council* [2011] Eq LR 942 (EAT) [25]-[27]. See also Sir James Dingemans, Can Yeginsu, Tom Cross and Hafsa Masood, *The Protections for Religions Rights: Law and Practice* (OUP 2013) [6.76]-[6.82].

<sup>20</sup> Gay Moon, 'From Equal Treatment to Appropriate Treatment: What Lessons Can Canadian Equality Law on Dignity and on Reasonable Accommodation Teach the United Kingdom?' (2006) 6 EHRLR 695, 695.

## THE PROBLEMS WITH ANTI-DISCRIMINATION MEASURES DERIVED FROM EU LAW

In a recent speech at Yale Law School, the Deputy President of the UK Supreme Court, Baroness Hale of Richmond, spoke about the clash between measures prohibiting discrimination on the grounds of religion and measures prohibiting discrimination on the grounds of sexual orientation.<sup>21</sup> She distinguished two types of cases: those when Christian believers assert their beliefs against their employers or the State and with “no competing equality right in play”, as in Mrs. Mba’s case,<sup>22</sup> and those where the manifestations of their beliefs cause Christians to deny goods or services from people on their grounds of their sexual orientation.<sup>23</sup>

Most of these cases fall under UK anti-discrimination provisions created directly as a consequence of European Union (EU) law, especially the general principle of equal treatment embodied in the Framework Directive on Equal Treatment in Employment and Occupation<sup>24</sup> and the subsequent package of domestic legislation. For instance, the 2003 Sexual Orientation Regulations<sup>25</sup> created mirror protections to the 2003 Religion or Belief Regulations, and both religion or belief and sex and sexual orientation are, alongside age, race, etc. “protected characteristics” under the Equality Act 2010.<sup>26</sup> The prohibition

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<sup>21</sup> Lady Hale, ‘Religion and Sexual Orientation: The Clash of Equality Rights’ (*Comparative and Administrative Law Conference*, 7 March 2014) <[www.supremecourt.uk/docs/speech-140307.pdf](http://www.supremecourt.uk/docs/speech-140307.pdf)> accessed 10 May 2014.

<sup>22</sup> Gibson in Matthew Gibson, ‘The God “Dilution”? Religion, Discrimination and the Case for Reasonable Accommodation’ (2013) 72 CLJ 578, 585-6 divides this category into two further sets: cases concerning the employee’s wish to modify personal appearance in accordance with their religion or belief, and cases relating to the conflict between an employee’s obligation to attendance religious observance ceremonies and their scheduled work duties. The only ‘relevant appellate UK anti-discrimination judgment’ he could find in the latter category is *Mr N Cherfi v G4S Security Services Ltd* [2011] WL 11519 (EAT), which only shallowly considers the proportionality exercise.

<sup>23</sup> Perhaps best known example of the latter is *Bull and another v Hall and another* [2013] UKSC 73, where the Bulls – Christian hoteliers who refused a double-bedded room to same-sex civil partners on the grounds of their blanket policy to let double accommodation to heterosexual married couples only – were found to be directly discriminating against Mr Hall and Mr Preddy.

<sup>24</sup> Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation.

<sup>25</sup> Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661.

<sup>26</sup> ‘Protected characteristics’ defined at Equality Act 2010, ss 4-12 and in s 19(3) in relation to indirect discrimination.

of indirect discrimination in the 2010 Act is very similar to that in reg 3 and it carries over the ambiguous language of group disadvantage and proportionality.<sup>27</sup>

As shown in *Mba* through the differing approaches of Maurice Kay LJ on the one hand and Elias and Vos LJs on the other, domesticated EU law (in the form of the 2003 Religion or Belief Regulations) sit uncomfortably with the jurisprudence of Article 9. This comes in part from three differences drawn by Lady Hale between the two legal systems in their protection for religious rights.<sup>28</sup>

