***God, secularism and freedom of expression for employees in the British National Health Service***

**Key words:** religion and belief; Equality Act 2010; religious symbols; religious speech; conscience; indirect discrimination

**Extended Abstract**

*The purpose of this paper is to consider the effects of legal restrictions, professional codes of conduct and internal job regulation on the freedom of staff with religious convictions to articulate these in the National Health Service, one of the largest employers in Europe and one where different staff groups are highly regulated by professional bodies as well as by employers.*

*The paper considers the issues from the perspective of employees with religious convictions. The relative freedoms and constraints on employees who wish to articulate their religious convictions are explored through a consideration of: the law (in particular, the relevant sections of the Equality Act 2010 and Article 9 of the European Convention on Human Rights); the General Medical Council and Nursing and Midwifery Council codes of conduct relating to expression of religion and belief; and Departmental guidance for NHS Trusts to assist them in policy making.*

*The effects of these in practice are then examined in two ways. The first involves a detailed consideration of four legal claims, three of which went forward to an employment tribunal and beyond. These cases all involved a religious claimant who had been refused permission to ‘manifest’ (or express) his or her religious beliefs at work, respectively through: (i) wearing a visible cross; (ii) using religious language in discourse with other staff; (iii) offering to pray for a patient; and (iv) engaging in religious conversations with a junior colleague with a view to making a conversion. The second involves an analysis of four interviews with: a Christian medical practitioner; a senior executive of a pressure group supporting Christian doctors; a senior executive of an organisation championing religious liberty; and a manager representing NHS employers.*

*The paper concludes that whereas some mild forms of ‘cultural’ religious expression (chiefly affecting dress codes) are tolerated in the NHS, in general the ‘religion’ is seen as a service to be provided discreetly by professionals (such as Chaplains) to those patients who specifically request it. Apart from that there appears to be a settled understanding, only partly articulated through the relevant policies and codes, that the NHS environment is a secular one. Attempts to challenge this involve the risk of official censure and even dismissal.*

*As legal challenges to this approach have been unsuccessful, it may be posited that the NHS is operating within the law (which, incidentally, it can be argued provides insufficient protection for potential claimants) but choosing to use any discretion it is afforded within the legal framework to suppress rather than encourage religious expression. It is noted that this is in many ways a curious situation, given that it is common ground in the NHS that spiritual health has a positive effect on health and well-being in general. It is further argued that these constraints are often unnecessary and a more inclusive and positive working environment would result from greater toleration, albeit within well-considered parameters.*

**Introduction**

A Christian NHS worker has been disciplined for 'bullying' a Muslim colleague by praying with her. Victoria Wasteney, an occupational therapist, was also condemned for inviting the woman to a sports day at her church. And a hearing found her guilty of a further count of misconduct: lending the colleague a book about a Muslim woman who converts to Christianity. The 37-year-old, who was suspended for nine months, has now been banned from discussing her faith at work and given a formal warning by East London NHS Foundation Trust that will remain on her record for a year.[[1]](#footnote-1)

This is a news report featured in the Daily Mail, and thus giving wide (and sympathetic) publicity to an employee who wished to communicate her religious faith to another employee, in this case through an offer of prayer and what Christians sometimes describe as ‘witnessing’ to (or attempting to convert) a non-Christian co-worker, and who suffered disciplinary sanctions from the employer as a result. This particular incident and its aftermath led to an employment tribunal claim (which will be examined later in the discussion).

It is this kind or situation (or analogous situations) which this paper considers. In what ways do employees in the NHS seek to manifest (or express) their religious beliefs? To what extent, for what reasons, and with what effect do NHS employers (and associated professional bodies) seek to impose restrictions? What role does the law play in determining the respective rights of both parties and which right should give way? In support of the discussion, the paper draws on published court and tribunal judgments, published newspaper accounts and four interviews, conducted with:

* a Christian medical practitioner;
* a senior executive of a pressure group supporting Christian doctors (Christian Doctors’ Leader);
* a senior executive of an organisation championing religious liberty (Religious Liberty Campaigner); and
* a manager representing NHS employers (NHS Employers Manager).

Attempts were made to widen the number of interviewees. However, given the perceived sensitivity of the subject matter, few potential participants were willing to fully commit themselves in this way.

**The nature of religious manifestation**

Commitment to religious beliefs varies by individual[[2]](#footnote-2) and sometimes adherence to religion is more accurately described as adherence to group or cultural mores or values.[[3]](#footnote-3) However, there are religious people who have a high degree of commitment to their religious beliefs *per se* and who feel compelled to act on these in various ways;[[4]](#footnote-4) they are often inspired to do so by injunctions from sacred texts or deeply held religious traditions. The facts of a number of tribunal cases, as well as empirical evidence, indicates that there are a number of employees in the British National Health Service who hold this level of commitment to their religious beliefs.[[5]](#footnote-5) This sense of compulsion to act (or not to act) in particular ways is often bound up with an individual’s conscience meaning that he or she may be considerably burdened if not permitted act in accordance with felt obligation.[[6]](#footnote-6)

Although religious belief can be held by an individual in unobtrusive ways it is also likely to break out in more obtrusive ways and so, in the language of the Article 9 (ii) of the European Convention on Human Rights (freedom of religion and belief), ‘manifest’ itself in a ‘visible’ way and one which may impact on others.Historically it has been argued that the workplace is not an appropriate forum to manifest religion, but there has been an increasing recognition that this is not a tenable position in principle.[[7]](#footnote-7) Committed religious believers do not put off religion as they might a coat and leave it at the door of the office.[[8]](#footnote-8) Instead, they seek to integrate their faith and their everyday lives, not making what might appear to them to be artificial distinctions between the work and non-work spheres.[[9]](#footnote-9)

Visible religious manifestation in the NHS may take a number of forms. Religious employees may wish to express their beliefs through: dress and grooming or the wearing of a particular religious symbol (such as a cross); by conscientiously objecting to an aspect of their job (e.g. to carrying out an abortion); or ‘religious speech’ (e.g. ‘witnessing’ to colleagues, or offering prayer to patients). What may either protect or constrain them from manifesting their religious beliefs however is the way in which such manifestation (and employers responses to it) might be regulated through the relevant legislative framework and the professional and internal job regulation within the NHS which overlays this.

