

Religious liberty in the workplace

A guide for Christian employees

Mark Jones



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CHRISTIAN INFLUENCE IN A SECULAR WORLD

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Dear reader,

As a lawyer who has advised Christians on a number of workplace issues, I have been asked to produce this guide for The Christian Institute. This guide sets out my views based upon the law and my understanding of the issues from those who have approached me. Within it I have tried to anticipate some of the situations that individual Christians may come across in the workplace and welcome guidance on. It does not seek to address issues that Christian organisations or those run in accordance with a Christian ethos may face.

This advice cannot be a definitive statement on the law and specific advice should always be sought on individual circumstances.

Yours faithfully,



Mark Jones
ORMERODS

Green Dragon House 64-70 High Street Croydon CR0 9XN
Telephone: 020 8686 5000; Fax: 020 8680 0972
e-mail: mark.jones@ormerods.co.uk www.ormerods.co.uk

The law

I do not propose setting out in full detail the legal provisions as they inform this advice, but an understanding of the basics may assist:

Contract law

All employees and workers provide their services to their employer under a contract, whether there is something in writing or not. In its most basic form, that contract is that the individual performs services required by the employer and the employer pays the individual.

Certain terms are implied into contracts. For employees, there is an implied term of mutual trust and confidence, which can be understood to mean that an employer should not without reasonable and proper cause conduct itself in a manner calculated (or likely) to seriously damage the relationship of mutual confidence and trust between employer and employee. An example of this would be an inappropriate threat of dismissal unless an employee's complies with an employer's wishes.

An employer's internal policies and procedures may form part of an individual's contract or may simply be advisory. All employers are obliged to have a grievance procedure allowing staff to raise formal concerns, and are obliged to provide details of that policy in writing within 2 months of your employment commencing.

Human Rights

Human Rights legislation protects the freedom to hold Christian views and beliefs and the freedom to manifest those beliefs in actions. However, whilst the right to hold the belief is absolute, the right to manifest it is qualified, that is it can be constrained by matters such as the rights of others. It is a “balancing act”. That said, any employer who attempted to force an employee to act against their core religious beliefs would run the risk of breaking the law.

Human Rights legislation is not directly enforceable upon private organisations (as opposed to state bodies), but the Courts and Tribunals as state bodies must ensure their decisions are consistent with the legislation (making it indirectly enforceable).

Discrimination Law

There are specific discrimination laws that set out protections and rights for individuals based upon their Christian faith and beliefs.

There are 4 basic sub-divisions of discrimination:

a) Direct discrimination would be where a Christian is subjected to less favourable treatment purely because of their faith. For example, you are the only person not invited to a works function because it is believed your Christian beliefs would impede others from “enjoying themselves”.

b) Indirect discrimination would be where an employer operates a provision criterion or practice that is not directly discriminatory but that puts Christians (and you) at a disadvantage. For example if all works functions are scheduled to take place on Sundays and you therefore feel unable to attend. A potential defence to indirect discrimination is to show that, even taking into account your concerns, the practice is “objectively justifiable”. This means that there is a legitimate purpose behind the policy and that the chosen method is a proportionate means of achieving it. Therefore if the legitimate purpose was to boost staff morale, the Company would have to show

that addressing this by only having functions on a Sunday was not using an inflexible hammer to crack a nut.

c) Victimisation would be where, having taken steps relating to concerns about discrimination (for example raising a grievance or supporting a colleague's concerns), you are then subjected to less favourable treatment as a result. An example would be if, having raised your concerns about work functions always being on Sundays and the difficulty this causes you as a Christian, you are then given a bad appraisal for not being a "team player".

d) Harassment would be where because of your faith you are subjected to unwanted conduct that violates your dignity or creates a working environment that is intimidating, hostile, degrading, humiliating or offensive for you. For example, colleagues ignore you because you never attend any of the Sunday work functions. In deciding whether or not the conduct is harassment, the question is whether having regard to all the circumstances including in particular your perception, it should reasonably be considered as having that effect. Reasonableness protects employers from being held liable on the whim of an unduly sensitive complainant.