Firstly, their contrasting spheres of operation. Through Article 14, the Convention protects against discrimination on the basis of rights protected therein. These rights are only enforceable vertically, against the State, unless the State has a positive obligation to ensure respect for a Convention right by private persons (as it does in regards to Article 9), an exception rather than the norm.<sup>29</sup> EU law covers largely<sup>30</sup> employment, occupation and training, as these are all part of establishing the common market in labour, but in both the private and public sectors.<sup>31</sup>

Secondly, EU law defines and protects fewer characteristics than the ECHR, and the ECHR list is non-exhaustive: “all sorts of things have been

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<sup>27</sup> Equality Act 2010, s 19: ‘(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s. (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if —(a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.’

<sup>28</sup> *Ibid* ss 4-5.

<sup>29</sup> ECHR (n 13) art 14: ‘Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

<sup>30</sup> See Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; for instances where the provisions of some goods and services are covered. The corresponding domestic legislation goes consistently further than EU law because it protects against discrimination in the supply of goods and services too.

<sup>31</sup> This situation will change when the EU Charter of Fundamental Rights becomes fully effective. Given its uncertain status in the UK, it is outside the scope of this analysis.

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recognised under the ‘other status’ rubric, including where you live or the character of your sentence of imprisonment.”<sup>32</sup>

Finally, EU and Convention jurisprudence take different approaches to justification. EU law distinguishes between direct and indirect discrimination and allows justification of the latter only – although identifying the species of discrimination can, as Lady Hale observed, be a fraught process.<sup>33</sup> The Convention also recognises both forms of discrimination but either may be justified if a proportionate response to a legitimate aim.<sup>34</sup>

Lady Hale’s view is that the Convention approach is “preferable” to the EU approach given the lack of a general defence of justification in the latter, which precludes courts and tribunals from “addressing the real issues” in discrimination cases such as legitimate aim, rational connection and the proportionality of a *prima facie* discriminatory measure. The exercise of distinguishing direct and indirect discrimination is, in effect, to distract the court from the real exercise at hand, *viz.* the administration of justice.

She suggests a new approach to claims like Mrs Mba’s. “[I]nstead of all the technicalities which EU law has produced, would it not be a great deal simpler if we required the providers of employment, goods and services to make reasonable accommodation for the religious beliefs of others? We can get this out of the ECHR approach but not out of our anti-discrimination law (although it is well established there in relation to disability).”<sup>35</sup>

Mrs Mba’s case, it is submitted, incrementally takes English law in that direction by blending Convention and EU law, by watering down group disadvantage for the purpose of reg 3 (and thus the 2010 Act), and by narrowing the factual inquiries in the assessment of proportionality. Especially where no other protected characteristic is in conflict, the reasonable accommodation approach provides a simpler solution, and one that, when the facts of Mrs Mba’s case, provides a fairer outcome. It is an idea whose time has come.

### **THE REASONABLE ACCOMMODATION OF RELIGIOUS RIGHTS: AN ALTERNATIVE APPROACH**

The reasonable accommodation of religious rights has emerged from numerous sources, including international jurisprudence (particularly in North

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<sup>32</sup> *Ibid* s 4.

<sup>33</sup> *Bull* (n 24) and the similar case of *Black and Morgan v Wilkinson* [2013] EWCA Civ 820; both following *James v Eastleigh Borough Council* [1990] 2 AC 751 (HL).

<sup>34</sup> Such justifications being ‘prescribed by law and are necessary in a democratic society’, as eg in ECHR (n 13) art 9(2).

<sup>35</sup> *Ibid* art 18.

America and the Strasbourg court) and academic discourse.<sup>36</sup> It draws on the concept of “reasonable adjustment” in disability law<sup>37</sup> as Lady Hale herself observed and has been suggested by the UK’s Equalities and Human Rights Commission<sup>38</sup> as a viable mechanism. As far back as 2000, the Hepple Report proposed that a duty of reasonable adjustment should be extended to religion or belief<sup>39</sup> and the notion has received the more recent blessing of a range of

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<sup>36</sup> Kristin Henrard, ‘Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality’ (2012) 5 Erasmus LR 59; Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, ‘Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?’ (2010) 17 MJ 137; Vickers (n 19); Moon (n 21); Gibson (n 23).

