Is there 'no place in the work context' for religious proselytism?

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ABSTRACT

The proposition that employers are right to prevent absolutely employees from proselytising their religious beliefs at work has been mooted by AG Sharpston, now retired Advocate-General of the Court of Justice of the European Union, in her Opinion in *Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA.* She argued this on three bases: that proselytism is not core to a person's religious beliefs (and therefore not a manifestation of religion); that working time is used for the purposes of business rather than proselytism; and because proselytism creates disharmony amongst the workforce. It is contended in this article that such a proposition is controversial as each of these statements is deserving of challenge. Proselytism has been recognised as a bona fide manifestation of religion by the European Court of Human Rights and not only facilitates a proselytiser's religious rights but also those of the potential proselyte (to have the opportunity to change religion). Working time is not exclusively spent in the relentless pursuit of business; there is a social dimension and an exchange of ideas would be commonplace. Disharmony, and even harassment, may result from proselytism, but this may be mitigated by moderation (on behalf of the proselytiser) and the judicious use of restriction (by the employer).

1. INTRODUCTION

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In her Opinion in *Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*,[1] outlining her understanding of religious manifestation, AG Sharpston argued that 'proselytising on behalf of one's religion' has 'simply no place in the work context' and employers may rightly prohibit it.[2]

The issues in play in *Bougnaoui* were not in fact concerned with proselytism,[3] but, as the case was one of the very few concerning religious expression to reach the Court of Justice of the European Union (CJEU), it may be that the Advocate General wished to consider religious manifestation in its widest sense. What is striking is that, in an otherwise nuanced Opinion demonstrating a sympathetic understanding of the manifestation of religion at work,[4] she should have such an uncompromisingly negative view of proselytism, rendering it beyond the pale of what might be considered acceptable manifestations of religion by individual actors in the workplace. AG Sharpston's contention was made in the context of an Opinion and cannot be said to represent the settled view of the CJEU.[5] However, in the absence of any judgments concerning proselytism at work, AG Sharpston's Opinion may at least represent a possible direction of travel for the Court, and, more significantly for the purposes of this article, other courts which might be open to persuasion by its reasoning, in particular the courts and tribunals in the United Kingdom post-Brexit,[6] and it is therefore worthy of serious consideration and critique.

[1] Case C-188/15, Opinion of AG Sharpston (13 July 2016).
[2] ibid, para 73.
[3] The case concerned the wearing of the Islamic headscarf.
[4] AG Sharpston's positive and expansive understanding of religious manifestation at work sits in contrast with the more restrictive view of AG Kokott, in an Opinion concerning a parallel case; Kokott suggested that an individual should be expected to 'moderate the exercise of his religion in the workplace': see *Achbita and Anor v G4S Solutions NV* Case C-157/15, Opinion of AG Kokott (31 May 2016) para 116. For a discussion, see Andrew Hambler, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from *Achbita* and *Bougnaoui*' (2018) 47 ILJ 149.
[5] Indeed there was no reference at all to proselytism in the actual judgment in the case: Case C-188/15, judgment of 14 March 2017.
[6] The Opinion was of course given whilst the United Kingdom was a member of the European Union and existing discrimination law in the United Kingdom has been shaped by EU directives, most notably Council Directive

The purpose of this article is to test the notion that individuals who proselytise in the mainstream workplace should be considered to be outside of any available legal framework for protection of religion. The focus will be on the legal jurisdiction of England and Wales.[7] The question will be considered largely in principle, but drawing also on the very limited authoritative case law. The claims in the public domain tend to engage both religious discrimination under the Equality Act 2010[8] and unfair dismissal claims under the Employment Rights Act 1996.[9] Most claims make reference to the European Convention on Human Rights (ECHR) but this is often an overlay to discrimination law – discrimination law engages different principles but should be read in a way which is compatible with the ECHR and, in this case, Article 9.[10] Courts have recognised this, inter alia, by the incorporation of Article 9 definitions in the context of religious discrimination claims. In *Grace v Places for Children*,[11] for example, a claim brought by an employee dismissed for proselytism, the Employment Appeals Tribunal (EAT) explicitly used the 'Strasbourg' language of manifestation when applying the principles of discrimination law:

> … there is no clear dividing line between holding and manifesting a belief and that an unjustified unfavourable treatment because an employee has manifested his or her religion may amount to unlawful discrimination.[12]

The article begins by defining proselytism and distinguishing it from other forms of verbalised religious expression. It moves on to consider the reasons why people engage in

2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, and CJEU decisions on its application.

[7] Albeit making reference to other jurisdictions, in particular the United States, where there is a greater body of relevant case law.

[8] s 10.

[9] s 94.

[10] Human Rights Act 1998 s 3(1).

[11] [2013] UKEAT 0217/13.

[12] ibid [6] (Mitting J). The judgment also cites, approvingly, Equality and Human Rights Commission (EHRC) guidance making the same point.

proselytism, both without and within the workplace. Next, it discusses the status of proselytism as a manifestation of religion, with particular reference to the European Court of Human Rights (ECtHR) and its jurisprudence. The discussion then turns to considering, and critiquing, objections to proselytism in the workplace, based around the contentions of AG Sharpston. Finally, consideration is given to those factors which might reasonably be taken into account when seeking to regulate, rather than outlaw, proselytism in the workplace.

2. WHAT IS PROSELYTISM?

In this section, an important preliminary issue will be addressed – how to conceptualise what is meant by proselytism.

The Oxford English Dictionary defines proselytism as:

1. The fact or condition of becoming or being a proselyte; conversion.

2. The practice of proselytizing; the making or seeking of converts; proselytizing zeal.[13]

It is submitted that the second leg of this definition is most pertinent to the analysis in this article. Proselytism in the workplace is likely to be characterised by efforts to persuade other actors (co-workers, clients, suppliers, etc.) to 'convert to' or adopt a particular religious worldview. This is perhaps most likely to arise during discourse between two or more actors in the workplace, but it could arise from actions (e.g. giving out religious texts to others) or even from dress or personal grooming when invested with 'powerful' symbolism which might be thought capable of influencing other people to act in particular ways.[14] Where proselytism arises during workplace discourse, the contextual conversation may have been initiated by the 'proselytiser' but, equally, it may not.

[13] *Oxford English Dictionary* (2nd edn, Oxford: Oxford University Press, 1989).
[14] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 Feb 2001).

It should also be noted that there may be a distinction between mildly and strongly worded proselytism.[15] It might also be possible to identify a slightly different form of verbalised religious expression, such as invoking God's blessing,[16] or offering to pray for a colleague or client,[17] which may have an indirect proselytising effect and could perhaps be usefully described as 'action short of proselytism'. Action short of proselytism will not be treated separately from proselytism in this discussion, not least because of the paucity of either academic writing or case law in this area.