Similar rights protect others on the grounds of their religious beliefs (including absence of belief) and some whose sexual lifestyle may be seen as conflicting with Biblical teaching and Church tradition. This creates conflicts. It is the unenviable task of an employer to juggle these conflicts and the guidance on how to do so is often unclear. Often these conflicts are resolved by decisions in the Courts and Tribunals, which may set precedents as to the correct approach if a similar conflict arises.

In relation to sexual lifestyle, there are provisions that protect individuals from being subjected to less favourable treatment because they are sexually attracted to persons of the same sex or both sexes. This applies to colleagues you may deal with and customers/third parties you may be expected to serve as part of your duties.

Particular considerations for Christians

Particularly in relation to human rights, harassment and indirect discrimination it is worth appreciating that actions of individuals can affect the balancing act mentioned above. If the impact of a practice on a Christian is seen as minor or they are considered unduly sensitive then there is less chance of there being a legal remedy. Sadly this is where our willingness as Christians to tolerate things that are wrong causes problems. For example, if we are too timid and take no exception to blasphemy in the workplace, the more likely it is that the isolated person who does take exception can be dismissed as unduly sensitive.

The more people know what Christians believe and expect Christians to profess their beliefs, the greater the prospects of society adapting. A community that allows itself to be offended without usually protesting is less able to objectively demonstrate offence when it chooses to protest.

This is not to suggest any form of civil disobedience, but, for example, if there are things in a workplace that mock Christ then it is legitimate to ask an employer if it would equally tolerate an image mocking other religious figures.

If as Christians we go along with the view that it is unacceptable to say that certain things are sinful, displeasing to God and may have

eternal consequences, the more we may become part of the problem: when someone does stick their head above the parapet it is more likely to appear extreme. For example, if we had zero tolerance of blasphemy, it would jar much more when someone did blaspheme than it does now in many workplaces.

There is also a vicious spiral: the less able or willing we are to teach others about our faith, the less it will be understood and the less it will be taken into account by employers as working practices develop. I believe we have a fundamental duty to be involved in educating and informing colleagues and employers and influencing the organisations we work in.

As a Christian I must consider whether I should be having an influence in my work place. Is there any reason why I cannot offer my experience as a Christian to my employer as it develops informed working practices? The stance is not necessarily one of confrontation but consultation and offering your services.

One further consideration when seeking to establish religious freedoms within a workplace is that under the law those freedoms may equally apply to other religions or belief systems. Therefore if your employer is willing to help you promote an activity of Christian worship, they may equally have to assist a colleague who wants to promote an activity of non-Christian worship.

Guidance referred to

Legal decisions

Decisions by a forum of first instance (which includes the Employment Tribunal) are not binding on other Courts, but are persuasive. Decisions by an appellate forum (such as the Employment Appeal Tribunal, the Court of Appeal and the House of Lords) are binding on every forum below them.

ACAS

ACAS is a statutory body that assists with the resolution of workplace disputes. It has produced a guide on “Religion or Belief and the Workplace” (“the ACAS Guide”). Although not legally binding (and, some have suggested, not sympathetic to Christians), the Guide is of persuasive value to those interpreting the law.

Department for Communities and Local Government

DCLG has produced “Guidance on New Measures to Outlaw Discrimination on Grounds of Sexual Orientation in the Provision of Goods, Facilities and Services” (“the DCLG Guidance”). Parallel religious guidance has also been produced by the DCLG.

Questions

I have set out below a number of potential scenarios. There is much overlap between the answers and common principles apply to many of them, so I would recommend reading everything rather than questions in isolation.

A. Can I send Christmas cards to my colleagues?

Yes. This is unlikely to cause a problem. If your employer introduces a policy that says not to, then the solution is not to disregard that policy but to challenge it by entering into a dialogue to understand what drives it, address any misconceptions and identify an acceptable solution.

If you were to single out people of other faiths and send cards only to them, or if a colleague has made it clear to you that they do not want to receive Christmas (or Easter) cards from you but you still send them one, then an allegation of harassment and/or indirect discrimination could be made against you.