<sup>37</sup> Equality Act 2010, ss 20-2 requires employers and providers of goods and services to make ‘reasonable adjustments’ to accommodate the needs of people with disabilities. This means that an employer must make sure that a person with disabilities has the same access, as far as is reasonable, to everything that is involved in getting and doing a job that a person without disabilities has.

<sup>38</sup> Equality and Human Rights Commission, ‘Religion or Belief in the Workplace: A Guide for Employers Following Recent European Court of Human Rights Judgments’ (Commission, 2013)

<[www.equalityhumanrights.com/sites/default/files/documents/RoB/religion\\_or\\_belief\\_in\\_the\\_workplace\\_a\\_guide\\_for\\_employers.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/RoB/religion_or_belief_in_the_workplace_a_guide_for_employers.pdf)> accessed 10 June 2014: ‘The Equality and Human Rights Commission supports individuals’ right to freedom of thought, conscience and religion, and to conditional protection of the right to express religion or belief. It seeks to promote a balanced approach to recognising and managing religion or belief issues at work and to help employers and employees find reasonable solutions, wherever possible, and avoid complex, costly and damaging litigation. It is in the interests of all parties to try to find reasonable solutions through discussion, mutual respect and, where practical, mutual accommodation.’ The EHRC encourages employers ‘to take as their starting-point consideration as to how to accommodate the request unless there are cogent or compelling reasons not to do so, assessing the impact of the change on other employees, the operation of the business and other factors outlined below.’ Such factors include the cost, disruption and wider impact on business or work if the request is accommodated, whether there are health and safety implications for the proposed change, the disadvantage to the affected employee if the request is refused, the impact of any change on other employees, including on those who have a different religion or belief, or no religion or belief, the impact of any change on customers or service users, and whether work policies and practices to ensure uniformity and consistency are justifiable...

<sup>39</sup> Bob Hepple, Marry Coussey and Tufyal Choudhury, *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart 2000) 49, recommendation 21. The Report was the forerunner to the

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religious and secular opinion-formers.<sup>40</sup> Moreover, it already exists as an embryonic concept in the context of religious rights exercised in employment situations, thanks to the Court of Appeal in *Copsey v WBB Devon Clays Limited*<sup>41</sup> and Lady Hale's judgment in *Bull and another v Hall and another*.<sup>42</sup> The Strasbourg court, too, has begun fashioning a right to reasonable accommodation as a way of achieving a legitimate aim that is least restrictive of rights and freedoms.<sup>43</sup>

Some commentators argue that there is no need for reasonable accommodation of religion or belief in EU law because the justification test for indirect discrimination already includes a duty to so.<sup>44</sup> However the point here is that, whatever its basis, whether reasonable accommodation is part of direct or indirect indiscriminate law or in fact a third sui generis legal mechanism, Mba's case shows how its reasoning is penetrating UK anti-discrimination jurisprudence.

What does a reasonable accommodation test look like? The most developed model for a reasonable accommodation approach is that found in Canada.<sup>45</sup> It is rooted in the 1982 Canadian Charter of Rights and Freedoms<sup>46</sup>

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general attempt to consolidate anti-discrimination measures in one Act, as was done in the Equality Acts 2006 and 2010.

<sup>40</sup> See the multiple contributors to the Christians in Parliament Adrian Hilton, Alec Bounds and All S Fitzwarren, 'Clearing the Ground' (2012) <[www.eauk.org/current-affairs/publications/upload/All-Contributors-CTG.pdf](http://www.eauk.org/current-affairs/publications/upload/All-Contributors-CTG.pdf)> accessed 10 June 2014; Prakash Shah, 'Asking About Reasonable Accommodation in the Context of Religious Universalism' (*Queen Mary University of London*, 2013) Queen Mary University of London, School of Law Legal Studies Research Paper 134/2013, 1 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243375](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243375)> accessed 20 August 2014.