There is also perhaps a third identifiable category which involves verbalised religious expression which has the capacity to offend others because it is critical of, inter alia, their religious convictions, lifestyle choices or sexual orientation.[18] It is submitted that this kind of expression is different to proselytism and is not, therefore, central to the analysis in this article. Nevertheless, it is recognised that there may be a nexus between proselytism and potentially offensive expression of this kind. For example, it is not uncommon for a speaker seeking to convert others to urge 'repentance' first. If the speaker then went on to itemise the sins that her audience needed to repent of, then this expression would encompass both proselytism and this third category.[19] However, it should be noted that proselytism itself need

[15] Similar to the distinction noted in *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127 between the use language which is 'extreme and offensive' [5] and 'appropriate and moderate' [111].
[16] For example, in the US case of *Banks v Service America Corp*., 952 F. Supp. 703 (D. Kan. 1996), the facts of which involved the dismissal of two employees for saying 'Praise the Lord' and 'God bless you' to customers.
[17] In a well-publicised case resolved before a tribunal hearing, an NHS bank nurse, Caroline Petrie, was suspended for offering to pray for a patient; see Caroline Gammell, '"Thousands are at Risk" in NHS after Nurse in Prayer Row is Suspended' *The Daily Telegraph* (London, 4 February 2009) 9.
[18] For a discussion and examples, see Megan Pearson, 'Offensive Expression and the Workplace' (2014) 43 ILJ 429.
[19] For example, in *Haye v Lewisham BC* (2010) UKET 2301852/09, an employee unsuccessfully claimed discrimination on the grounds of religion and belief, as well as unfair dismissal, after being dismissed for emailing the Chief Executive of the Lesbian and Gay Christian movement (from a work computer) to criticise her for her beliefs about sexuality, and to suggest she was possessed by an evil sexual spirit, and then to urge her 'to repent and turn from [her] sinful ways before it is too late' [6].

not *necessarily* be linked to expression which is potentially offensive for other reasons, and this allows it to be analysed separately.

3. WHY DO PEOPLE PROSELYTISE?

In *Mbuyi v Newpark Childcare (Shepherd's Bush) Ltd*,[20] the Claimant framed her proselytising activities at work in these terms: 'I believe what I have got is a gift [and] ... a desire to share'.[21] The language used is indicative of a positive and outward-looking intention to offer something of value to others, a motivation which is not captured by the term 'proselytism', with its pejorative overtones.[22] Bickley makes an important point in this regard:

> It is hard to think of any religious individual or organisation that would willingly use the language of proselytism to describe their own activity – Muslims would refer to Da'wah, Christians to mission, evangelism and witness.[23]

It may be that in many cases, proselytism (or *Da'wah*, mission, evangelism or witness) originates in an unselfish desire to 'share' spiritual truths with others, as suggested by the Claimant in *Mbuyi*. However, it can also be framed as a matter of religious obligation. Many religious employees take inspiration from sacred texts. For Christians, the final recorded words of Jesus before the Ascension, known as the Great Commission, read thus:

> Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you. And surely I am with you always, to the very end of the age.[24]

For Muslims, there is the following injunction from the *Quran*:

[20] (2015) UKET 3300656/14.
[21] ibid [54].
[22] Despite any negative connotations, the term proselytism is used in this article, largely in want of a suitable alternative, and with the intention of using it neutrally.
[23] Paul Bickley, *The Problem of Proselytism* (London: Theos, 2015) 23.
[24] Matthew 28 v 19-20 (New International Version).

> Invite to the way of your Lord with wisdom and good instruction, and argue with them in a way that is best. Indeed, your Lord is most knowing of who has strayed from His way, and He is most knowing of who is [rightly] guided.[25]

Amongst Christians and Muslims, there are those who are likely to feel under compulsion to act on the injunctions in these and other texts, to 'witness to' or proselytise within the workplace which they may perceive as a 'mission field'.[26] Not to do so would represent an act of disobedience to God (with attendant consequences),[27] as well as selfishly ignoring the perceived spiritual needs of others.

4. IS PROSELYTISM A MANIFESTATION OF RELIGION?

Before focussing clearly on the workplace, there is a preliminary question to be addressed relating to the legitimacy of proselytism *per se*. Proselytism is not uncontroversial. In mediæval times in Europe, attempts by heretical groups, such as the Waldensians, to seek converts from the Catholic Church were met with pitiless resistance.[28] Converts to Catholicism, who were persuaded to return to their initial religious faiths, were subjected to sometimes bloody persecution.[29] It was only with the advent of the Eighteenth Century Enlightenment that such attitudes began to fundamentally change in Europe,[30] yet to this day, on the broader international stage, a number of countries continue to prevent adherents of

[25] *Quran* 16 v 125.
[26] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford: Oxford University Press, 2013) 348.
[27] See Kimball Gilmer and Jeffrey Anderson, 'Zero Tolerance for God: Religious Expression in the Workplace after Ellerth and Faragher' (1999) 42 *Howard LJ* 327, 344.
[28] Robert Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe 950-1250* (New York: John Wiley & Sons, 2008).
[29] The work of the Spanish Inquisition both within Early Modern Spain, and its colonies, is the most notorious example: see Joseph Pérez, *The Spanish Inquisition: a History* (New Haven: Yale University Press, 2005).
[30] See, for example, Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton: Princeton University Press, 2003).

minority religions from seeking converts from the majority religion on pain of criminal penalties.[31]

Under modern human rights instruments, religious freedom is invariably treated as a fundamental human right. Article 18 of the United Nations Universal Declaration of Human Rights for example reads thus:

> 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 teaching, practice, worship and observance.

The drafting is mirrored in the European Convention on Human Rights.[32] What is notable about the wording of these texts, for the purposes of this article, is that the right is inclusive of the right to *change* religion and belief. This is important because the ability to change religion or belief presupposes that the individual has the necessary information to do so. It is for this reason that proselytism has the potential to become an important facilitator of the right to freedom of religion. This was recognised by the ECtHR in *Kokkinakis v Greece*,[33] in which the legality of a Greek law criminalising some forms of proselytism was challenged by Mr Kokkinakis, a Jehovah's Witness who had been convicted for attempting to convert a Greek Orthodox Christian during an unsolicited visit to her home. The Court concluded that one of the reasons proselytism was justifiable is because it might be necessary for others to

[31] See the detailed evidence presented in: Pew Research Center, *A Closer Look at How Religious Restrictions Have Risen Around the World* (15 July 2019) <https://www.pewforum.org/2019/07/15/a-closer-look-at-how-religious-restrictions-have-risen-around-the-world/> accessed 1 July 2021.
[32] Article 9(i) ECHR.
[33] (1993) 17 EHRR 397.

exercise their Article 9 rights to change religious beliefs. Indeed without proselytism, the right to change religion 'would be likely to remain a dead letter'.[34]

The Court also affirmed proselytism as a manifestation of religion because of its importance as a component of an individual's religious freedom:

> While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions … .[35]

It went on in the same paragraph to add further emphasis, noting that 'freedom to manifest one's religion … includes in principle the right to try to convince one's neighbour, for example through "teaching"... .'[36]

It would seem from *Kokkinakis* that not only is proselytism regarded as a bona fide manifestation of religion but it may be argued that it is one with a particularly high status because it has a dual function – to fulfil the felt need of the religious individual to try to convince others of his or her religious beliefs, and also because it allows others to fully exercise their right to change religion in response to persuasion. In this sense, no other manifestation of religion has such a strong claim to legitimacy.

