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## **Outside the Equality Act: non-standard protection from discrimination in British law**

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### **Abstract**

The ‘single’ Equality Act 2010 was intended to unify and simplify British discrimination law which had grown up piecemeal over 40 years. However, a number of protections did not follow the standard model (as originally laid down in the Sex Discrimination Act 1975) and remained outside the unification process. Such grounds include Trade Union membership and the possession of whistleblower status and past criminal records. This difference has been significant in the government’s reaction to the European Court of Human Rights’ decision in *Redfearn v UK* regarding membership of political parties where the government opted to expand these ‘other’ protections rather than amend the Equality Act 2010. This article considers the role and status of these other discriminations which remain outside the Equality Act 2010 in light of the government’s response to *Redfearn*.

### **Keywords**

Equality Act 2010, Discrimination, Protected Characteristics, Trade Union membership, Public Interest Disclosure, Rehabilitation of Offenders, Political membership

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## Outside the Equality Act: non-standard protection from discrimination in British law

### **Introduction**

There was, and is, no general equality principle within British anti-discrimination law. Rather, as Fredman wrote in 2001, there was ‘a relatively sophisticated set of anti-discrimination statutes [which] operates within a narrow area’ (2001: 149). Over the years since then the set of statutes grew in number and scope and in 2008 the government noted that there were ‘nine major pieces of discrimination legislation, around 100 statutory instruments setting out connected rules and regulations and more than 2,500 pages of guidance and statutory codes of practice’ (Government Equalities Office, 2008: 6). In place of this myriad web, they proposed instead a single piece of legislation, somewhat misleadingly described by some as the single equality act,<sup>1</sup> which in the words of the Long Title would ‘restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics’. The restatement within the Equality Act 2010 was primarily intended to simplify, and to varying extents, unify, harmonise and strengthen, the British anti-discrimination statute book and related guidance.<sup>2</sup> While it has, indeed, unified much of the law and

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in doing so erased some of the apparently peculiar distinctions formerly within it (discussed further below), there are other protections from discrimination which were left untouched and these form the focus of this article.

The now-unified provisions generally previously provided protection in the same way as each other building on the seminal model laid down in the Sex Discrimination Act 1975, although there were notable exceptions in the wording and scope of protection (some of which continue). However, not all protection from detriment or less favourable treatment, be it related to one's characteristic, conduct, contract or membership, followed the common model and these remained outside the unification process.<sup>3</sup> This disparate treatment inevitably raises questions as to a hierarchy of protections and the disparate way rights are designed and protected and, furthermore, was of significance in the Government's reaction in 2013 to the European Court of Human Rights (ECtHR) judgment in *Redfearn v United Kingdom*.<sup>4</sup> It was held in *Redfearn* that the UK was in breach of Article 11 ECHR as it had not taken reasonable measures to protect employees from dismissal on grounds of political affiliation. One response to the decision could have been an extension to the protected characteristics within the Equality Act 2010 which could have opened the door to further

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incorporating some or all of the excluded protections into the Act. The other response was to add to the list of protections outside of the single Act.

Having briefly set out the context of the protections provided by the Equality Act 2010, this article considers some of the significant non-Equality Act protections from discrimination and the response of the Government to *Redfearn*. Consideration will necessarily be limited to exploring the areas outside the standard model which relate to the common theme of ‘what people are’ or ‘what they have done’ rather than the economic circumstance of their contract (not least as, in contrast to the other areas, the UK and EU protection regarding atypical workers such as part-time and agency staff, to quote Fredman (2000: 195), ‘come[s] down firmly on the side of market regulation, rather than individual rights’).<sup>5</sup>

### **The Equality Act 2010**

Previously, separate pieces of legislation covered the grounds of sex (incorporating marriage and civil partnership, pregnancy and maternity and gender reassignment),

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race (including colour, nationality and ethnic and national origins), disability, religion or belief (including non-belief), sexual orientation and age.<sup>6</sup> From the Sex Discrimination Act 1975 through to the Employment Equality (Age) Regulations 2006, they followed a broadly standard model, albeit one which allowed for a host of significant, and insignificant, differences and which evolved over time. The legislation outlawed certain activities (either covering a wide range of fields e.g. discrimination in employment, in the provision of goods and services, in housing, etc. or just one or others of those)<sup>7</sup> having first defined discrimination using variants of a standard formula.<sup>8</sup>