<sup>41</sup> [2005] EWCA Civ 932 [71] (Rix LJ): 'It seems to me that it is possible and necessary to contemplate that an employer who seeks to change an employee's working hours so as to prevent that employee from practising his sincere adherence to the requirements of his religion in the way of Sabbath observance may be acting unfairly if he makes no attempt to accommodate his employee's needs.' Also at para 72: 'It seems to me that if respect for the right to manifest one's religion is to have meaning in a democratic society, it is not possible to say that an employer who, in the given situation, would simply ignore any need to seek a reasonable accommodation would be acting fairly.'

<sup>42</sup> *Bull* (n 24) [45]-[51].

<sup>43</sup> *Francesco Sessa v Italy* App no 28790/08 (ECtHR, 3 April 2012).

<sup>44</sup> Erica Howard, 'Reasonable Accommodation of Religion and Other Discrimination Grounds in EU Law' (2013) 38 E L Rev, 360.

<sup>45</sup> Moon (n 21); Briobosia (n 37) 144-50; Gibson (n 23) 593-7.

<sup>46</sup> Canadian Charter of Rights and Freedoms 1982, ss 1, 15.

and 1985 Canadian Human Rights Act.<sup>47</sup> In outline, once a religious belief has been identified, as in English law it must be recognised as sincere<sup>48</sup> and must be the basis of the discrimination complained of. Employers are obliged to protect their employees' religious rights without "undue interference" in those rights.<sup>49</sup> Any discriminatory measure is subject to a now standard test. The employer must show, on the balance of probabilities, "(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose."<sup>50</sup>

Lest this balancing act result in the scales of justice becoming stuck in the middle, the key to the Canadian model is that "to show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer."<sup>51</sup>

Factors to be taken into account in assessing "undue hardship", in a non-exhaustive list, include financial cost, any disruption of a collective agreement, morale problems for other employees, the inter-changeability of workforce and facilities, the size of the employer, and safety.<sup>52</sup>

It is noticeable how high a threshold the employer faces to justify his discriminatory measure: it must be *impossible* to accommodate individual employees without undue hardship on the part of the employer. By comparison, in the United States the reasonable accommodation hurdle is set extremely low: undue hardship in federal law<sup>53</sup> means, in the context of

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<sup>47</sup> Canadian Human Rights Act 1985, s 2 mandates that 'all individuals should have an opportunity to equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered or prevented from doing so by discriminatory practices based on...religion...'

<sup>48</sup> Lord Nicolls in *Wilkinson* (n 34) was quoting a Canadian case.

<sup>49</sup> *Ontario Human Rights Commission (O'Malley) v Simpson Sears* [1985] 2 SCR 536 [23] (Mr Justice McIntyre).

<sup>50</sup> *British Columbia (Public Service Employee Relations Comm) v BCGEU* [1999] 3 SCR 3 [54] (Justice McLachlin).

<sup>51</sup> *BCGEU* (n 51) [54] (Justice McLachlin): 'The elevated standard is not to give undue recognition to religious interests; rather, it is to force courts to engage with all the relevant issues so as to resolve whether, and if so how far, an accommodation should have been made.'

<sup>52</sup> *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 SCR 489.

<sup>53</sup> Civil Rights Act 1964, Title VII 42 USCC 21 701(j).

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religious discrimination, “more than a *de minimis* cost” on the part of the employer.<sup>54</sup>

One of the principal benefits of the Canadian model is that the balancing of reasonable accommodation can happen at both an individual and group level without the cumbersome procedure in reg 3, and is therefore much more like Lady Hale’s current preference in the Convention. All three Lord Justices in *Mba* were concerned to move away from the need to consider the numbers of adherents holding a particular belief. They sought to be sensitive to “the diversity of beliefs between and within religions, which flows from the respect that is accorded to the range of sincerely held religious beliefs.”<sup>55</sup> The reasonable accommodation test clearly places the burden of proving the impossibility of accommodation onto the shoulders of the employer and removes the need for the employee to adduce evidence of other employees affected.