Some organisations may take the view that their corporate Christmas cards should be “multi-faith” or non-Christian. I remember one year receiving a Christmas card from a lawyer I know in Canada saying “happy holidays” and the offence/dismay I felt at Jesus’ excision from a card commemorating his incarnation. There is nothing to prevent you from suggesting to your employer that the cards it uses

should honestly reflect the occasion. It may be worth explaining that a Christian could be offended by something else.

B. Should I be allowed time off because of Church Services/ Christmas/Easter?

Those who work in retail have specific protection under the Employment Rights Act 1996 and are able to serve written notice on their employer that they are not willing to work Sundays. Three months' notice must be given. This exemption does not apply for those who only work on Sundays. (The same protection also applies to those in the betting trades).

In *Copsey v WWB Devon Clays Ltd* the Court of Appeal (in a decision that binds Employment Tribunals) held that an employer had done everything it reasonably could to accommodate a Christian employee's desire not to work on Sundays (and that his dismissal was therefore not because of his faith but his refusal to accept a change to the shift pattern). This "reasonable accommodation" principle is an important one and is in addition to the discrimination protection (which came into force subsequently).

Cases decided under the discrimination legislation strengthen this position. In the cases of *Williams-Drabble v Pathway Care Solutions Ltd*, the Employment Tribunal held that it was unlawful indirect discrimination against a Christian to require all employees to work a shift pattern including Sundays. Although there may have been a legitimate reason behind the aim, the impact of the policy upon Mrs Williams-Drabble was excessive and therefore disproportionate in relation to the aim. A similar conclusion was reached by the Employment Tribunal in the case of *Edge v Visual Security Services Limited*.

In cases like this, the resources of the employer are important. A small employer will be more able to argue that it is unable to accommodate requests for different working patterns. An employer

with several hundred employees will face a more difficult argument that it was not possible to accommodate. My view is that it is not an excuse for an employer to refuse a Christian's request to have time off at a particular time on the basis that that will open the floodgates, ie. that everyone will then claim they are a "Christian" and then ask for Christmas off. It is only if such a situation arises and causes a problem in practice that the employer may need to review the extent to which such requests are accommodated.

The ACAS Guide states (p32) that "*Staff may request annual leave to coincide with religious festivals. Refusal to grant such leave may be discriminatory if it cannot be justified by a legitimate business need which cannot be met by any other reasonable means.*"

When submitting any such request it therefore makes sense to offer ways in which the request may be reasonably accommodated.

C. Can I wear a cross?

Generally speaking the answer has to be yes.

It would be direct discrimination if the only items of jewellery banned from a workplace were Christian symbols such as a cross or an ichthus fish. It might be indirect discrimination if all jewellery was banned, depending upon the reasons.

To draw a parallel, in the case of *Azmi v Kirklees MBC* the Employment Appeal Tribunal (whose decisions bind Employment Tribunals) held that it was legitimate for a school to require a Muslim teaching assistant to remove her veil while in class. As it was all head coverings that obscured the face that were banned (so not exclusively applying to Muslims) it was not direct discrimination. As there was a legitimate purpose (to educate children) and the ban was held to be a proportionate means of achieving this there was no indirect discrimination.

There is less obviously a legitimate reason for banning jewellery that does not impact upon a person's duties. A health and safety risk

may be suggested, but unless the risk is obvious, any perceived health and safety risk should be explained and should be understood as a consideration within the balancing act, rather than conclusive.

The ACAS Guide states (p33) that “*organisations should try to be flexible where they can to enable staff to dress in accordance with their beliefs but still meet the organisation’s requirements*”.

It may be important for an employer to understand that, for a Christian, whilst an outward expression of their faith through specific clothing or jewellery may not be prescribed in the Bible, it is a tenet of their Christian faith to share that faith with others. They may choose to do this by wearing certain jewellery, publicly displaying to their colleagues the convictions they hold. Employers should realise that this is a considered way of doing so (one that perhaps avoids ways that could cause employers greater consternation). The employer who wants to ban such expressions should be prepared to enter into a dialogue of how the concerns leading to the ban can be addressed in a way that still permits such expression. For example, in *R on application of SB v Headteacher & Governors of Denbigh High School* the House of Lords held that a school could refuse to allow a Muslim schoolgirl to wear a full-length jilbab when it was prepared to allow her to wear a shalwar kameez, or other modest clothing.