The Equality Act 2010 has followed the format of the precursor legislation and ironed out some (but not all) of the differences. Thus then and now, direct discrimination refers to less favourable treatment on protected 'grounds' or 'because of a protected characteristic' (while the words have changed to the latter, the meaning is explicitly the same).<sup>9</sup> The Equality Act 2010 did, however, replace the former distinction whereby sex and age direct discrimination had to be because of the claimant's own characteristic whereas race, religion and sexual orientation discrimination could be because of another's characteristic (i.e. discrimination by association).<sup>10</sup> Then and

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now, indirect discrimination is where there is a provision, criterion or practice applied both to people who have and those who do not have that protected characteristic but which causes a particular disadvantage to people with that characteristic (including the claimant) unless the defendant can show that provision, etc. to be a proportionate means of achieving a legitimate aim. The wording is arguably more formulaic now but the meaning is again unchanged from that used in the later days of the old discrimination legislation. Then and now, harassment appears as a separate wrongful act and is defined in similar terms to when it was first introduced into the discrimination statute book in 2003 (changes to wording being to simplify the phrasing, remove redundancies and explicitly adopt the European ‘related to’ formulation in preference to ‘on grounds of’). Victimisation has, however, undergone a more radical change in definition; it is now where someone is subjected to a detriment because of their doing something under the act (such as bringing or helping with proceedings or alleging a contravention) rather than where someone is treated less favourably on similar grounds, thereby, some say, taking it outside the realm of discrimination.<sup>11</sup> The Equality Act 2010 then goes on to render discrimination, harassment and victimisation unlawful when undertaking particular activities, such as

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providing services and within employment, with sundry other provisions governing enforcement, positive action/discrimination and other matters.

Not only does the format remain broadly the same, a number of distinctions between the characteristics have also been copied over. Disability retains its unique identity, having special provisions requiring reasonable adjustments and providing for discrimination arising from a disability (which can be justified)<sup>12</sup> along with it being a protected characteristic for direct and, now, indirect discrimination; pregnancy/maternity also has some special provisions and is expressly excluded from being a protected characteristic for indirect discrimination and for harassment and potentially excluded from direct discrimination;<sup>13</sup> marriage/civil partnership, while listed among the protected characteristics in section 4, is frequently excluded from provisions;<sup>14</sup> and age remains the sole protected characteristic for which justification is available to defeat a direct discrimination claim.<sup>15</sup> The former legislation, while introducing harassment across much of the board (excluding marriage/civil partnership and pregnancy/maternity), did not render religion or belief and sexual orientation harassment unlawful per se with regard to the provision of goods and services, the disposal and management of premises and school (but not further or

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higher) education. Those distinctions remain and so while there are nine protected characteristics in section 4, there are only seven relevant protected characteristics detailed within the definition of harassment and the prohibition of harassment in the provision of services delists those two reducing the effective number there down to five.<sup>16</sup> The prohibition on harassment constituting a detriment for the purposes of a direct discrimination claim is however disapplied for such delisted characteristics and so such claims may be brought as direct discrimination.<sup>17</sup> The rationale for treating religion or belief in this way, that freedom of speech was threatened by the prohibition, was accepted by the Joint Committee on Human Rights when considering the Bill, however they concluded that sexual orientation, marriage/civil partnership and pregnancy/maternity could and should have been included as relevant protected characteristics so as to provide further protection and ‘eliminate confusing distinctions’.<sup>18</sup> Such concerns about freedom of belief are also addressed to some extent in the disapplication of the prohibition of direct discrimination where there is an ‘occupational requirement’ to have a particular characteristic. This in general allows, for example, male cloakroom attendants or black actors to be appointed if it is necessary to have such a characteristic but there are two dedicated provisions regarding where employers have an ethos based on religion or belief<sup>19</sup> and



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employment for the purposes of an organized religion (whereby an employer may require a person to be of a particular sex, sexual orientation or marital state if certain requirements are met).<sup>20</sup>