The CJEU, in recent preliminary decisions, has followed the ECtHR decision in *Kokkinakis*, recognising the freedom to proselytise as a 'corollary' of freedom of religion,[37] and as 'conduct linked to the exercise of the freedom of religion'[38] under the Charter of Fundamental Rights[39] (in addition to the ECHR) and emphasised its necessity in order to fulfil

[34] ibid, para 31.
[35] ibid.
[36] ibid.
[37] C-25/17, *Proceedings brought by Tietosuojavaltuutettu* [2018] Opinion of AG Mengozzi (1 February 2018) para 46.
[38] C-56/17, *Bahtiyar Fathi v Predsedatel na Darzhavna agentsia za bezhantsite* [2018] Opinion of AG Mengozzi (25 July 2018) para 64.
[39] Article 10(1).

the right to change religion which would be 'meaningless' if the court recognised a general negative right for a 'target' public to be free from proselytism.[40]

Whereas employment tribunals in England and Wales have not obviously adopted such an elevated view of proselytism, nevertheless its legitimacy as a manifestation appears to have been recognised. For example, in *Grace,* in which a nursery manager was dismissed following an unauthorised training session for staff members in which she discussed her religious beliefs, the EAT found that, in so doing, 'the Claimant had manifested her religion'.[41] Similarly, in *Wasteney v East London NHS Foundation Trust,*[42] attempts by a senior occupational therapist to convert a Muslim junior colleague to Christianity was accepted as a manifestation of her religion.[43]

Returning to *Kokkinakis,* it is notable that the high status of proselytism was reserved for 'bearing Christian witness' which 'corresponds to true evangelism' and did not extend to 'improper proselytism'.[44] The ECtHR did give some guidance on what improper proselytism might be, based on a document prepared by the World Council of Churches on which it placed reliance:

> The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it

[40] *Tietosuojavaltuutettu*, para 48. Similarly, 'the right to freedom of religion in Article 9(1) ECHR does not include a right not to be confronted by someone else's religion': Gerhard van der Schyff, 'Does the European Convention on Human Rights Guarantee a Right to Freedom 'From' Religion?: A Theoretical and Comparative Analysis' in Cole Durham, Jr., Javier Martínez-Torrón and Donlu Thayer (eds.), *Law, Religion, and Freedom: Conceptualizing a Common Right* (Abingdon: Routledge, 2021) p. 137; see also the reasoning in *Lautsi and Ors v Italy* (2012) 54 EHRR 3.
[41] *Grace* (n 11) [6].
[42] [2016] UKEAT 0157/15.
[43] ibid [51].
[44] *Kokkinakis* (n 33) para 48.

> is not compatible with respect for the freedom of thought, conscience and religion of others.[45]

This may be regarded as helpful.[46] It sets the bar fairly high for what may be regarded as improper – bribery, improper pressure on vulnerable people, violence and brainwashing.

The definition of improper proselytism was widened slightly as a result of the Court's judgment in *Larissis and others v Greece*[47] to include the abuse of power.[48] This was in the context of a military environment where junior ranks had been approached by officers who invited them to attend church and sought to engage them in conversations about religion. The officers had been convicted of a criminal offence under Greek law and applied (unsuccessfully) to the Court on the basis that this represented an interference with their Article 9 rights. The Court clearly intended to limit the reach of its decision to the specific context in which it arose:

> In this respect, the Court notes that the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel [….]. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.[49]

Although this decision related to a military context only, with the clear implication that civilian life is very different, it is notable that 'power differentials' exist in other employment spheres.

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[45] ibid.
[46] Although some commentators would disagree, for example Scharffs, who is critical of the court for both creating the distinction and then, in his view, of 'failing to define it clearly': Brett Scharffs, 'Kokkinakis and the Narratives of Proper and Improper Proselytizing' (2017) 12 *Religion & Human Rights* 99, 110.
[47] (1999) 27 EHRR 329.
[48] ibid, para 51.
[49] ibid.

This has been recognised in US jurisprudence in *Chalmers v Tulon Co*,[50] where a court found that a supervisory job role increased the likelihood that religious speech could lead to a hostile work environment for staff at a lower level of seniority. It was also a factor in the more recent EAT judgment in *Wasteney*.[51]

Under the ECHR, the manifestation of religion can be restricted where necessary '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'.[52] This is of course quite a different categorisation to that of improper proselytism, which denies the very legitimacy of an apparently religious activity. Thus, it was open to the EAT in *Grace* to uphold an employer's dismissal decision because the claimant had proselytised 'in a way in which was inappropriate and which upset members of staff'.[53] Equally, in *Wasteney,* the EAT ruled that attempts to convert a Muslim colleague was capable of being restricted, as the Appellant had 'subjected a subordinate to unwanted and unwelcome conduct, going substantially beyond "religious discussion", without regard to her own influential position' – and therefore she could be disciplined.[54]

5. OBJECTIONS TO PROSELYTISM AT WORK

This article began by invoking the observations of AG Sharpston concerning the legitimacy of proselytism. It is instructive to consider her actual words in detail.

> When the employer concludes a contract of employment with an employee, he does not buy that person's soul. He does, however, buy his time. For that reason, I draw a

[50] 101 F.3d 1012, 1021 (4th Cir. 1996).
[51] *Wasteney* (n 42) [65].
[52] Article 9(ii) ECHR.
[53] *Grace* (n 11) [6].
[54] *Wasteney* (n 42) [65].

> sharp distinction between the freedom to manifest one's religion … and proselytising on behalf of one's religion. … The latter practice has, in my view, simply no place in the work context. It is therefore legitimate for the employer to impose and enforce rules that prohibit proselytising, both to ensure that the work time he has paid for is used for the purposes of his business and to create harmonious working conditions for his workforce.[55]

It can be seen that Sharpston argues the case against the toleration of proselytism at work on the basis of three contentions:

i. Proselytism is a 'practice' rather than a *bona fide* manifestation of religion, from which it can be distinguished.
ii. The employee should be at the availability of the employer and his time should be spent carrying out the business of the employer and not engaging in proselytism.
iii. Proselytism can cause disharmony in the workplace.

Although not explicitly stated by AG Sharpton, it might be argued that, in some circumstances, not only might it cause disharmony but there may be a further implication:

iv. Proselytism at work may lead to actual or perceived harassment.

These four contentions will be critiqued in the section below.

A) Non-core practices

AG Sharpston is not alone amongst those who have argued the importance of distinguishing between manifestations of religion and religiously-motivated practices. The former sometimes characterised as 'core' to an individual's religious beliefs and the latter as 'non-core'. Lord Justice Neuberger in *Ladele v Islington Borough Council,* for example, described a

[55] *Bougnaoui* Opinion of AG Sharpston (n 1) para 73.

registrar's objection, for reasons of personal religious conviction, to registering same-sex civil partnerships as 'not a core part of her religion'[56] (in contrast to what was presumably core, 'worshiping as she wished').[57] Similarly, in *Mba v Merton Borough Council*, the EAT affirmed the observation by an Employment Tribunal that 'the belief that Sunday should be a day of rest was not a core component of the Christian religion'.[58] This line of inquiry by courts stemmed from an early decision by the ECtHR, *Arrowsmith v United Kingdom*,[59] in which the Court drew a distinction between acts which are merely 'motivated or influenced by a religion or belief' and those which are necessary for someone to actually practice his or her religion or belief.[60]

The problem is, of course, the extent to which Courts are suitably equipped to determine what is core and what is non-core to any individual's religious beliefs. Ultimately, in *Eweida and Ors v United Kingdom*,[61] the ECtHR overturned its earlier approach concluding that 'there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question'.[62] Instead, the Court established that 'a sufficiently close and direct nexus between the act and the underlying belief',[63] is enough to engage Article 9.