Whereas the first three limbs of the test allow broad application to a wide variety of factual matrices, the factors to be taken into account when evaluating undue hardship mean that the case law is ultimately narrower and more structured, giving more security and certainty to employers and employees alike. The reasonable accommodation test is squarely presumptive in favour of the employee, unlike the proportionality test which always begs the question, “proportionate to what?”, and thus tends towards obliging employers to make the minimum effort not to disadvantage the employee. In doing so, reasonable accommodation moves the analysis from individuals and their characteristics to the context or environment in which they exist, and sharpens the focus of the exercise onto the dignity and autonomy of the worker. It points towards substantive equality in the workplace, where employees are aided in their pursuit of moral needs, rather than a bland or formal equality that is the by-product of desiccated legal reasoning.<sup>56</sup>

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<sup>54</sup> *Trans World Airlines v Hardison* (1977) 432 US 63; On US reasonable accommodation: *Bribosia* (n 37) 139-44; *Gibson* (n 23) 596.

<sup>55</sup> *Mba* (n 1) [14] with emphasis in original.

<sup>56</sup> *Bribosia* (n 37): ‘Reasonable accommodation is based on a fundamental observation: some individuals, because of an inherent characteristic they have, such as disability or religion, are prevented from performing a task or from accessing certain spaces in conventional ways. Since society is organised primarily on the basis of people who do not share those traits, the former may be unable to access employment, services, or other activities. Hence, the interaction between an individual’s characteristics and the physical, social or normative environment ultimately deprives him/her of the advantages of an employment or of a service which, in principle, should be open to everyone.’

The reasonable accommodation test is admittedly not without its downsides, none of which are insurmountable hurdles.<sup>57</sup> On its own, a positive obligation to accommodate religion or belief would potentially create privilege over other protected characteristics (except, as the law currently stands, for disability). But this is an argument for extending reasonable accommodation to all protected grounds. As Lady Hale explained in both her lecture and judgment in *Bull*, the reasonable accommodation test does not necessarily assist Christians who deny the provision of goods and services to others.<sup>58</sup> Whilst it may be tempting to limit reasonable accommodation to Lady Hale’s first category of cases and not the second (thus sidestepping the “clash” of equalities Regulations)<sup>59</sup> that would still leave a large area of law open to be considered under the existing and unsatisfactory indirect discrimination mechanism.<sup>60</sup> It is possible that there may be religions or beliefs which qualify for protection even though they may be reasonably thought of as pernicious, and it is unclear (following *Nicholson*) whether political beliefs would fall within the protections – yet both of these criticisms are true of the legal status quo.

Moreover, the reasonable accommodation test sharpens scrutiny on the practical, real relationships between employer and employee, and does not dress this balance up in abstractions. As Lady Hale put it when advocating the Convention approach over the EU law approach, “Courts and tribunals have a natural eye for what they see as the merits of the case. If they think that there is a good reason for a difference in treatment they will try and find a reason why it is not unlawful.”<sup>61</sup> The reasonable accommodation test gives more latitude to apply that “natural eye” and, in doing so, it points in spirit towards an objective assessment of competing interests. It thereby takes the sting out of Laws’ LJ remark that “[t]he 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

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<sup>57</sup> Gwyneth Pitt, ‘Taking Religion Seriously’ (2013) 42 ILJ 398, 405-6; Aileen McColgan, ‘Class Wars? Religion and (In)equality in the Workplace’ (2009) 38 ILJ.

<sup>58</sup> *Smith and Chymyshyn v Knights of Columbus and Others* (2005) BCHRT 544 and *Eadie and Thomas v Riverbend Bed and Breakfast and Others* (No 2) (2012) BCHRT 247, both cases before the British Columbia, Canada, Human Rights and broadly analogous to *Bull* (n 24) and *Black* (n 34).