If the employer’s stance is that no such expressions are permitted then it is important that they understand the disproportionate impact this will have upon Christians who may feel that it is their duty to bear Christian witness.

If an employer has a diversity or similar policy, then this can be checked for compatibility. It strikes me that an organisation that forbids considered expressions of the Christian faith is not standing for diversity at all but rather a bland secular uniformity.

D. I am being asked to wear an immodest uniform – can I refuse?

If the objection is because of your faith, the reasoning set out in “C” above will apply. (There may also be an argument that an immodest uniform could amount to sex discrimination.)

It is worth adding that an employee will tend to be in a stronger position to ask for their faith to be accommodated if what is required of them (to which they object) has changed since their employment commenced, compared to someone who goes into a job knowing what is expected of them and working initially without protest. If an employee comes to faith whilst in the job and that leads to their concern, that would explain their previous acquiescence and put them in a slightly stronger position to object to an existing practice.

E. Can I share my faith in the workplace?

Generally speaking the answer has to be yes.

The Gospel is offensive and as Christians if we are going to share the Gospel we must anticipate that we will cause offence. This will bring us necessarily into conflict. The choices are: to avoid the risk of ever causing offence; be oblivious and indifferent to any offence that may be caused; or thoughtfully yet boldly find the middle ground.

Some employers may have a policy specifically forbidding discussions about faith, although this is rare. The ACAS Guide advises at p31 that “*a ban on discussions about [Christianity] may create more bad feeling amongst staff and cause more problems than it solves.*” If such a ban is in place, an appropriate step is to enter into a dialogue with the employer to understand the ban and its underlying concerns and see if these can be addressed in a way that will allow such discussions.

The concern will often be that other staff who do not share your faith may be made to feel uncomfortable.

However, the ACAS Guide also confirms that *“If harassment has been explained to staff they should be able to distinguish between reasonable discussion and offensive behaviour. Staff should be aware that if their discussions cause offence then this may be considered to be harassment...”*.

The ACAS Guide gives the specific question and answer example that *“ ‘A group of religious staff have started trying to persuade other employees to attend their church. An atheist has said that it makes him uncomfortable. What should we do?’ The group’s behaviour may amount to harassment, for which the company could be liable unless it takes steps as are reasonably practicable to prevent it. You should refer the employee to the grievance procedure in case he wishes to make a formal complaint. Even if he doesn’t, it would be sensible to speak to the staff informally and explain that some people find their behaviour unwelcome”*.

In order not to fuel any such concerns about workplace discussions it is important to express your beliefs in a temperate way, bearing in mind your position. Someone in a managerial position may also be considered to have greater influence over staff and therefore expected to exercise greater discernment.

The last 2 paragraphs in “C” above may also be relevant here.

Furthermore, an employer may need to understand that an inability to discuss Christianity in the workplace is going to be conducive to a lack of understanding of the Christian faith and may well cause problems to arise through ignorance. For example, there may be an increased likelihood of language and conduct likely to unintentionally offend Christians if other employees are unaware of what Christians delight in or derive offence from.

F. Can I give a Christian opinion on controversial topics?

The legally “safe” advice would be to minimise any risk of ever creating a personal liability by never doing anything that someone

could be offended by. As a Christian lawyer, I could not live by the standard that I would then be commending.

One Employment Tribunal has held that the fact that it is scripture being quoted does not provide a blanket defence to allegations that those views are offensive. Nevertheless, an employer should take into consideration whether an opinion is informed by your Christian beliefs and, if so, take that into account before deciding what response is appropriate.

One consequence of the legislation is that a person has better protection when expressing their views if those views derive from their Christian faith rather than someone whose views are not informed by their faith (or absence of faith).

A principle that can be extrapolated from the DCLG Guidance (see “G” below) is that it may be more acceptable to put something in the context of a personal view, for example “as a Christian, I believe that...” or “the Bible says that...” rather than stating something as a bold fact without a reference point for that view.

This should also encourage Christians to share their personal testimony with colleagues during such discussions, taking them on the journey travelled rather than just expressing a concluded view.