AG Sharpston's Opinion was provided as a preliminary to a CJEU and not an ECtHR hearing;[64] however, there is clear evidence that the CJEU attempts to reconcile its judgments

[56] [2009] EWCA Civ. 1357 (CA), [2010] IRLR 211 [52].
[57] ibid.
[58] [2012] UKEAT 0332/12 [41].
[59] (1978) 3 EHRR 218.
[60] Sometimes referred to as a 'necessity test': see Peter Cumper, 'The Public Manifestation of Religion or Belief' in Richard O'Adair and Andrew Lewis (eds.), *Law and Religion* (Oxford: Oxford University Press, 2001).
[61] (2013) 57 EHRR 8.
[62] ibid, para 82.
[63] ibid.
[64] As the constitutional court of the European Union, the CJEU has a wider remit than the ECtHR which creates the possibility of divergence between the approaches taken by the two courts, *inter alia*, with regard to matters of religious freedom: see the discussion in Ronan McCrea, 'Singing from the Same Hymn Sheet? What the

with those of the ECtHR.[65] It is therefore perhaps surprising to observe AG Sharpston appearing to resurrect the necessity test by returning to a pre-*Eweida* stance. It should be noted that domestic courts also appear to have reverted at times to a similar position. For example, in *Ngole v University of Sheffield,*[66] a social work student posted a series of social media comments critical of same-sex marriages based on his Christian beliefs and was removed from his course as a result by a disciplinary panel. In his subsequent court action, Mr Ngole's application under Article 9 was rejected on the basis that Mr Ngole's social media postings constituted a 'religiously motivated contribution to a political debate' rather than a protected manifestation of religion.[67] Yet, it may be strongly argued that a 'close and direct nexus between the act and the underlying belief' can be established in this case and an Article 9 application should therefore have been admitted.[68]

Ultimately, the argument that proselytism is not core is difficult to evidence, and is not supported in substance by the ECtHR decision in *Kokkinakis* or, as a filtering device, in *Eweida.*

B) Working time

The second argument is that employees should not be proselytising whilst they should be working in the employer's time, presumably just as they should not be accessing Facebook or reading an online newspaper. This argument has some force, not least in a traditional office or factory work environment. Few people would argue that employees should steal time from

Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State' (2016) 5 *Oxford Journal of Law and Religion* 183.

[65] For example in *Achbita and Anor v G4S Solutions NV*, Case C-157/15, judgment of 14 March 2017.

[66] *Ngole* (n 15).

[67] ibid [61].

[68] In this particular case, a parallel Article 10 application by the Claimant was successful.

their employer by neglecting work for their own pursuits at the employer's expense.[69] However, there is a difficulty. The workplace is often a social space: people do not generally view work exclusively as a means of earning a living,[70] but may seek to satisfy different human needs there, such as the need for affiliation;[71] consequently, few employers require employees to work in silence and discussions in work time on non-work topics are almost invariably tolerated as to seek to ban any non-work conversation is likely to lead to an oppressive and sterile environment. Thus, if an employee is permitted to share his enthusiasm (during working hours) with co-workers for a football team, why might he not be permitted to share his enthusiasm for a religious faith? Even assuming that an employer only tolerates minimal non-work interaction between employees, there is a further difficulty. Employees working six hours or more have a legal right to a 20 minute break away from their workstation,[72] and it is difficult to see how proselytism in this context could be said to be encroaching on the employer's time.[73] In many less rigidly defined workplaces, or indeed work

[69] There is a possible example of this in the judgment in *Kallas v Motor Vehicles*, 560 P.2d 709 (Wash. 1977), where the plaintiff, who had been suspended for refusing to refrain from proselytising, was also accused of spending excessive time discussing his religious views and for 'the time ... spent on the telephone dealing with church matters' – overall this was said to have 'interfered with performance of the department's business' (p 356).
[70] Which Esau characterises as the 'instrumental' approach to work as opposed to the 'organic' view he prefers which involves a wider participation in the life of the organisation in association with its members: see Alvin Esau, '"Islands of Exclusivity": Religious Organizations and Employment Discrimination' (1999) 33 *University of British Columbia Law Review* 720. This view is not dissimilar to modern 'human resource management' approaches to work, e.g. Denise Rousseau, *Psychological Contract in Organizations: Understanding Written and Unwritten Agreements* (London: Sage, 1996), and its antecedents in the human relations tradition, e.g. Frederick Herzberg, Bernard Mausner and Barbara Snyderman, *The Motivation to Work* (New York: John Wiley and Sons, 1959).
[71] David McClelland and Eric Johnson, *Learning to Achieve* (Glenview, Illinois: Scott Foresman and Co., 1984).
[72] Working Time Regulations 1998 SI 1998/1833, reg. 12(3).
[73] Commenting on the same issue in a US context, Moberley recommends a legal approach which would allow employers to restrict proselytism during 'working time' (but only if they also restrict 'comparable speech' which is not 'religiously motivated'); however, it would only permit them to regulate religious proselytism during 'nonworking time' in situations where 'that speech was disruptive, or otherwise interfered with production': see Michael Moberly, 'Bad News for Those Proclaiming the Good News: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing' (2001) 42 *Santa Clara L. Rev.* 1, 61. It may be objected that this approach, with its apparently clear dichotomy between working and non-working time, lacks nuance and would not be helpful in situations where the difference between the two is more opaque.

roles,[74] the boundaries between what is considered the employer's time, and what is not, may not always be obvious;[75] equally, employers sometimes consider themselves to have an interest in what might normally be considered an employee's private sphere (most notably social media postings).[76] In such circumstances, a policy of penalising employees for private conversations in a forum which may not be clearly a work one may be considered unfair.[77]

Although Sharpston does not make this point explicitly, there is a suggestion that the religious person should restrain herself from proselytising at work, leaving that activity at the door and picking it up on exit.[78] This is akin to the legal position under the ECHR (until 2013) which assumed that the religious actor was able to preserve her Article 9 rights by virtue of being able to resign from the job, albeit in this case the focus is on one specific manifestation under Article 9.[79] This 'rule' (that Article 9 rights did not apply in 'specific situations')[80] was repudiated as a filter for applications in *Eweida*.[81] The workplace, however it is configured, is the place where a large proportion of the population spend the majority of their waking hours, and therefore the majority of their speech is likely to take place there,[82] and it may be thought unreasonable to fetter religious expression for the entirety of this time. This is not of course to suggest that employees who wish to proselytise should have carte blanche to spend

[74] The fact that the Working Time Regulations recognise, and make exceptions for, so-called 'unmeasured work' (reg. 20(1)) implies that it is possible for an employee's work and non-work roles to overlap and perhaps in places merge together. Similarly, in *Niemietz v Germany* (1992) 16 EHRR 97, the ECtHR observed that 'it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not' [29].
[75] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Modern Law Review* 912.
[76] For an example of this pertinent to religiously-motivated expression, and involving the disciplining of an employee, see *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).
[77] See discussion in Andrew Hambler, *Religious Expression in the Workplace and the Contested Role of Law* (Abdingdon: Routledge, 2015) 221-222.
[78] This is difficult, perhaps impossible, for those religious people for whom 'all of life is inspired by or generated by faith and belief': Ahdar and Leigh (n 26) 157.
[79] *Stedman v United Kingdom* (1997) 23 EHRR 168 (Commission Decision).
[80] *Kalac v Turkey* App no 20704/92 (Commission Decision, 1 July 1997) para 27.
[81] *Eweida and Ors v United Kingdom* (n 61) para 83.
[82] Eugene Volokh, 'Freedom of Speech and Workplace Harassment' (1992) 39 UCLA L Rev. 1791, 1849.

as long as they wish, whenever they wish, doing so (in the same way that the employee who spends all his time talking about his leisure pursuits could not expect to escape censure by his employer). However, it is simply to recognise that just because 'working time' is in play is insufficient a reason, by itself, to ban religious proselytism.