**The Law**

The primary way in which religion and belief enjoy protection in domestic law in England, Wales and Scotland is through anti-discrimination legislation and its interpretation by employment tribunals and courts.[[10]](#footnote-10)Although discrimination law in employment dates back to 1968, it is only since the adoption by the European Union of the Framework Equality Directive in 2000[[11]](#footnote-11) that religion and belief have been covered by its various protections. This Directive was implemented into domestic law in stages, including through the adoption of the Employment Equality (Religion and Belief) Regulations 2003.[[12]](#footnote-12) The provisions of these regulations were consolidated into the Equality Act 2010.

Under the Equality Act there are a range of definitions of discrimination (or ‘prohibited conduct’). The key definitions for the purposes of this paper are: direct discrimination, indirect discrimination and harassment. These are set out and discussed in relation to religion and belief below.

*Direct Discrimination*

The definition of direct discrimination, according is as follows: ‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably because of a protected characteristic’.[[13]](#footnote-13)

Direct discrimination is a remedy for the more obvious forms of discrimination (i.e. where equality in its formal sense is denied to a current (or prospective) employee or worker because of his or her protected characteristic.[[14]](#footnote-14) Thus, a decision not to appoint someone because he is a Buddhist would mean that he has been treated unequally to others because of the protected characteristic of religion and in a way which means he has suffered a ‘detriment’ as a result. Traditionally, courts and tribunals have sought to identify a ‘comparator’ (real or hypothetical) in order to make a determination. [[15]](#footnote-15) Thus, in this example, a tribunal would ask itself the question, would a non-Buddhist in otherwise similar circumstances have been refused employment? If the answer is ‘no’, then direct discrimination will have been shown. Where direct discrimination is demonstrated, there is no employer justification defence available to respondents.

*Indirect Discrimination*

Indirect discrimination is defined as follows:

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.[[16]](#footnote-16)

The purpose of the doctrine of indirect discrimination is helpfully described by Lady Hale:

The law of indirect discrimination is an attempt to level the playing field by subjection to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic … . The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified … .[[17]](#footnote-17)

Applied to religion and belief, indirect discrimination therefore aims to provide a measure of protection where employers impose on their workforces a contractual requirement or works rule which is apparently neutral but which in reality has a significant and adverse effect on employees holding certain religious beliefs *and who wish to manifest them*. For example, if an employee imposed a dress code which prevented all staff from wearing jewellery without exceptions (thus a universal and general rule), this would not seriously burden most staff but would impose serious costs (‘particular disadvantage’) on, amongst others, those Sikh women who feel it is a religious obligation to wear a *Kara* bracelet. To avoid a successful indirect discrimination claim, the employer would then need to justify both its rule and, moreover, the general application of this rule in order to show that it represents ‘a proportionate means of achieving a legitimate aim.’ The role of the employment tribunal or court in such cases will be to test the employer’s argument and weigh up the interest involved to decide which over-rides the other. This is sometimes known as ‘proportionality balancing’.

The Employment Appeals Tribunal made it clear in *Azmi* v. *Kirklees MC* that manifestations of religion are most likely to find protection under indirect rather than direct discrimination provisions (albeit that it noted that this was not a universal truth).[[18]](#footnote-18) Thus, in considering the manifestation of religion in a workplace such as the NHS, it is this form of prohibited conduct which is likely to provide the most promising avenue of redress for religious claimants.[[19]](#footnote-19)

*Harassment*

Harassment is defined as follows:

1. A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B’s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.[[20]](#footnote-20)

The doctrine of harassment is intended to protect employees from suffering abuse or offence in the workplace on the grounds of a protected characteristic. Whether harassment has taken place is determined in large part by the perception of the individual who considers him or herself to be harassed; subject to a basic threshold of ‘reasonableness’,[[21]](#footnote-21) it is therefore a matter of individual perception.[[22]](#footnote-22) A single act is sometimes enough to constitute actionable harassment; however, in most cases this would not be sufficient. Fairness normally requires that the apparent harasser (‘Person A’) should know that his words or actions are offensive to Person B because of a protected characteristic. This may not be obvious to Person A, particularly if Person B’s religious beliefs are not known, but once it is known then the likelihood that ‘harassment’ is taking place is much greater.

Harassment on the grounds of religion could easily encompass giving offence to non-religious co-workers or co-workers of a different religious faith. The intention is not likely to be a deliberate attempt to cause offence – this is merely a potential by-product of a more worthy aim. The religious employee may well rather have an urgent concern for the spiritual well-being of co-workers and strongly desire to see them converted to the same religious faith. For this reason, the harassment provisions of the Equality Act can rightly be described as a double-edged sword, at once protecting religious employees from offense on the grounds of their religious beliefs, and at the same time punishing them for causing offence to others by virtue of those same beliefs.