From an employer’s perspective, dialogue between staff rather than confrontation maintains the desired working relationship.

G. I am worried I might be accused of being homophobic.

To an extent this follows on from “F” above.

My view is that the term “homophobic” should never properly be applicable to a Christian. Our words and actions should never derive from hatred or an irrational fear of those under any form of temptation, sexual or otherwise. However, it must be recognised that this is how expressing the Church’s orthodox position on sexual sin may be perceived or described by some.

It may therefore be important to convey the context of any

particular view. For example, consider whether it is misleading to talk exclusively about homosexual sexual sin if you consider the biblical view to be that all sex outside marriage is sinful. It is also important that colleagues understand how your view is informed.

The DCLG Guidance (which is within the context of providing goods and services) states that “if a pupil asks a teacher his views on homosexuality and the teacher gives his view, then again, that teacher will not be acting unlawfully”, although the way that view is conveyed could be inappropriate. If this is the view within schools in relation to a teacher pupil context, it should be all the more so in relation to discussions between colleagues who are peers.

Although it remains to be seen if this is what happens in practice, the FAQ within the DCLG Guidance (p33) says “*The Regulations [governing the provisions of goods and services] will not: i) enable someone to be sued for holding or expressing views about homosexuality or sexual relationships...*” However this does not mean that there may not be a breach of some other legal obligation, including an employer’s own workplace standards and expectations.

If a Christian considers that there are workplace practices that promote homosexual issues and behaviour that they are uncomfortable with, (for example promotion of a workplace gay and lesbian society, fundraising for gay rights groups or diversity training that expresses the view that sexual orientation is exclusively a matter of nature), the starting point is to explain in advance to the employer the issue this creates. It is important to put this in a full context, so that you explain that you are a Christian and what you believe as a Christian, before going into specifics about what concerns you and why (and explaining how it is informed by your Christian faith). Then you can move on to make any suggestions that could help and finally refer to any company policy that means that you hope that your concern will be taken seriously and accommodated.

H. Can I object where my employer has asked me to undertake duties that are contrary to my Christian conscience?

Yes. Examples could include lying on someone else's behalf or being asked to work a lottery machine in a newsagent when you are opposed to gambling.

The same principle of reasonable accommodation set out in "B" above applies. If you have been targeted to undertake such duties precisely because of your faith, this is likely to be direct discrimination. In relation to indirect discrimination, it is questionable whether lying could be seen to be a legitimate aim, but if the duty you are being asked to undertake is a legitimate aim, as mentioned above, the need for you to undertake it must be proportionate to that aim.

Whilst continuing to act in a manner that is reasonable, you should object clearly, as soon as the request is made; be aware that the more you acquiesce in requests contrary to your conscience, the more difficult it may be to convince anyone of the strength of your religious convictions.

I. My employer has asked me to supply a good or service to a client that is contrary to my Christian conscience.

Where this relates to sexuality, again it must be appreciated that there are additional considerations due to the need to balance competing rights within discrimination law. In general terms, it would be unlawful to refuse to provide a service to an individual because of their sexual orientation or lifestyle. However, if in providing that service you would be compromising your Christian conscience it will be quite appropriate to ask for your conscience to be accommodated and it may be unlawful if your request is not properly taken on board.

For example, it may be possible to draw a valid distinction between a person who works at a printers who objects to providing any services to a homosexual (which should be assumed to be unlawful) and objecting as a matter of Christian conscience to printing

flyers promoting homosexual sexual activity (in the belief that they would thereby be condoning behaviour anathema to their personal conscience). In such a case, a Christian may need to show consistency when asked to print material pertaining to heterosexual sexual activity which they similarly consider to be wrong (such as that outside marriage) or be able to justify any distinction drawn (which may not be straightforward).

Rights of religious conscience figured prominently in The Christian Institute's 2007 case against the Northern Ireland Sexual Orientation Regulations (The Christian Institute & Ors, Re Application for Judicial Review). In giving his decision, Mr Justice Weatherup referred favourably to the Canadian case of Ontario Human Rights Commission v Brockie. He summarised the approach to religious conscience in the Brockie case by saying that a believer is "not required to undertake action that promotes that which the essence of the belief teaches to be wrong". Although this case relates to the area of goods and services, the principle is just as applicable to an employment scenario.