C) Disharmony

The broader view that any form of conspicuous religion at work might be a source of conflict and should be suppressed in favour of an entirely secular workspace, as espoused by some writers,[83] is clearly not the position adopted by A G Sharpston, whose focus is on the narrower issue of proselytism alone. The notion that proselytism might create disharmony in the workplace would tend to assume, at the very least, that it is not welcomed by its auditors (or at least some of them). The fact that proselytism may be unwelcome is in a sense intrinsic to the exercise. If the aim of the activity is to convert people to a perhaps radically different world view and way of life then, by definition, there must be something hard-hitting or cathartic about it. As Berg puts it, many religious people 'believe, as a matter of conscience, that they must communicate religious truths to others, even if - in fact, perhaps precisely because - those truths disturb and unsettle those who hear them.'[84] Even if the underlying religious motivation were disregarded, it is clear that the freedom to express perceived truths or ideas is not bounded by what is welcomed by others. As the ECtHR has stated, freedom of expression 'is applicable not only to "information" or "ideas" that are favourably received or

[83] See, for example, Caroline Cintas, Berangere Gosse and Eric Vatteville, 'Religious Identity: a New Dimension of HRM? A French View' (2013) 35 *Employee Relations* 567.
[84] Thomas Berg, 'Religious Speech in the Workplace: Harassment or Protected Speech?' (1999) 22 (Summer 1999) *Harvard Journal of Law and Public Policy* 959, 964.

regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.'[85]

There are of course different ways of communicating perceived truth, disturbing or otherwise, and some are less likely than others to result in disharmony. Courts frequently make approving reference to those who engage in 'moderate' religious expression.[86] People have varying degrees of sensitivity to their impact on others and, although the notion of moderation is a helpful one, it might be misapplied to exclude unsophisticated communicators. Whatever its limitations, it may be suggested that the notion of moderation (or alternatively the wider notion of 'civility')[87] is much more helpful in its focus on the manner of expression than a focus on the content of a particular form of expression. Worryingly, for example, an employment tribunal has recently entertained the principle that 'absolute' statements are amongst the factors to be weighed in determining whether or not a philosophical belief may be considered 'worthy of respect in a democratic society'[88] for the purposes of deciding whether or not it is entitled to be defined as a philosophical belief for the purposes of the Equality Act.[89] For many committed religious adherents from conservative traditions, truth is absolute, and there is only one path to 'salvation' – such people would never be able in conscience to accept that there are 'many ways up the mountain' and thus to acknowledge that other religions or world views might have equal

[85] *Handyside v United Kingdom* (1979-80) 1 EHRR 737 para 49. This observation related to the scope of Article 10 ECHR but it is strongly arguable that it might be applied also to the right to proselytise, albeit that the Court has generally preferred to deal with proselytism by way of an Article 9 analysis only.
[86] *Smith* (n 76) [63]; *R (Ngole)* (n 15) [111].
[87] In particular, the dimension of civility which involves 'respect for others': see Nicole Billante and Peter Saunders, 'Why Civility Matters' (2002) 18 *Policy: A Journal of Public Policy and Ideas* 32, 32; see also, for an in-depth treatment, Stephen Carter, *Civility: Manners, Morals, and the Etiquette of Democracy* (New York: Harper Perennial, 1998).
[88] *R (on the application of Williamson and others) v Secretary of State for Education and Employment and Others* [2005] UKHL 15; *Grainger Plc & Others v Nicholson* [2009] UKEAT 0219/09, [2010] IRLR 4 (EAT).
[89] *Forstater v CGD Europe & Anor* UKET 2200909/2019 (18 December 2019). For a comment, see Andrew Hambler, 'Beliefs Unworthy of Respect in a Democratic Society: A View from the Employment Tribunal' (2020) 22 Ecc LJ 234. The decision, and its reasoning, was overturned on appeal (UKEAT 0105/20).

status. It would be a mistake to attribute this to obstinacy or bigotry, as such exclusivity has a mandate in the plain reading of sacred texts.[90]

An allied concern is likely to be that those who do not welcome proselytism may be unable to escape it due to the confines of a typical work environment. This is because it is much more difficult for 'unwilling listeners' (or indeed viewers or readers) to avoid the unwelcome conduct of those to whom they are required to be in close proximity and where this proximity is not out of choice. This is a manifestation of what is often referred to as 'the captive audience problem',[91] where unwilling listeners are required to be in close proximity to others and cannot avoid their various forms of self-expression.[92] In such cases it may be argued that unwilling listeners in the workplace should be protected by restrictions on the expression of others.

The captive audience principle does seem to have been in play (to some extent) in *Drew v Walsall NHS Healthcare Trust,*[93] a rather unusual religious discrimination case in which the Claimant (a Christian hospital consultant), as part of a proposed resolution following a rather complex grievance investigation, was required, inter alia, to 'accept that his own wider personal views and religious beliefs should be kept to himself and should not be imposed on others'.[94] These 'views' and 'beliefs' found only indirect expression through the use of religious language in his everyday communications with colleagues. Yet the EAT did not overturn the employment tribunal's finding that there was no discrimination involved. The Trust could justify this requirement of Dr Drew 'that he should refrain from any religious

[90] For example, with reference to Christianity, Jesus is recorded as stating: "I am the way and the truth and the life. No one comes to the Father except through me" (John 14:6 New International Version).
[91] The 'problem' was identified by the US Supreme Court in decisions on First Amendment rights, such as *Kovacs v. Cooper* 366 US 77 (1949).
[92] For a helpful discussion, see Marcy Strauss, 'Redefining the Captive Audience Doctrine' (1991) 19 *Hastings Constitutional Law Quarterly* 85.
[93] [2013] UKEAT 0378/12.
[94] ibid [9].

references in his professional communications',[95] as the readers, who presumably had no choice but to read them, objected to the language used.[96]

The captive audience principle has been criticised, notably by Volokh, who argues that, as people cannot avoid encountering speech they find offensive in the public sphere (e.g. demonstrations, and logo-bearing clothing) and are in this sense captive to it, this is not considered a reason to ban such speech.[97] Indeed free speech principles require that it should not be.[98] On this basis, Volokh argues that since such speech is protected, despite the captive audience principle, then logically that protection must extend to workplace speech too.[99]

It may be objected that Volokh goes too far. If individuals are a captive audience in the public square, forced to view or hear something they find offensive, this is more likely to be of short duration; escape from captivity is often relatively straightforward – even on public transport, passengers can alight at the next stop.[100] In the workplace, this is usually not so as there is less likelihood of permanent escape,[101] unless an individual accepts the costs of resignation, and the search for another job - which is unlikely to be a realistic option for many.[102] Nevertheless, as Berg observes, '[a]lthough these proselytizing activities may offend

[95] ibid [88].
[96] In the case of one member of staff, the religious language was cited as part of a formal grievance against Dr Drew, ibid, [9].
[97] Volokh, 'Freedom of speech and workplace harassment' (n 82).
[98] ibid. Volokh argues this empirically with extensive examples of US First Amendment jurisprudence.
[99] ibid.
[100] Thus, even the passengers taking Feinberg's celebrated bus ride are only exposed to various causes of offence until the bus reaches its destination or, with some inconvenience, at an intermediate bus stop: Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1985) 10-13.
[101] Duration of course may not always be important – someone could be significantly disturbed by a brief encounter (hence the concept of the violation of dignity under the definition of harassment, which can result from a single incident).
[102] As Deakin puts it: ''jobs are not always interchangeable, and searching for an alternative can be costly. Labour and skills cannot be stored, so that few employees can afford to be without employment for long": Simon Deakin, 'Equality, Non-discrimination, and the Labour Market: a Commentary on Richard Epstein's critique of Anti-discrimination laws', in Richard Epstein, *Equal Opportunity or More Opportunity? The Good Thing about Discrimination* (London: Civitas, 2002) 49.

others in the workplace, bans on such activities impose a serious burden on religious freedom and should be subject to exacting legal standards'.[103]

Finally, there is danger in singling out proselytism as a cause of disharmony with a view to excluding it. There are many potential sources of disharmony in the workplace when ideas are openly discussed;[104] that an employee should enjoy the unrestricted right to share his strongly-held views about BREXIT, perhaps with a view to seeking to change a co-worker's opinion, but that another should not be allowed to talk about her religious faith, in the hope of obtaining a convert, would seem to create an inequitable situation. Such a situation could be dealt with by imposing a wide-ranging policy of religious, philosophical and political 'neutrality'.[105] However, such a policy can be considered repressive rather than even-handed, allowing no space for dissenting ('non-neutral') voices.[106] It may be argued that it is preferable (and perhaps more realistic) instead to adopt a generous approach to permitting the free exchange of ideas, including those involving an element of persuasion, and relying, as much as possible, on employees' sense of the need for civility to impose the necessary restraint in their exchanges rather than on workplace regulation.