While the aim to simplify and unify discrimination law was, in some ways, ambitious, the government generally eschewed any major changes (such as making single-sex clubs unlawful for fear of causing the legislation to be blocked; something which the minister responsible appears now to regret).<sup>21</sup> The government thus opted to retain the closed-list approach to discrimination, whereby characteristics are specifically identified, rather than adopt an open-list approach, which allows for organic, judicial expansion, as with the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights. While section 15(1) of the Canadian Charter lists seven characteristics (equivalent to five of the UK characteristics – race, religion, sex, age, disability – with national or ethnic origin and colour included there rather than in an explanatory section) these are prefaced by ‘in particular’ and follow a general statement that every individual has the right to equal protection and benefit. Similarly, Article 14 ECHR prohibits discrimination in the enjoyment of human rights on an itemised list of grounds but concludes with ‘or other status’. This open

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approach has meant that for both charters, to take two examples, sexual orientation and marital status have received charter protection.<sup>22</sup> While such an approach can allow for protection to be extended where considered judicious, it does carry with it the risk of uncertainty and confusion which has been a hallmark of the European Court's inconsistent generosity in interpretation.<sup>23</sup>

Not only did the government not seek to adopt an open-list approach, they did not take the opportunity to expand the pre-existing list of characteristics, save perhaps for one belated exception. The only arguable extension in terms of actual protected characteristics (as opposed to their coverage) is the inclusion of the power to add caste discrimination, inserted by the House of Lords during report stage, despite the government's initial belief that protection was already available within the Act by other means, and with an order set to be laid in 2015 bringing it into effect. This, however, will not make it the 10<sup>th</sup> protected characteristic but will add caste alongside colour, nationality and ethnic or national origins as an aspect of race.<sup>24</sup> Not only were the range of grounds within the Charter of Fundamental Rights of the European Union, such as political opinion, language, genetic features and property, not brought into UK law (in line with the UK having 'opted out'),<sup>25</sup> existing protections from less

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favourable treatment because of such things as whistleblowing, past conviction and trade union membership remained outside the unified Act.

### **Conduct – blowing the whistle and past misbehavior**

The protection against detriment due to whistle-blowing or past misbehavior could be said not to relate to inherent characteristics of the person (such as their sex, race, orientation, age, etc.) but instead relate to something they have done (in one case creditable and the other discreditable but historic).

Protection for ‘whistle-blowers’ was brought in by the Public Interest Disclosure Act 1998 (PIDA 1998). The protection operates through the Employment Rights Act 1996, with the 1998 Act inserting definitions as to what is a protected disclosure, in terms of what the worker must reasonably believe to qualify for protection and to whom it is made, and rights regarding not suffering a detriment and unfair dismissal. The worker must reasonably believe that the disclosure would show that a criminal offence has been or is likely to be committed, that a person has failed or is likely to fail to comply with a legal obligation, that a miscarriage of justice has occurred or is

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likely to occur, that the health and safety of a person has been or is likely to be endangered, that the environment is or is likely to be endangered or that information about any of the foregoing is being or is likely to be concealed, in all cases unless an offence is committed by making it or doing so breaches legal professional privilege.<sup>26</sup> Such disclosures must also be in the public interest. The Act then, through inserting sections 43C to 43H, states to whom the disclosure may be made (e.g. to an employer or employer authorised third-party, a legal adviser without condition; a government body or regulator if it is in respect of their functions and the allegations are substantially true; or to any other appropriate person if a range of conditions are met including not making personal gain, it being reasonable in the circumstances and the worker reasonably believed either that he or she would be victimised if he or she made the report internally or to a regulator or that evidence would be hidden if he or she did so or that he or she had already so reported to either or both). Such disclosures join the protection from detriment serially afforded to such other areas as undertaking jury service, asserting rights under the Working Time Regulations 1998, acting as health and safety representative, employee representative, trustee of pension scheme, asking for flexible working and, most recently, refusing to accept an offer to become an employee shareholder.<sup>27</sup> On complaining to an Employment Tribunal the