On the DCLG website, in giving an overview of the DCLG Guidance, the DCLG states that "*individuals who are concerned that the requirements of their job may be incompatible with their religious beliefs may ask their employer to be redeployed. Employers should be sensitive to the religious beliefs and perspectives of their employees and will need to be mindful of their obligations under the [discrimination legislation] not to discriminate against their employees on grounds of religion or belief.*"

The above quote is specifically in relation to matters where there is a conflict between religious rights and matters of sexual orientation. The obligation to accommodate Christians will be stronger where the matter of conscience does not need to be balanced against rights relating to sexual orientation, such as where the printer is asked to print a flyer containing a blasphemous image.

J. How should I convey my concerns?

I would generally recommend putting concerns in writing, because it provides a clear record and also may enable you to express matters more fully and in a way that is not possible (or could be easily misunderstood) if expressed for the first time face-to-face. The approach should be one of informing and indeed educating an employer (who may be completely ignorant about what Christians believe) rather than confronting. This may be the first opportunity the person you write to will ever have had to hear the Gospel, so use the opportunity and privilege wisely.

As stated at the beginning, employees should have access to a grievance procedure and that is normally the appropriate first step.

A failure to adequately investigate or pursue an employee's grievance can amount to discrimination in itself, if the failure to deal properly with the complaint was itself due to religious reasons (extrapolating the principle from *Eke v Commissioners of Customs & Excise*).

There is also a more formal "Questionnaire" procedure. This allows workers to use a prescribed document to submit specific questions about their treatment and their concerns that it is discriminatory. If an employer fails to answer it or gives evasive answers, a Tribunal is likely to consider that reaction to be strong evidence in support of any claim.

Finally, it may be possible to pursue a remedy in the Employment Tribunal. Normally claims have to be brought within 3 months of the offending act. This should normally be the last resort.

It has to be understood that employers are given a certain amount of flexibility within the judicial process. There are employers who are sympathetic to Christians and there are employers who are hostile. Different decisions may be reached by different organisations facing similar circumstances and both may be equally justifiable in law. It is important to bear in mind that, in the event of a dispute, a third

party may end up reading your communications. If a situation cannot be resolved and the correspondence shows an employee to have been reasonable in the face of an unreasonable employer, they are more likely to have the Tribunal's sympathy.

Conclusion

In a nutshell, it is important to understand that the employer who disregards your Christian beliefs has broken the law. The employer who considers your Christian beliefs and reaches a conclusion that is reasonable, albeit not the conclusion you were hoping for, is likely to have complied with the law in principle. The employer who accommodates every request Christians make may be breaking the law in its obligations to its other staff and/or its clients.

There is therefore undoubtedly the need for discernment and wise counsel, both spiritually and legally, in the concerns we raise and the manner in which we raise them. Pursuing an ill-founded complaint against a colleague or employer can be no less harmful a witness than acquiescing in ungodly conduct.

There are secular organisations that may be able to provide advice without charge, including ACAS (www.acas.org.uk) and the Citizens Advice Bureau, although this is unlikely to be advice with a specific Christian sentiment.

Religious liberty in the workplace

This handy guide, written by an employment lawyer, addresses common questions of concern to Christians in the workplace:

- Can I send Christmas cards to my colleagues?
- Should I be allowed time off because of Church Services/Christmas/Easter?
- Can I wear a cross?
- I am being asked to wear an immodest uniform – can I refuse?
- Can I share my faith in the workplace?
- Can I give a Christian opinion on controversial topics?
- I am worried I might be accused of being homophobic.
- Can I object where my employer has asked me to undertake duties that are contrary to my Christian conscience?
- My employer has asked me to provide a good or service for a client that is contrary to my Christian conscience.
- How should I convey my concerns?



Mark Jones is head of Employment law at Ormerods solicitors. Mark's advice has been relied upon by many "household name" corporations; he also advises a number of Christian organisations and has assisted many individuals who feel discriminated against at work because of their Christian faith. Mark has been involved in many of the most notable cases affecting employment and religious liberties.



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