D) Harassment

If proselytism is capable of causing disharmony, as AG Sharpston suggests, then it is a short step to conclude that it might also be capable of construction as 'harassment'. Harassment is defined under the Equality Act 2010 as follows:

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[103] Berg, 'Religious Speech in the Workplace' (n 84) 964.
[104] As recently recognised by Google in its 'Community Guidelines' aimed at staff: 'While sharing information and ideas with colleagues helps build community, disrupting the workday to have a raging debate over politics or the latest news story does not'; Google, *Community Guidelines* <https://about.google/intl/ALL_us/community-guidelines/> accessed 1 July 2021.
[105] Considered to constitute a legitimate aim (at least in relation to customer-facing roles) by the CJEU in *Achbita* (n 65) para 37.
[106] See Shaun de Freitas, 'Proselytism and the Right to Freedom from Improper Irreligious Influence: The Example of Public School Education' (2014) 17 *Potchefstroom Electronic Law Journal* 867.

(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.[107]

One of the protective characteristics which might be engaged by this definition is religion and belief.[108]

Although the harassment provisions with respect to religion and belief were perhaps intended as a shield to protect religious employees, they have equal potential to be used as a sword against them.[109] Thus, some employers may be concerned that unwelcome religious speech might be taken by some employees to amount to 'unwanted conduct' creating for them 'an intimidating, hostile, degrading, humiliating or offensive environment'.[110] The extent to which this represents a real possibility is discussed below.

In *Richmond Pharmacology v Dhaliwal,*[111] the EAT provided a three-fold framework for interpreting the different elements of the definition of harassment (the first two of which are of interest to this discussion):

(1) *The unwanted conduct*. Did the respondent engage in unwanted conduct?

(2) *The purpose or effect of that conduct*. Did the conduct in question either:

(a) have the *purpose* or

[107] Equality Act 2010, s 26(1).
[108] Equality Act 2010, s 10.
[109] Lucy Vickers, 'Is All Harassment Equal? The Case of Religious Harassment' (2006) 65 *Cambridge Law Journal* 579.
[110] Equality Act 2010, s 26(1).
[111] [2009] UKEAT 0458/08/1202, [2009] ICR 724, [2009] IRLR 336.

(b) have the *effect*

of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her ? (We will refer to (i) and (ii) as "the proscribed consequences".)

(3) *The grounds for the conduct.* Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?[112]

The first stage, to establish whether or not there has been 'unwanted conduct', is largely a question of fact for the tribunal and may not be easy to entirely divorce from the second stage.[113] The second stage is slightly more problematic as it effectively envisages two initial possibilities: that the unwanted conduct was carried out with deliberate intent ('had the purpose of'); or was carried out without intent but nevertheless 'had the effect' of either violating someone's dignity or creating an adverse environment for him. There are therefore two classes of unwanted conduct, which some commentators have termed 'animus' and 'non-animus' respectively.[114] Animus conduct is likely to constitute harassment because that is its intention, whereas the situation is more complicated in respect of 'non-animus' harassment. It is difficult to envisage circumstances in which religious proselytism could be said to constitute 'animus' harassment.[115] Unlike the sexual or racial harasser, an individual does not proselytise 'for the purpose' of violating the dignity of, or otherwise offending, other people. He may 'bear witness' in the knowledge that it is likely to unsettle the hearer, but that is a side-effect. Thus, potential harassment is likely to arise only because of its effect on the

[112] ibid [10] (Underhill, J. ['either'/'or' underlined in the original]).
[113] A point made by Underhill J., ibid. [11].
[114] See, for example, Deborah Kaminer, When Religious Expression Creates a Hostile Work Environment' (2000) 81 *New York University Journal of Legislation and Public Policy* 81, 139.
[115] Unless perhaps the proselytism is prefaced by insulting and derogatory comments about the hearer's own religious beliefs or lack of them: see Berg, 'Religious Speech in the Workplace' (n 84) 986.

auditor. The Equality Act identifies three important considerations when assessing the effect of the unwanted conduct:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.[116]

Thus, once a threshold of reasonableness has been met,[117] individual perception is of paramount importance when determining the effect of proselytism. When it comes to individual perception, unless a single act is so egregious as to violate an individual's dignity in and of itself, the concern is whether or not the unwanted conduct has created an 'intimidating, hostile, degrading, humiliating or offensive environment' for an individual. In the case of proselytism, it is possible to envisage examples where a single act might violate someone's dignity. Berg, in a US context, proposes that proselytism with menaces (e.g. a supervisor's threat of dismissal if an employee does not attend church or convert) might fit such a category.[118] However, it is more likely that the effect of proselytism might create a hostile or offensive environment and this usually requires more than a single act. Thus, in the case of an employee who is repeatedly exposed to unwanted proselytism, once he gives notice to the proselytiser that he finds the proselytism unwelcome, if the proselytism persists, then it is likely to constitute actionable harassment.[119]

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[116] Equality Act, s. 26(4).

[117] An example of a religious harassment claim where this threshold was not met is to be found in *Heafield v. Times Newspapers* (2013) UKET 1305/12, where a Roman Catholic employee brought a claim after hearing the words 'the fucking pope' used by an editor; the tribunal judge rejected the claim, observing 'sometimes people use bad language thoughtlessly: a reasonable person would have understood that and made allowance for it' [10] (Underhill, J).

[118] Berg, 'Religious Speech in the Workplace' (n 84) 985. The facts of *Venters v City of Delphi*, 123 F.3d 956 (7th Cir. 1997) provide a good example of this possibility; this case involved an employee who had been threatened by her supervisor with dismissal if she did not 'choose 'God's way' over 'Satan's way'.

[119] Berg (n 84) also makes this point. It should also be noted that it is possible that a religious employee might be so consumed with concern for the fate of the soul of her co-worker that she would be prepared to ignore clear signals that her actions are unwelcome.