*Unfair Dismissal*

In addition to the specific protection for religion under anti-discrimination law, religious employees may also benefit from the protections of more general employment legislation such as those under the Employment Rights Act 1996 which make it unlawful to ‘unfairly dismiss’ employees,[[23]](#footnote-23) and sets out expectations of substantive and procedural fairness in situations where dismissals do take place.[[24]](#footnote-24) As is well-known, in dismissals where the employee’s conduct is the reason, then employers must carry out an adequate investigation and follow a fair disciplinary procedure. Employers may dismiss employees but they must show that they have acted ‘within the band of reasonable responses.’[[25]](#footnote-25) If an individual is dismissed because of a protected characteristic (such as religion and belief) then that dismissal is considered ‘automatically unfair’.[[26]](#footnote-26)

*Conscience Clauses*

Outside of discrimination law, there are a small number of specific exemptions from certain workplace activities enshrined in particular statutes. Probably the most well-known and long-standing example is the clause in the Abortion Act 1967 which allows medical staff to refuse to participate in abortion procedures if they have a ‘conscientious objection.’[[27]](#footnote-27) This right of refusal was extended to embryo research in 1990[[28]](#footnote-28) and would have been extended to apply to assisted dying under a private members Bill introduced to Parliament in 2004.[[29]](#footnote-29) Where abortion is concerned, conscientious objection is not referenced to a religious or other form of belief. In fact, no grounds for this objection are specifically required, albeit that the burden of proof that a genuine objection exists rests with the medical practitioner.[[30]](#footnote-30) It is perhaps safe to assume that a large number of practicing members of religious faiths will be amongst those medical practitioners who avail themselves of this clause,[[31]](#footnote-31) but it is significant that it is the objection, not the motivation for the objection, which triggers the available protection.

*The European Convention on Human Rights (Article 9)*

The European Convention on Human Rights and Fundamental Freedoms (ECHR) was established in the aftermath of the Second World War to foster a culture of basic human rights which European nations would be encouraged to adopt. The United Kingdom became a signatory in 1951 meaning that the Convention is legally binding on the Government and any breaches of the rights contained therein can be appealed directly by individuals to the European Court of Human Rights in Strasbourg.[[32]](#footnote-32)

Furthermore, the Convention has been written into domestic law in the form of the Human Rights Act 1998. This Act allows individuals to bring claims in domestic courts where they consider that public authorities have infringed their Convention rights.[[33]](#footnote-33) As a result, in the workplace, public sector workers are able, theoretically, to bring a claim against their employers; employees of an enterprise in private may also do so where the organisation performs a public function.[[34]](#footnote-34) In addition, the Human Rights Act states that courts and tribunals are also public bodies,[[35]](#footnote-35) and so the ECHR also applies. The Act states that to the extent that ‘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.’[[36]](#footnote-36) Courts are thus required to take into account Convention rights when they interpret legislation, including of course, employment legislation.

Article 9 of the Convention states that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice or observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

As it deals explicitly with religion, Article 9 is the most significant Convention article for the purposes of this paper. As its text makes clear, Article 9 ECHR is a clear statement of the importance of religion and belief. It recognises this at two levels, respectively the *forum internum*[[37]](#footnote-37)and the *forum externum*.[[38]](#footnote-38)The *forum internum* refers to the right to hold a religious belief, identify with it and to worship with others. This enjoys absolute protection under Article 9(i). The *forum externum* encompasses forms of religious expression (or manifestation) which arise from a religious belief. Religious speech would be included in this category. The forum externum receives qualified protection only under Article 9(ii) as ECHR signatory states may impose restrictions on religious manifestation in a number of circumstances of which ‘the protection of the rights and freedoms of others’ is likely to be the most common reason for such a restriction. It used to be thought that Article 9 Convention rights did not apply in the workplace (because people voluntarily accept constraints when accepting a job role). However, as a result of the ruling in January 2013 in *Eweida and Ors* v. *United Kingdom,[[39]](#footnote-39)* it is now accepted that Article 9 rights do apply at work, although in practice this will not normally significantly affect the legal position in the United Kingdom due to the religious discrimination provisions of the Equality Act.

**Professional and Job Regulation**

In addition to being affected by discrimination and human rights law, staff who hold professional qualifications are often bound by ethical codes of practice which are issued by their respective professional bodies. These professional bodies in turn are often empowered to do so by secondary legislation.[[40]](#footnote-40) Some professional staff (notably medical doctors) can be called to account before disciplinary tribunals which can strip them of their right to practice their professions either temporarily or permanently.

Such codes of practice have been issued by, for instance: the General Social Care Council the General Medical Council (GMC); the Nursing and Midwifery Council (NMC); and the General Pharmaceutical Council. These codes sometimes make explicit reference to the personal religious beliefs of a professional practitioner and provide guidance setting out any restrictions on how these beliefs can be manifested.[[41]](#footnote-41) Other codes are less specific, however, in that they simply set out general guidelines on how commitment to the values of ‘equality’ and ‘diversity’ should affect professional practice;[[42]](#footnote-42) and these values could potentially have a negative impact on an individual’s religious values.

Relevant to some of the disputes around religious speech are the guidelines from the GMC and the NMC respectively. It is notable that the NMC provides much more generalised guidance than the GMC but that this has not stopped nurses being held to account for even mild examples of religious speech. The NMC code states that a nurse ‘must demonstrate a personal and professional commitment to equality and diversity’ (with these terms remaining undefined)[[43]](#footnote-43) and that a nurse is not permitted to use his or her ‘professional status to promote causes that are not related to health’,[[44]](#footnote-44) which may include the ‘promotion’ of religion through speech. The GMC guidelines are now quite specific, stating: ‘You may talk about your own personal beliefs only if a patient asks you directly about them, or indicates they would welcome such a discussion’.[[45]](#footnote-45) These guidelines replaced earlier ones which allowed for more discretion, stating: ‘You must not impose your beliefs on patients, or cause distress by the inappropriate or insensitive expression of religious, political or other beliefs or views.[[46]](#footnote-46) The reason for this appears to be a disciplinary action which was brought by the GMC against a Dr Richard Scott in 2012, a GP in a Christian medical practice, following complaints from a patient that he was ‘pushing religion’ following a conversation in which Dr Scott had apparently recommended Christianity as providing a deeper and more holistic cure for his patient’s troubles. The GMC decided that Dr Scott had ‘sought to impose [his] own beliefs on [his] patient [and] thereby caused the patient distress through insensitive expression of [ ] religious beliefs’ and he was given a formal warning.[[47]](#footnote-47) The difficulty here was one of two reasonable interpretations of the same guidance: Dr Scott felt he had not been insensitive and had not breached the guidance; the GMC apparently differed but was clearly aware of the ambiguity in its guidelines such that it decided to amend them in a manner which is further exclusionary of religious speech, or at least that religious speech initiated by doctors.