<sup>59</sup> *Bull* (n 24); *Black* (n 34); *R (Core Issues Trust) v Transport for London (Secretary of State for Culture, Media and Sport and Minister for Women and Equalities Intervening)* [2014] EWCA Civ 34.

<sup>60</sup> See Gibson (n 23).

<sup>61</sup> *Ibid* 5.

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compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion”.<sup>62</sup>

So, if the Canadian model were applied to Mrs Mba’s case, would the outcome have been any different?

### **REASONABLE ACCOMMODATION APPLIED TO MRS MBA’S CASE**

The EAT distilled the background to the council’s policy of contractually obliging staff to work on Sundays as follows. Brightwell provided an important community care function which required continuity of care “insofar as possible”, as a lack of such continuity increased the risks of significant behavioural changes in children going unnoticed. National standards required minimum levels of staffing experience and provision for both male and female workers at all times. There were set patterns for daily shifts and weekly and monthly rotas which provided alternative 24-hour cover by three (or sometimes four) members of staff, which Brightwell’s management were adamant that it was “not possible to alter”. There were only five full-time members of staff when Brightwell was established for nine personnel; agency and locum staff were hired as necessary, but this was a more expensive option, especially for weekend cover. Mrs Mba’s employment contract included the duty of working on occasional Sundays.<sup>63</sup>

The EAT summarised the tribunal’s findings on the council’s legitimate aim in its policy of “ensuring (a) an appropriate gender balance on each shift, (b) an appropriate seniority mix on each shift, (c) a cost-effective service in the face of budgetary constraints, (d) fair treatment of all its staff, and (e) continuity of care in staff looking after the children at the Brightwell”.<sup>64</sup>

The council also submitted (in their internal appeal process) that it was “concerned about the impact of continuing on a permanent basis to accommodate [Mrs Mba’s] request not to work Sundays. It limited flexibility. It affected other staff. They would have to cover Sunday shifts disproportionately, and it would reduce their opportunity to have a full week’s leave. It was more costly to the council. It provided less well-trained staff, since agency staff would have to cover and they were less well trained. Thus the quality and continuity of service to children with disabilities would not always be so high.” The more limited use of agency and locum staff was also sought by the council. The conclusion was that “[w]here possible, requests in

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<sup>62</sup> *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880 [21].

<sup>63</sup> *Ms C Mba* (n 6) [4]-[8].

<sup>64</sup> *Ibid* [18].

respect of faith days would be accommodated but specific days off as a matter of routine could not...be accommodated.”<sup>65</sup>

Mrs Mba’s claim to religious freedom in respect of her Sabbatarian belief was in the context that she had a sincere belief that was worthy of respect, and that that belief was a manifestation of her faith that was a fundamental part of her autonomy and human dignity. More specifically, she suggested to the tribunal and EAT that there were ways the council could circumvent the problem: using agency or bank workers, recruiting an additional female permanent employee, scheduling one of two other female employees or an experienced locum to cover Sundays, or redeploying members from a related team in the council.<sup>66</sup>

Applying the arguments on both sides to the Canadian test, it is more likely than not that Mrs Mba’s case would have been decided differently and that her Sabbatarianism would have been reasonably accommodated. Although the council applied the obligation of Sunday working for a purpose rationally connected to the continued and smooth running of Brightwell, and that the council acted in an honest and good faith belief that the obligation was necessary for the fulfilment of that work-related purpose, it was less than likely that the obligation was reasonably necessary for that purpose. This is because, it is submitted, the council could not show that it would be impossible<sup>67</sup> to accommodate Mrs Mba without imposing undue hardship, for the following reasons.