Whereas claims may be brought against fellow employees, and moreover their employers,[120] it may be argued that the threat to the right to proselytise comes less as a result of direct legal action but rather the effect of the possibility of such action on employers as they make policy.[121] Employers are encouraged to develop robust anti-harassment guidelines as a means of mitigating their vicarious liability (by demonstrating that they 'took all reasonable steps' to prevent harassment occurring)[122] and many do so. Where this happens, there is every incentive for an employer to be rigid in its definition of harassment. As Volokh observes (with reference to harassment prohibitions in the USA) '[t]he employer's only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with any other statements, may lead to a hostile environment.'[123] The problem with overly strict policy-making in this area is that it has the tendency to create a 'chilling effect' on even permitted forms of this type of religious manifestation, rendering them unnecessarily conspicuous, or even disreputable, in the organisational environment which risks becoming, de-facto, a 'neutral' or secular space.[124] The majority of the limited number of publicly available employment tribunal and EAT claims concerning proselytism have been brought by the proselytiser, after being dismissed or disciplined by the employer for

[120] Who are vicariously liable, Equality Act 2010, s 109(1).
[121] Some employees are also subject to disciplinary action for proselytising activities if they violate the conduct rules of professional bodies; for example, in the case of medical doctors, the relevant conduct rules state: 'You must not express your personal beliefs (including political, religious and moral beliefs) to patients in ways that exploit their vulnerability or are likely to cause them distress' (General Medical Council, *Good Medical Practice* (March 2013) <www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/good-medical-practice> accessed 1 July 2021 [54]). At least one practitioner has been disciplined for violating such a rule by instigating religious conversations with a patient (under an earlier version of the code); see General Medical Council, *Dr Richard Scott Investigation Committee Decision* (14 June 2012).
[122] Equality Act s 109(4).
[123] Eugene Volokh, 'What Speech Does "Hostile Work Environment" Harassment Law Restrict?' (1997) 85 Geo LJ 627, 638-9.
[124] One example of this is some interesting research into how 'religious' student nurses feel forced to conceal their religious identities when working within the national health service: see Stephen Timmons and Aru Tarayanasamy, 'How do Religious People Navigate a Secular Organisation? Religious Nursing Students in the British National Health Service' (2011) 26 *Journal of Contemporary Religion* 451, 462.

proselytism of co-workers,[125] or clients or service-users.[126] Claims have been made, inter alia, for direct discrimination,[127] indirect discrimination[128] and harassment (sometimes with a degree of interchangeability), whilst often seeking to engage Article 9 in the process.[129] An indirect discrimination claim would appear to be normally the most appropriate course as a rule preventing employees from proselytising is likely to amount to 'a provision, criterion or practice' which puts a person at a 'particular disadvantage' due to her religion,[130] compared to non-religious employees who have no wish or perceived need to proselytise. Indirect discrimination does of course allow the employer to justify its conduct if it can be shown to be 'a proportionate means of achieving a legitimate aim'.[131]

Courts and tribunals have tended to accept the arguments of respondents in such cases, which usually focus on the actual or potential harassment of co-workers or clients, whilst rejecting the claimants' various discrimination claims.[132] In *Wasteney,* for example, the EAT agreed with the employment tribunal that, in giving the claimant a final disciplinary warning, the employer had acted properly in response to 'serious complaints about acts which blurred professional boundaries and placed improper pressure on [a] colleague'.[133] In *Chondol,* the EAT agreed with the employment tribunal that the (dismissed) Claimant 'was improperly foisting [his religion] on service users'.[134] In *Grace*, the EAT held that the Claimant

[125] *Wasteney* (n 42)*; Grace* (n 11).
[126] *Chondol v Liverpool City Council* [2009] UKEAT 0298/08; *Monaghan v Leicester Young Men's Christian Association* (2004) UKET 1901830/04; *Amachree v Wandsworth Borough Council* (2009) UKET 2328606/09.
[127] Equality Act 2010 s 13.
[128] ibid s 19.
[129] *Wasteney* (n 42) is perhaps the most illustrative example, the judge commenting that the Claimant's arguments 'slipped between different ways of putting her claims … and between different potential statutory bases of claim … . [Her counsel contended] that once Article 9 is engaged, the obligation on the Court is to find a route for a claim to be pursued in domestic law without being overly technical as to how this is done' [58] (Eady J).
[130] ibid s 19(1).
[131] ibid s 19(2)(d).
[132] *Mbuyi* (n 20) being an exception – but this was largely due to an unfair process in the form of hostile questioning about the Claimant's views on sexual orientation during the disciplinary hearing [169]-[154].
[133] *Wasteney* (n 42) [62].
[134] *Chondol* (n 126) [23].

had been fairly dismissed because she 'had manifested her religion in a way in which was inappropriate and which upset members of staff'.[135]

6. LEGITIMATE AND PROPORTIONATE CONSTRAINTS ON WORKPLACE PROSELYTISM

It has been argued in this article that there is no reason to conclude that proselytism is not a legitimate manifestation of religion within the workplace. As a manifestation of religion, those who practice it are afforded protection, inter alia, from the various forms of prohibited conduct under the Equality Act. One of those forms is harassment, and proselytisers are protected from harassment from co-workers on the grounds of religion, in the same way as those with other protected characteristics would be so protected in analogous circumstances. However, as has been noted in the preceding discussion, the act of proselytism is also capable of construction as harassment. Where this occurs, the courts (and indeed employers) are in the more difficult position of seeking to navigate between upholding freedom of religion and preventing harassment – an exercise which is less obviously required in cases of harassment for reason of other protected characteristics. The legitimacy of any constraints on proselytism will arise from the result of this navigation.

However, the employment case law in England and Wales is very limited and where courts and tribunals might draw the boundary lines in relation to the legality of employer's constraints on proselytism is not yet sufficiently clear. Whereas the prevention of religious harassment of clients and co-workers is likely to be considered to be a legitimate aim for employers, the extent to which it is proportionate, in pursuit of this aim, to restrict or prevent employees from proselytising is far less clear cut. Absent of such clarity, in the following paragraphs a number of factors relevant to how a court might make such an assessment will

[135] *Grace* (n 11) [6] (Mitting, J).

be proposed. It is mooted that there are five factors which may hold particular weight: the medium of communication; the civility of the communication; the nature of the workplace environment; the reaction of the audience; and power differentials at work.

A) The medium of communication

This chief concern of this article has been 'verbalised' proselytism. However, as noted earlier, it is also possible that religious dress or symbolism might be construed as having a proselytising effect,[136] albeit that this may be disputed.[137] Religious dress of course makes a statement of identity and individuals may feel mandated, either by religious injunction, or because of a personal commitment, to wear certain dress or symbols as a matter of obedience.[138] If, in the process, the wearing of such dress is seen as a form of proselytism (i.e. bringing some form of pressure to bear on others perhaps to take their faith more seriously) then it is non-directed and is likely to be incidental to the religious manifestation. As such, it might be described as a very weak form of proselytism and is the employer is likely to bear a particularly strong burden to justify any restrictions it might impose on religious dress for this reason.[139] Verbalised proselytism on the other hand is more likely to be directed towards a particular individual, to be explicit in its intention and clear in its message. Restrictions on verbalised proselytism may be more capable of justification, therefore, assuming other factors are present.

[136] For example in *Dahlab* (n 14), where an application to the ECtHR by a primary school teacher who had been prohibited from wearing an Islamic headscarf was found inadmissible because of 'the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children … [which] might have some kind of proselytising effect' (p 13).

[137] AG Sharpston for example, explicitly categorises 'the wearing of distinctive apparel as part of one's religious observance' as a manifestation of religion rather than an example of 'proselytising on behalf of one's religion': see Opinion of AG Sharpston (n 1) para 73.

[138] *Eweida* (n 61) paras 12, 18.

[139] Alongside the example in *Dahlab* (n 14) there is another rare example of such circumstances in *Ebrahimian v France* App no 64846/11 (ECtHR 26 November 2015), where the ECtHR upheld the legality of a ban on the wearing of a headscarf in a hospital and social care centre on the basis that the ban was necessary to protect vulnerable patients from any risk of influence or bias.