Internal job regulation, applied more generally to all staff within NHS trusts and other bodies, is also likely to encompass religion and belief. The main source for current practice in this area is a document containing rather poorly written guidelines intended to have general effect amongst NHS employees (albeit that they confusingly conflate together proselytism, religious discussions and religiously motivated comments about sexual orientation):

Members of some religions, including Mormons, Jehovah’s Witnesses, evangelical Christians and Muslims, are expected to preach and to try to convert other people. In a workplace environment this can cause many problems, as non-religious people and those from other religions or beliefs could feel harassed and intimidated by this behaviour. This is especially the case when particular views on matters such as sexual orientation, gender and single parents are aired in a workplace environment, potentially causing great offence to other workers or indeed patients or visitors who are within hearing. To avoid misunderstandings and complaints on this issue, it should be made clear to everyone from the first day of training and/or employment, and regularly restated, that such behaviour, notwithstanding religious beliefs, could be construed as harassment under the disciplinary and grievance procedures.[[48]](#footnote-48)

Taken at face value, such guidance may lead NHS employers to impose restrictions on religious speech in general terms rather than exploring any nuances between different types of religious speech.

**The Case Law**

The discussion will now turn to an exploration of some of the relevant case law, under the three key categories presented earlier: conscience; dress; and religious speech. Under each category significant cases will be considered in detail alongside relevant interview data from the four research participants.

*Conscience*

There are limits on the exercise of the conscience clause under the Abortion Act. For example, those medical professionals who oppose abortion in all circumstances absolutely are required, conscientious objections notwithstanding, to participate in abortions if this is required to save the life or prevent serious and permanent physical or mental injury to a pregnant woman.[[49]](#footnote-49) This is likely to affect only a small group of particularly stringent conscientious objectors. However, many more are likely to be affected by a more significant limitation on the exercise of conscientious objection - that it has been held to apply to medical treatment only. Thus*,* in *R v Salford AHA ex parte Janaway*,[[50]](#footnote-50) a doctor’s secretary, who was Roman Catholic, was unsuccessful in arguing that she was entitled to use the exemptions under Section 4(1) of the Abortion Act to justify her refusal to type a letter of referral for a patient seeking an abortion. The exemption was held to apply only to actual participation in the hospital *treatment* leading to abortion. Similarly, in a Scottish case under the same legislation, *Doogan & Anor, Re Judicial Review,*[[51]](#footnote-51) the exemptions for conscience were held not to apply to two midwifery sisters (both Roman Catholic) who opposed being required to ‘delegate, supervise and support staff in the treatment of patients undergoing termination of pregnancy’.[[52]](#footnote-52) These activities were held not to constitute direct involvement in abortion because ‘[n]othing [the applicants] have to do as part of their duties terminates a woman's pregnancy.’[[53]](#footnote-53)

These judgments strongly suggest that any *indirect* participation in abortion does not fall within the available protections for conscientious objection. Thus, participation in pre- and post-operative care would be excluded, including potentially the referral by GPs to an abortion clinic.[[54]](#footnote-54) There is, however, a second conscience clause which permits GPs to refuse to make such referrals where they have a conscientious objection to abortion, but which requires them to make ‘prompt referral to another provider of primary medical services who does not have such conscientious objections’.[[55]](#footnote-55) What this means is that the GP must indirectly assist the patient to be referred to an abortion clinic, via another GP who is not opposed to terminating a pregnancy. This represents a serious limitation on the exercise of conscience. *Inter alia*, it excludes from protection those GPs who struggle to see a moral difference between referring a patient to an abortion clinic and referring a patient to another GP, for inevitable onward referral to an abortion clinic.[[56]](#footnote-56) In other words (to adopt the language of moral philosophy), it accommodates only those who adopt a rigidly deontogical view of the moral rightness of their own actions, and not those who take a broader consequentialist view of the likely ultimate effect of those same actions.[[57]](#footnote-57)

As the Christian Doctors’ Leader put it:

*I think with regard to freedom of conscience in a multi-faith and multi-cultural society, reasonable accommodation should be made. No one should be forced to do something they believe is morally wrong. Or threatened to be excluded from certain lines of work or to be disciplined or lose their job because they're not willing to do something they regard as unethical.*

*Religious Symbols*

An important claim under the Equality Act 2010 was that of Shirley Chaplin, a nurse, who took her employer, the Royal Devon and Exeter NHS Foundation Trust, to an employment tribunal for religious discrimination having been told to remove (or conceal) a crucifix which she wore around her neck, despite having done so for 30 years as a nurse.[[58]](#footnote-58)

Chaplin argued that wearing a visible cross was ‘an outward manifestation of her deeply held religious conviction.’[[59]](#footnote-59) Her employer argued that the move was not specifically about the crucifix, but about health and safety concerns. Some religious items, however, could be exempted from the rule, such as Muslim headscarves because, suitably styled, they did not pose a health and safety risk.[[60]](#footnote-60)

The tribunal followed *Eweida* and dismissed the case on the basis that indirect discrimination could not apply as the provision, criterion or practice in question affected the beliefs of one person rather than ‘persons’ as the legislation requires. This was partly a consequence of the fact that the wearing of the cross was not considered mandatory for Christians; therefore the tribunal began from a position that it represented an individual expression of religious belief. However in *Chaplin* this decision was somewhat more problematic and led to the dissention of one of the wing members of the tribunal. This was because a second nurse in the trust, Mrs Babcock, also wore a visible cross for religious reasons, casting doubt on how far Chaplin’s belief could be said to be an individual one. However, when Mrs Babcock was asked to remove her cross and chain, she did so without objection in order to ‘avoid confrontation’.[[61]](#footnote-61) The tribunal, by majority, inferred from this that only Chaplin suffered a ‘particular’ disadvantage; Mrs Babcock, with her apparently weaker conviction to wear a visible cross, suffered only ‘slight’ disadvantage.[[62]](#footnote-62) Thus was the tribunal able to exclude Mrs Babcock from the formula (of more than one person) which it conceded would invoke the first stage of an indirect discrimination claim.[[63]](#footnote-63)

Chaplin took her claim to the ECHR on the basis that the UK government had failed to guarantee her Article 9 rights (freedom of religion) in domestic law. The ECHR overturned the argument that a religious symbol had to be ‘mandatory’ to the religion concerned to deserve protection, but it declined to contest the argument that health and safety issues could preclude the wearing of a visible cross, depending on the judgment of the relevant national authorities, albeit that in Chaplin’s case no evidence had ever been produced to support the contention that health and safety was in play.