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worker or employee (depending on the right in question) may be compensated for any loss suffered. Furthermore, protected disclosures join the list of automatically unfair dismissals<sup>28</sup> where the usual qualifying period for unfair dismissal does not apply<sup>29</sup> and the somewhat shorter list where the statutory cap on compensation (at time of writing the lower of £78,355 or 52 multiplied by a week's pay of the complainant) is disapplied.<sup>30</sup>

There has been some criticism of the Act and its working. The charity Public Concern at Work organised an independent commission to review whistleblowing which reported in November 2013.<sup>31</sup> While PIDA 1998 was described as 'indispensable', concern was expressed that it was a retrospective protection and this only indirectly supports whistleblowing.<sup>32</sup> A pro-active system of encouragement and reporting requirements along with clear government advice and simplification of the law are among the recommendations.<sup>33</sup> Lewis has proposed system of mediation to allow for more effective resolution to whistleblowing disputes.<sup>34</sup> The government have already acted to amend the law inserting a public interest requirement (as some were citing breaches of their employment contract as a failure to comply with a legal obligation and thus benefit from the disapplication of the qualifying period and cap on

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damage)<sup>35</sup> and vicarious liability for victimisation (bringing it into line with discrimination legislation)<sup>36</sup> while removing the former requirement that all disclosures had to be made in good faith to balance the additional public interest requirement (with absence of good faith now sounding in damages instead).<sup>37</sup> There are also plans for further reform pending consultation. While the EAT in *Fecitt v NHS Manchester*<sup>38</sup> elided PIDA with ‘other discrimination’,<sup>39</sup> it can be seen that it is quite different in concept.

#### *Past misbehavior*

Some jurisdictions include past convictions within aspects of their standard anti-discrimination laws. For example, the Newfoundland and Labrador Human Rights Act 2010, in its provision prohibiting discrimination in employment, refers to ‘prohibited ground[s] of discrimination’ and then adds ‘or because of the conviction for an offence that is unrelated to the employment of the person’.<sup>40</sup> The protection does not extend outside the employment-related field hence its non-inclusion within the ‘prohibited grounds’. Similar laws apply in British Columbia.<sup>41</sup> In Australia, one State and one Territory include ‘irrelevant criminal record’ (i.e. spent, uncharged,

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unconvicted, quashed, pardoned or where the circumstances are not directly relevant to the situation in which the discrimination arises) among the protected attributes across a range of protected activities (with some specific exceptions),<sup>42</sup> a further State and Territory prohibit discrimination on the basis of spent convictions (i.e. convictions of a suitably short duration after a period of time), in one case through including it as protected attribute and in the other through statutory reading in,<sup>43</sup> and the federal Human Rights and Equal Opportunity Commission Regulations 1989 includes criminal record among grounds of discrimination (but in that case the remedy if voluntary settlement fails is a report by the commission to the minister). UK law, through the Rehabilitation of Offenders Act 1974, prohibits discrimination regarding spent convictions through holding in section 4(3)(b) that a spent conviction<sup>44</sup> or failure to disclose a spent conviction or any ancillary circumstances ‘shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment’. While this seems straight-forward, the Act does not explicitly state what the consequences of contravening this provision are. Pitt-Payne QC, in a 2011 policy paper, considered that the remedy for such a breach, particularly as regards not appointing someone, was unclear. While a public authority could be subject to

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judicial review, he mooted breach of statutory duty as a possibility for a private sector employer but noted that despite being in force for nearly 40 years ‘there appears to be no case-law addressing these questions [which] itself calls into question the effectiveness of the legislation: it suggests that in practice little use of the legislation has been made in order to challenge refusals to employ’.<sup>45</sup> There is, indeed, little case law even on where people have been dismissed but there the remedy seems to be that a dismissal cannot fall under the fair reasons for dismissal (as today contained in the section 98(2) and (1)(b) of the Employment Rights Act 1996) if section 4(3)(b) of the Rehabilitation of Offenders Act 1974 applies.<sup>46</sup> This dichotomy between ‘in employment’ discrimination and discrimination against applicants emerges again with regard to ‘membership’ discrimination (below). In his conclusion Pitt-Payne suggests that the 1974 Act should be replaced and that an approach based on discrimination law should be adopted.<sup>47</sup> This would provide greater and clearer protection and it could easily be added as an additional protected characteristic but employers would still need to be aware of the other elements currently covered by the 1974 Act such as the definition of spent convictions and the consequences of unauthorised disclosure of them.<sup>48</sup>



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### **Membership – not a defining characteristic?**

There is a clear difference between inherent personal characteristics such as one's sex, race or disability and membership of a trade union or political party or group.