B) The nature of the communication

If religious proselytism is accompanied by menaces (or indeed extrinsic, as opposed to spiritual, incentives),[140] then it seems clear that such proselytism is capable of restriction.[141] The rather different issue was also noted earlier that judges speak approvingly of moderation in religious expression. Proselytism which meets the norms of 'civility', i.e. which is expressed with tact and courtesy (and with the use of judicious language) is, it may be suggested, less likely to offend others and restrictions may be considered less justifiable for that reason.

C) The nature of the workplace environment

In some legal jurisdictions, there may be a distinction to be drawn between public and private employers, with public employers able to justify greater restrictions on proselytism on the basis that the public sector is constitutionally a 'neutral' space.[142] However, within England and Wales, as there is no such constitutional requirement, this distinction is unlikely to carry much, if any, weight.[143] Where there may be a distinction to be drawn is with reference to those organisations which provide services for vulnerable people, in areas such as health and social care or primary and secondary education,[144] and those which do not. The case for greater restrictions on proselytism in these fields rests on the notion that vulnerable people are more open to undue influence from proselytism due to their very vulnerability.[145] As such the argument for greater restraint on proselytism in these fields can only apply to interactions

[140] *Kokkinakis* (n 33) para 48.
[141] In fact, such proselytism is likely to fall into the category of 'improper proselytism' and thus lose its prima facie legitimacy as a manifestation of religion.
[142] For example, in France, under the doctrine of *laicite*; see Myriam Hunter-Henin, 'Why the French Don't Like the Burqa: *Laïcité*, National Identity and Religious Freedom' (2012) 61 *International & Comparative Law Quarterly* 613.
[143] The analysis in this section does not extend to the more unusual case of employees who work for religious-ethos employers and who may wish to proselytise a different religious faith – in such cases the burden of justification on the employer who wishes to prevent such proselytsim may be lighter than it might be in other circumstances on the basis that it wishes to preserve the religious character of the employment.
[144] *Dahlab* (n 14); *Ebrahimian* (n 139); *Chondol* (n 126); *Amachree* (n 126); *Monaghan* (n 126).
[145] De Freitas, 'Proselytism and the Right to Freedom from Improper Irreligious Influence' (n 106).

between employees and service users (or pupils) and not employees and co-workers. It should be noted that there is a difficulty here – many employees in health and social care and education may be motivated to take jobs in these fields because of their religious beliefs and preventing them from sharing these beliefs with those they feel both need to hear, and may be sensitive to, perceived religious truth may be a very burdensome restraint - a possibility that should not be taken lightly by courts and indeed employers.

Conversely, organisations not in these sectors will have a greater burden to justify restrictions on proselytism even to clients, although business concerns might be a consideration if the employee's proselytism, or action short of proselytism, is so conspicuous that it might reasonably be considered to be significantly off-putting to customers.[146]

D) The reaction of the audience

The definition of harassment under the Equality Act was considered earlier and the importance of the response of the 'target' towards conduct such as proselytism noted. Clearly, if an employee makes it clear to a co-worker, either directly or via a supervisor or another representative of the employer, that any proselytism they have experienced from a particular individual is unwelcome then it is more likely to be considered harassment if it persists. However, it may be argued that it is important that there is clarity. If the conduct of co-workers has been ambivalent – e.g. if they have engaged in religious discussions at the same time as arguing that the proselytism is unwanted – then this should be taken fully into account when considering the reasonableness of any action against the proselytiser.[147]

[146] Rudin and Harshman argue that, in the United States, '… courts appear to be following an unwritten principle by which unusual displays of religious expression are assumed to be costly for employers to tolerate' and give the example of *Johnson v Halls Merchandising* 49 FEP 527 (W.D. Mo. 1989), in which the dismissal was upheld of an employee who prefaced 'nearly every sentence' with the affirmation, 'In the name of Jesus Christ of Nazareth': see Joel Rudin and Ellen Harshman, 'Keeping the Faith but Losing in Court: Legal Implications of Proselytizing in the Workplace' (2004) 16 *Employee Responsibilities and Rights Journal* 105, 108.

[147] A point clearly made in Judge Niemeyer's dissenting judgment in *Chalmers* (n 50) 1023.

E) Power Differentials

Power differentials in the workplace between the proselytiser and the potential proselyte may be a relevant factor which courts will and should consider. The issue is how far does an employee's (or indeed, in smaller businesses, possibly an actual employer's) hierarchical position vis-à-vis another employee make it difficult for the other employee to object to being proselytised? It has been held that, other things being equal, prolonged exposure to proselytism by a more senior colleague might create an adverse environment for an employee who, by virtue of his relative position in the hierarchy, might not feel able to clearly indicate that the proselytism is unwanted.[148] However, it is difficult to see how an absolute ban on proselytising in these circumstances could be proportionate (significantly limiting the right of supervisors or managers to manifest their religious belief in the process), particularly in relation to occasional acts such as an invitation to a church service or a brief explanation of religious convictions.[149]

The discussion in this section has been concerned with the factors a court may take into account when assessing the proportionality of any restrictions on proselytism in the workplace. At an organisational level, it is submitted that employers should seek to develop appropriate guidelines taking into account these issues and should avoid imposing disproportionate outright bans. Where employees are thought to have proselytised in a way which contravenes organisational guidelines then, by the same logic, it is important that any disciplinary action is proportionate, including making full use of the available stages in a

[148] *Wasteney* (n 42).
[149] In addition, although not central to the issues considered in this article, any retaliatory action by an employer or manager with religious convictions against an objector is likely to be considered unlawful victimisation: see *Brown Transport v Human Rel. Com'n* 133 Pa. Commonwealth Ct. 545 (1990) 578 A.2d 555.

typical disciplinary process,[150] rather than constructing the issue unnecessarily as one of gross misconduct, with the likelihood of summary dismissal.

7. CONCLUSION

Proselytism may legitimately be regarded as a manifestation of religion, unless and until it becomes 'improper'. A high bar has been set by the ECtHR before proselytism can be declared improper, albeit that there exists the possibility that the height of this bar could be adjusted in future. The reason it is legitimate is that it is both a recognised religious practice, and therefore important for the full exercise of religious freedom by individuals, and also because it facilitates the possibility that others may change religion, also a core aspect of individual religious freedom. AG Sharpston's contention that proselytism has no place in the work context is out of step with ECtHR jurisprudence post-*Eweida*, which recognises that Article 9 rights can be exercised in the workplace, albeit subject to restriction in certain circumstances, not least if the rights of others are subject to interference.

Sharpston's arguments in principle against the toleration of proselytism at work are unconvincing in relation to its essential importance as manifestation of religion *per se* and its place within the wider social context of 'working time'. Her case is stronger when it comes to the potential for disharmony (and by extension) harassment (albeit that fear of harassment claims can lead to an over-zealous repressive response from employers). Undoubtedly, proselytism has the potential to be uncomfortable for the auditor. Of itself, however, this is not a reason to impose an outright ban, particularly when done in a respectful and 'moderate' way, but certainly it makes the case for the possibility that restrictions might, in certain

[150] See the guidelines provided by ACAS: ACAS, *Code of Practice on Disciplinary and Grievance Procedures* (11 March 2015) <https://www.acas.org.uk/acas-code-of-practice-on-disciplinary-and-grievance-procedures> accessed 1 July 2021.

narrowly-defined circumstances, be imposed by employers, with the support of the legal framework (in this case, both Article 9(ii) and the second leg of the definition of indirect discrimination, allowing otherwise indirectly discriminatory conduct when it amounts to 'a proportionate means to achieve a legitimate aim'). It is submitted, however, that employers should be careful not to impose restrictions too readily or too widely, and courts should be equally careful not to accept them with too little scrutiny. The importance of religious freedom at work deserves no less.