The fact that accommodations were made in this case for members of minority religions but not for Christians has not been lost on the Religious Liberty Campaigner, who observes:

*And actually, interestingly, accommodation and a light touch is often made for the Muslims. I mean, in our cases what we've seen is that the hijab has been accommodated; respect for the covering of the arms has been accommodated; for the bracelets for the Sikh sword - these things have been accommodated, but the cross hasn't been accommodated. So we have not seen equal accommodation made.*

The Christian Medical Practitioner agrees:

*If you look at how wearing a cross has been unacceptable in various cases, wearing a turban, a hijab, etc, seems to be absolutely fine. In the NHS nurses and theatre nurses are given garments paid for by the NHS to cover up their arms if they're a Muslim, for example. But a Christian can't wear a cross. So there are double-standards here, favouring other faiths*

However, this point notwithstanding, it may be that requests to wear a cross are rare and this may have contributed to a degree of policy making on the hoof, as appeared to be the situation for Chaplin. According to the Christian Doctors’ Leader, the wearing of Christian symbols has not been notably problematic for Christian doctors at least:

*I'm aware of the Shirley Chaplin case, but I don't know a single case of a Christian doctor getting into trouble for wearing a cross or displaying religious symbols or whatever. I mean, I'm not saying there haven't been cases, but they've not been highlighted in the media and they've not come to us.*

Similarly the NHS Employers Manager was unaware of any incidents excepting that of Shirley Chaplin where the wearing of a Christian cross had been an HR issue.

*Religious Speech*

An employment dispute which generated considerable media exposure was that of Caroline Petrie, a nurse employed by North Somerset Primary Care Trust, who was a committed Christian. She asked an elderly patient if she could pray for her. The patient, whilst apparently ‘not offended’ was ‘taken aback’ and reported the comment via her carer.[[64]](#footnote-64) As a result, Petrie was reportedly suspended without pay ‘on suspicion of failing to “demonstrate a personal and professional commitment to equality and diversity”.’[[65]](#footnote-65) She obtained legal support from the Christian Legal Centre and challenged her suspension.[[66]](#footnote-66) The Trust relented and allowed her to return to work. In the process, it made this (limited) concession:

It is acceptable to offer spiritual support as part of care when the patient asks for it. But for nurses, whose principal role is giving nursing care, the initiative lies with the patient and not with the nurse. Nurses like Caroline do not have to set aside their faith, but personal beliefs and practices should be secondary to the needs and beliefs of the patient and the requirements of professional practice.[[67]](#footnote-67)

This seemed to suggest that offering unsolicited prayer, as Nurse Petrie had done, was still potentially a disciplinary offence. Certainly the concession, very much in accord with the revised guidelines for GPs,[[68]](#footnote-68) appeared to have been too little for Caroline Petrie who reportedly responded ‘‘I cannot divide my faith from my nursing care’ and implied that she would continue to make offers of prayer as in the past.[[69]](#footnote-69)

As the Religious Liberty Campaigner put it:

*Caroline Petrie who goes and wants to have a little chat with her patients, do more than just a quick in and out, sit down and love them a bit, that needs to be seen in its proper context, not as if offering prayer is dangerous.*

The Christian Doctors Leader agreed, seeing the offer of prayer as potentially a normal aspect of a healthcare professional’s relationships with patients:

*That attending to the spiritual needs of patients is part of the holistic health care for all patients and that every doctor should be taking a spiritual history, knowing and respecting the beliefs of their patients and understanding them. And I think that faith sharing and the offer of prayer should be ... provided it is done with sensitivity, permission and respect, should be accepted.*

Indeed, assuming this is done sensitively, and with good grace if the offer is refused, it seems difficult to see why offering prayer should be a disciplinary offence. Even (moderate) atheist patients might gain some consolation from knowing that a nurse’s concern for his or her well-being extends beyond cool professionalism alone. Those who are offended could surely only be mildly so, and it may be argued that most people would feel able to politely refuse if they so wished, with little need for intervention from the employer. As the Religious Liberty Campaigner put it:

*And I also think it's down to the NHS to understand that part of just being human is we will have these things and some won't like it, and when they don't, just deal with it, but just deal with it normally. The way to deal with normally would be: 'that patient wasn't very happy, just be careful when you're speaking again.'*

The Christian Medical Practitioner identified a similar problem with discussions with patients:

*According to the GMC now a doctor cannot bring in faith as an option, even though he or she might well suspect this will strongly help the patient's situation. … That's incredibly intrusive, that's lacking in trust of the doctor and also makes a mockery of their statement that they are fully aware that a spiritual angle of health is important. They sign-up to the WHO view that your health has a spiritual, mental and physical angle, but the practicality is if you approach the spiritual angle and run into trouble, they come down on you like a ton of bricks, they don't support you.*

The NHS Employers Manager took a slightly different view, highlighting the continuing importance of the hospital chaplain role and the opportunity to refer patients, where appropriate to chaplains for spiritual needs to be addressed.

Of course the notion that faith should be approached as a ‘professional service’ rather than as an aspect of normal working life is not universally convincing, not least for a nurse like Caroline Petrie.