- (a) Although the tribunal did not delve deeply into the council’s finances, the marginal financial cost of one additional employee to a London borough to cover Mrs Mba’s Sunday working is likely to be minimal (if not *de minimis*). The problem for the council was not the cost of employing a full-time member or members of staff, but in the extra expense of temporary and agency staff, which they were reluctant to employ.
- (b) Although the impact on staff morale was a concern, it is far from certain that it would have been impossible to ameliorate through proper and effective personnel management by the council. There is no competing protected characteristic that is mutually exclusive with Mrs Mba’s religious freedom. No collective agreement or other trade union compact was claimed to affect the council’s relationship with

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<sup>65</sup> *Ms C Mba* (n 6) [19].

<sup>66</sup> *Ibid* [21].

<sup>67</sup> See *Mba* (n 1) [24] for a stricter test than the remark of Maurice Kay LJ that there was ‘really no viable or practicable alternative way of running Brightwell effectively’.

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Mrs Mba. It was likely that, should Mrs Mba's case be resolved pragmatically in her favour, positive public relations would accrue to the council as a consequence.

- (c) There were clear arguments for interchangeability of staff, as Mrs Mba's counsel argued throughout, and several other reasonable options lay open to the council (albeit at varying levels of expense). The employer was a large entity with an associated "outreach" team which could have provided alternative staff cover.
- (d) So far as legal obligations on the employer were concerned, there was no evidence it would have been impossible to take accommodating steps without compromising safety. These measures could, in all likelihood, have been taken in such way as to comply with national minimum standards.
- (e) Mrs Mba had already been allowed to not work on Sundays for over two years, showing that a reasonable adjustment could be made to the council's staff roster and subsequently undermining the council's claim that it was "not possible to alter" staff shift patterns.

## CONCLUSION

There is always an uneasy dynamic in English law, as judges expand the scope of religious protections in some directions whilst narrowing them in others in response to cultural changes.<sup>68</sup> In the limited circumstances of Mrs Mba's case at least, it is time to move from the negative injunction – "do not interfere without justification in a protected right" – to the positive duty of reasonable accommodation.<sup>69</sup>

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<sup>68</sup> This is sharply shown in the changed attitude and protections given to the Church of Scientology between the Court of Appeal in *R v Registrar General, Ex parte Segerdal and Another* [1970] 2 QB 697 (CA) and the Supreme Court in *R (Hodkin and Another) v Registrar General of Births, Deaths and Marriages* [2014] AC 610 (SC), which redefined Scientology as a religion and thus allowed the registration of Scientology buildings as places for the valid conduct of marriage ceremonies. Lord Toulson pithily noted how cultural and normative change shaped the acceptability of Scientology as a form of religious worship (at [61]): 'In my view the meaning given to worship in *Segerdal* was unduly narrow, but even if it was not unduly narrow in 1970, it is unduly narrow now.'

<sup>69</sup> In a speech to the Law Society of Ireland on 13 June 2014, which largely re-iterated her comments at Yale, Lady Hale appeared to suggest that the right of reasonable accommodation could provide an overarching test that draw in and unified the many

This takes religious protections away from the “specific circumstances” defence used by employers, who argue that employees put themselves voluntarily in a position where their religious freedoms are curtailed. Employees who cannot square such restrictions with their conscience should quit and find another job – a particularly pernicious idea in a time of high unemployment and an ever more specialised labour market and one explicitly rejected by the Strasbourg court in *Eweida*.<sup>70</sup>

In an increasingly diverse society with more religions and beliefs finding legal protection, employers risk losing valued staff and employees risk becoming ostracised from mainstream employment, creating social silos as people congregate by creed in the workplace.

As a matter of public policy, this is very undesirable. Given the judicial push for a more individualised set of anti-discrimination religious protections and the complexities in contemporary anti-discrimination law, it is time for the reasonable accommodation of religious freedom to be revisited.

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‘different strands’ of protections for freedom of religion and belief. She also hinted that Mrs Mba’s case may yet be appealed to the UK Supreme Court. Lady Hale (n 22).

<sup>70</sup> *Eweida* (n 14) [83]: ‘Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.’