Although Petrie herself was unwilling to separate her work from her religious convictions, some recent research into the ‘identities’ of student nursing staff with religious convictions suggests that many others, perhaps particularly those being inducted into the NHS culture, have felt forced into implementing just such a divide between their professional and private selves. The authors of the research concluded:

The participants in our research adopted two modes of presenting themselves. In the hospital, they put on a front which was professionally acceptable by concealing the religious beliefs that they perceived as a possible cause of conflicts between values. Where there was the possibility of conflict, particularly in the practice setting, the students adopted a ‘conventional’ nursing identity, being careful about whether and how they presented their beliefs. However … the students were able to return to their ‘true’ identity as religious people when they joined fellow believers in their Sunday congregations.”[[70]](#footnote-70)

It may be that both specific policy, and the chilling effect of cases like that involving Caroline Petrie, have resulted in a reluctance by some religious employees to make their faith convictions known in workplaces like the NHS. As the Religious Liberty Campaigner put it:

*I mean, it's a complete myth that the public space is neutral because you remove from it any discussion of faith. What that does is have a chilling impact and it's not neutral at all, it imposes a new liberal, secularist ideology.*

Another important tribunal judgment, *Wasteney* v. *East London NHS Foundation Trust,*[[71]](#footnote-71) involved allegations of proselytism by a supervisor towards a more junior staff member. A claim of religious discrimination (direct, indirect and harassment) and breach of Article 9 ECHR was brought by a senior Occupational Therapist and Christian, Victoria Wasteney, who had been given a final written warning following a protracted disciplinary investigation, for the ‘bullying and harassment’ of a junior colleague, a young Muslim woman and newly-qualified Occupational Therapist. The alleged bullying and harassment arose from a series of incidents in which Ms Wasteney: invited her junior colleague to Church services; gave her literature (including a book about Muslim conversion to Christianity); and prayed with her, which included (on one occasion) the laying on of hands.[[72]](#footnote-72) Her eventual final disciplinary warning was influenced (significantly) by the fact that the issue was not ‘just a one off incident’ and the disciplinary panel was ‘particularly worried about the laying on of hands’.[[73]](#footnote-73) The panel also suggested that Ms Wasteney’s seniority was a relevant factor:

Everyone has their own beliefs: however the panel felt that given the seniority of your role, staff may find it difficult to refuse your invitations and discussions regarding your personal beliefs as such professional boundaries should be maintained in the workplace at all times.[[74]](#footnote-74)

Although the tribunal did note (significantly) that: ‘[I]n fairness to the Claimant there were some mixed messages in the texts [sent from the Muslim junior colleague] in that they suggest in parts that [she] welcomed discussion of religion’,[[75]](#footnote-75) nevertheless it rejected the allegation of direct discrimination, concluding:

The context of the disciplinary process against the Claimant was religious acts but the reason for her treatment was because these acts blurred professional boundaries and placed improper pressure on a junior employee rather than that they were religious acts.[[76]](#footnote-76)

The tribunal went on to suggest that the claimant would have been treated in exactly the same way had she been pressing a particular political point of view on a junior colleague. This would appear to be the correct application of the doctrine of direct discrimination in this case. The disposal of the indirect discrimination claim was however less satisfactory. A logical approach might have been for the tribunal to have accepted that Wasteney’s actions in ‘proselytising’ her colleague amounted to a *bona fide* manifestation of religion; because the disciplinary policy was applied to penalise this (and this in itself would amount to ‘a provision, criterion or practice (PCP)’), she could therefore be said to have suffered *prima facie* indirect discrimination. It would then be for the employer to justify its approach, presumably with reference to the rights of others (i.e. the Muslim colleague). Instead, the tribunal determined that there was no PCP so the indirect discrimination claim fell at the first hurdle. It stated:

We find that any senior manager who fails to maintain an appropriate boundary between their personal beliefs and their role in the workplace such that junior employees feel under pressure to behave or think in certain ways is likely to be the subject of disciplinary proceedings.[[77]](#footnote-77)

Whilst this might be a reasonable response to a direct discrimination claim, this statement does not appear to be an adequate response to an indirect discrimination claim. Equally troubling was the tribunal’s suggestion (which was not fully explained) that in this case religion represented ‘merely the context’ rather than the reason for the claimant’s treatment.[[78]](#footnote-78) Yet the tribunal did clearly understand the claimant’s motivation and came close at one stage to recognising it as a manifestation, when it stated: ‘she was simply sharing … her positive experience of Christian belief’.[[79]](#footnote-79) One possible reason why the tribunal did not recognise a PCP and thus *prima facie* indirect discrimination was perhaps because the claim was not presented sufficiently clearly by the counsel for Ms Wasteney. Rather than presenting a general argument, the claimant’s case was made up entirely of quite detailed allegations, each of which it was possible to refute (e.g. that the dissemination of Christian literature was prohibited by the Trust – this could be shown to be incorrect and so could not be sustained).

Ultimately, the judgment in this case is troubling. This is not because the overall decision was necessarily wrong, but rather because it appears not to fully recognise the perceived religious mandate underlying Wasteney’s activities and that the decision, based on the employer’s disciplinary policies, to discipline her for exercising this mandate was *prima facie* indirectly discriminatory and therefore required justification. To frame the issue almost entirely as an abuse of position, leading to bullying and harassment, is an over-simplification which ignores some of the issues of principle involved. Also concerning was the acknowledgement that there was some evidence that religious discussion had been welcomed by the junior colleague. Arguably this should have been subjected to rather more consideration by the tribunal. Was it suggesting that religious discussions, with the consent of both parties, should be considered to be at best unprofessional, at worst harassment, merely because of an imbalance in the relative positions of the individuals involved on the organisational hierarchy? Presumably it would not have gone so far, and could point to the ambiguity surrounding consent in this case, but this possibility arguably required fuller consideration.

Regardless of any issue of power differentials, cases like this raise wider concerns for the Religious Liberty Campaigner:

*I think that what I find really worrying is that we've taken faith out of the public discourse. We've taken Jesus out of the public discourse, so any mention of him in the public square or in the workplace is somehow deemed to be controversial or proselytism.*

**Conclusion**

In this paper, a number of difficulties for employees in the British National Health Service who wish to manifest their religious convictions have been identified drawing on policy material, specific case examples and ‘commentary’ from interested parties. What can be concluded tentatively is that there is a place for religious expression but it is a small one. Due to primary legislation, the NHS has no choice but to tolerate conscientious objection for medical practitioners directly involved in abortion or abortion referrals. However, it is clear from the cases examined that such a right to conscientiously object is very narrowly understood - objections from staff involved indirectly in abortion are not protected. Similarly, whereas there is a grudging exception in the professional guidelines for doctors and nurses for patients who specifically request prayer, it is clear that medical practitioners are otherwise prevented through codes of conduct to discuss faith issues with patients. This is curious given the accepted evidence that there is a spiritual dimension to healthcare, once which practitioners will clearly neglect if they are required not to enter into relevant discussions. The NHS appears to partly resolve this by professionalising faith as a ‘service’ practiced by chaplains to whom patients can be referred in order to deal with any apparent spiritual needs. As well as forbidding religious discussions with patients, cases such as *Wasteney* also cast light on how the NHS deals with staff discussions with co-workers. Clearly in some cases at least this is discouraged. The law appears to have offered little protection for religious claimants – thus far, no reported claim for religious discrimination where religious manifestation has been engaged has enjoyed success before an employment tribunal. NHS employers are broadly able, therefore, to exercise their legal discretion to suppress religious expression.

For religious employees, there are clearly difficulties. Interview data has suggested that there is a perception that the NHS has embraced a form of dogmatic secularism which is squeezing out faith. A more generous explanation would be that policy makers are unable to fully appreciate the holistic nature of religious faith at least for some employees, considering that it is practicable and logical for them rather to separate their religious and secular selves, keeping the former private. Perversely, the efforts the NHS appears to have made to accommodate religious dress (at least for minority religions) provides evidence for this. If religion can be treated as a manifestation of culture which goes no deeper than dress or symbolic display then it is less likely to offend the secularist worldview. Employees who are fully committed to their religious identities are likely to find this very burdensome as they are unlikely to accept that it is possible to compartmentalise their religious beliefs.

The question is whether or not this is necessary. It is difficult to see what genuine harm can come from religious expression where good taste and tact are employed. Given that medical practitioners are trusted with the health and very lives of patients it seems odd that they should not equally be trusted to exercise discretion wisely in the way in which they deal with religious issues with patients and other staff. A policy review in this area would seem to be timely.

ANDREW HAMBLER

1. M De Graaf, ‘NHS worker is disciplined for 'bullying' Muslim colleague by praying with her and giving her a book about a woman who converts to Christianity’ *Daily Mail* (London, 29 June 2014). [↑](#footnote-ref-1)
2. S. Leader, ‘Freedom and Futures: Personal Priorities, Institutional Demands and Freedom of religion’ (2007) 70 *Modern Law Review* 713. [↑](#footnote-ref-2)
3. McColgan, ‘Class Wars? [↑](#footnote-ref-3)
4. Ahdar and Leigh, *Religious Freedom in the Liberal State*. [↑](#footnote-ref-4)
5. Stephen Timmons & Aru Narayanasamy, ‘How do Religious People Navigate a Secular Organisation? Religious Nursing Students in the British National Health Service’ (2011) 26 *Journal of Contemporary Religion*, 451. [↑](#footnote-ref-5)
6. J Childress, ‘Appeals to Conscience’ (1979) *Ethics* 315. [↑](#footnote-ref-6)
7. See discussion in I Leigh and A Hambler, ‘Religious Symbols, Conscience and the Rights of Others’ (2014) 3 *Oxford Journal of Law and Religion* 22. [↑](#footnote-ref-7)
8. Ahdar and Leigh, *Religious Freedom in the Liberal State,* 157. [↑](#footnote-ref-8)
9. See discussion below. [↑](#footnote-ref-9)
10. Northern Ireland has a separate legal framework based on the Fair Employment and Treatment Order 1998 SI No. 3162 (N.I. 21). [↑](#footnote-ref-10)
11. EC Directive 2000/34 on equal treatment [2000] OJ L303/16. [↑](#footnote-ref-11)
12. SI No.1660. [↑](#footnote-ref-12)
13. Equality Act 2010, s 4. [↑](#footnote-ref-13)
14. S Fredman, *Discrimination Law* (2nd edn., OUP 2011). [↑](#footnote-ref-14)
15. *Glasgow City Council* v. *Zafar* [1988] ICT 120 HL. [↑](#footnote-ref-15)
16. Equality Act 2010, s 19. [↑](#footnote-ref-16)
17. *Homer* v. *Chief Constable of West Yorkshire Police* [2012] IRLR 601 [17]. [↑](#footnote-ref-17)
18. (2007) EAT 0009/07 [76]. [↑](#footnote-ref-18)
19. Albeit that not all claimants have seen the wisdom of this insight. [↑](#footnote-ref-19)
20. Equality Act 2010, s 26(1). [↑](#footnote-ref-20)
21. *Driskel* v. *Peninsula Business Services Ltd* [2000] IRLR 151. [↑](#footnote-ref-21)
22. Equality Act 2010, s 26(4). [↑](#footnote-ref-22)
23. Employment Rights Act 1996, s 94(1). [↑](#footnote-ref-23)
24. Ibid, ss. 98; 98A. [↑](#footnote-ref-24)
25. Per the test established in *BHS Stores* v*. Burchell* [1980] ICR303. [↑](#footnote-ref-25)
26. Employment Rights Act 1996, s 126. [↑](#footnote-ref-26)
27. Abortion Act 1967, s 4(1). [↑](#footnote-ref-27)
28. Human Fertilisation and Embryology Act 1990, s 38. [↑](#footnote-ref-28)
29. Assisted Dying for the Terminally Ill Bill [HL] 2004, s 7; interestingly, however, such a clause was not included in the End of Life Assistance (Scotland) Bill 2010. [↑](#footnote-ref-29)
30. Abortion Act 1967, s 4(1). In Scotland this can be discharged simply by ‘making a statement on oath by any person to the effect that he has a conscientious objection’ (s 4 (3)). [↑](#footnote-ref-30)
31. It is known, for example, that members of the Christian Medical Fellowship have been amongst those who have utilised the conscience clauses; see P Saunders, ‘Abortion and Conscientious Objection’ (1999) Spring *Nucleus,* 4. [↑](#footnote-ref-31)
32. I Leigh, and R Masterman, *Making Rights Real – The Human Rights Act in its First Decade* (Oxford: Hart, 2008). [↑](#footnote-ref-32)
33. Human Rights Act 1998, s 6. [↑](#footnote-ref-33)
34. Vickers, *Religious Freedom, Religious Discrimination and the Workplace,* 85. [↑](#footnote-ref-34)
35. Human Rights Act 1998, s 6(3). [↑](#footnote-ref-35)
36. Ibid, s 3(1). [↑](#footnote-ref-36)
37. First used in ECHR jurisprudence in *C* v*. the United Kingdom* (1983) 37 DR 142. [↑](#footnote-ref-37)
38. See also for a discussion of these terms, C Evans, *Freedom of Religion under the European Convention* (Oxford: Oxford University Press 2000), 72-73. [↑](#footnote-ref-38)
39. Appl Nos. 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013). [↑](#footnote-ref-39)
40. For example General Pharmaceutical Council is empowered by the Pharmacy Order 2010 SI 231/2010 to issue a Code of Conduct for professional members. [↑](#footnote-ref-40)
41. For example, the General Pharmaceutical Council states: ‘Make sure that if your religious or moral beliefs prevent you from providing a service, you tell the relevant people or authorities and refer patients and the public to other providers’, General Pharmaceutical Council, *Standards of conduct, ethics and performance,* September 2010,[3.4]. [↑](#footnote-ref-41)
42. For example, the General Social Care Council, *Codes of Practice for Social Care Workers*, 2010. [↑](#footnote-ref-42)
43. Nursing and Midwifery Council, *The code: Standards of conduct, performance and ethics for nurses and midwives,* NMC(1 May 2008), s 48. [↑](#footnote-ref-43)
44. ibid., s 59. [↑](#footnote-ref-44)
45. General Medical Council, *Personal Beliefs and Medical Practice* (March 2013) [31]. [↑](#footnote-ref-45)
46. General Medical Council, *Personal Beliefs and Medical Practice* (March 2008) [19]. [↑](#footnote-ref-46)
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48. Department of Health, *Religion or belief: A practical guide for the NHS* (Department of Health, January 2009), 22; copy at: <<<http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_093132.pdf>>>, accessed 27 February 2016. [↑](#footnote-ref-48)
49. Abortion Act 1967, s 4(2). [↑](#footnote-ref-49)
50. [1988] 3 All ER 1079. [↑](#footnote-ref-50)
51. [2012] ScotCS CSOH\_32 (29 February 2012). [↑](#footnote-ref-51)
52. ibid. [10]. [↑](#footnote-ref-52)
53. ibid. [80]. [↑](#footnote-ref-53)
54. D Hill, ‘Abortion and Conscientious Objection’*,* 16 (2010) *Ethics in Brief;* copy at <<<http://klice.co.uk/uploads/EiB/Hill%20v16.1%20pub.pdf>>>, accessed 2 December 2011. [↑](#footnote-ref-54)
55. The National Health Service (General Medical Services Contracts) Regulations 2004, s 3(e). [↑](#footnote-ref-55)
56. See J Jackson, *Ethics in Medicine* (Polity 2006). [↑](#footnote-ref-56)
57. For a discussion of these concepts see T Beauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy* (2nd edn, McGraw Hill 1991). [↑](#footnote-ref-57)
58. *Chaplin* v. *Royal Devon and Exeter NHS Foundation Trust* (2010) ET Case No. 1702886/2009. [↑](#footnote-ref-58)
59. ibid. [14]. [↑](#footnote-ref-59)
60. ibid. [16]. [↑](#footnote-ref-60)
61. ibid. [15]. [↑](#footnote-ref-61)
62. ibid. [27]. [↑](#footnote-ref-62)
63. ibid. [28]. [↑](#footnote-ref-63)
64. C Gammell, ‘“Thousands are at risk” in NHS after nurse in prayer row is suspended Nurse suspended over prayer “could lead to thousands facing discipline”’ *The Daily Telegraph* (London, 4 February 2009) 9. [↑](#footnote-ref-64)
65. NMC guidelines. [↑](#footnote-ref-65)
66. See <<<http://www.christianconcern.com/cases/caroline-petrie>>>, accessed 20 May 2015, [↑](#footnote-ref-66)
67. H Saxbee and E Beavan, ‘Praying nurse is reinstated’, *Church Times* (4 February 2009); available at: << <http://www.churchtimes.co.uk/articles/2009/6-february/news/praying-nurse-is-reinstated>>>, accessed 20 May 2015. [↑](#footnote-ref-67)
68. See earlier discussion. [↑](#footnote-ref-68)
69. C Gammell, ‘Nurse Caroline Petrie: I will continue praying for patients’, *The Daily* *Telegraph,* (London, 7 February 2009); copy at: << <http://www.telegraph.co.uk/news/religion/4537452/Nurse-Caroline-Petrie-I-will-continue-praying-for-patients.html>>>, accessed 20 May 2015. [↑](#footnote-ref-69)
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73. Ibid. [85]. [↑](#footnote-ref-73)
74. Ibid. [↑](#footnote-ref-74)
75. Ibid. [64]. [↑](#footnote-ref-75)
76. Ibid. [108]. [↑](#footnote-ref-76)
77. Ibid. [135]. [↑](#footnote-ref-77)
78. Ibid. [108]. [↑](#footnote-ref-78)
79. Ibid. [↑](#footnote-ref-79)