Arguably, the line is less clear with regard to religion or belief (where, for example, belief in the urgent necessity to act to mitigate climate change and to prevent fox-hunting have been held to be protected beliefs).<sup>49</sup> Nonetheless, the ECHR list of protected grounds expressly includes 'political or other opinion'<sup>50</sup> as does the EU's Charter of Fundamental Rights.<sup>51</sup> Jurisdictions such as Tasmania and the Northern Territory in Australia do likewise and further specify 'industrial activity' or 'trade union or employer association activity' as protected attributes.<sup>52</sup> British law, however, affords protection to members of trades unions, and following the 2012 ECHR decision in *Redfearn v UK*<sup>53</sup> political parties, through other means.

Freedom of association is a fundamental right, with Article 11 ECHR stating that '[e]veryone has the right... to form and join trade unions for the protection of his interests'. In British law, section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992 states quite clearly that 'It is unlawful to refuse a person

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employment– (1)(a) because he is or is not a member of a trade union...’ and provides for a claim to the Employment Tribunal. Later sections go on to prohibit dismissal and action short of dismissal on trade union grounds.<sup>54</sup> There is, however, a stark difference between these provisions as written: unlike section 137 they expressly refer to ‘trade union membership or activities’ and contain particular paragraphs concerning taking part in trade union activities, and making use of their services, at an appropriate time.<sup>55</sup>

A literal interpretation of these provisions would thus suggest that there is no protection for an applicant who is refused employment because of his or her past or probable future trade union activities whereas once in employment he or she would be so protected. A further difference can be discerned as to on whom the burden of proof lies. As regards applicants, section 137 is silent and so the burden lies with the claimant. Section 152 provides a remedy for dismissal via the unfair dismissal mechanism, amending it to remove the requirement of qualifying service and providing for special compensation, and so the burden is as provided for under unfair dismissal (that it is the employer who has to show the reason for the dismissal). The provisions dealing with detriment short of dismissal (sections 146-151) include the

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express provision that ‘[o]n a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act’.<sup>56</sup> This disparity is more marked when comparing section 137 with regulation 5 of the Employment Relations Act 1999 (Blacklists) Regulations 2010.<sup>57</sup> These regulations seek to protect people from the use of prohibited lists (comprising details of trade union members or those who have taken part in union activities) and any detriment, dismissal or refusal of employment that is related to such lists. Regulation 5 provides for similar protection as in section 137 but includes an Equality Act-like burden of proof provision under which the burden shifts to the prospective employer once facts have been shown from which the tribunal could conclude, in the absence of any other explanation, that there had been a contravention.<sup>58</sup> However, the law regarding the difference between membership and activities can be said to be unsettled following national and European judicial intervention.

The Employment Appeal Tribunal has held that, notwithstanding the statutory wording or lack of it, ‘a divorce of the fact of membership and the incidents of membership is illusory... [p]articipation in the activities of a union is one of the ways in which membership of a union is manifested’,<sup>59</sup> although having said that while they

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overlap they are not necessarily co-extensive and it is a matter of fact in each case as to whether the reason related to membership. A case before a differently constituted EAT, looking at predecessor legislation, had previously drawn a distinction between membership and the ‘fruits of membership’.<sup>60</sup> The Court of Appeal reversed this decision and was itself reversed by the House of Lords who drew a distinction between deterring or penalising membership and deterring the use of some of the union’s services.<sup>61</sup> To quote Lord Bridge:

a general proposition of law that, ... membership of a union is to be equated with using the "essential" services of that union, at best it puts an unnecessary and imprecise gloss on the statutory language, at worst it is liable to distort the meaning of these provisions which protect union membership as such.<sup>62</sup>

This in turn led to a complaint to the ECtHR which, in 2002, held that in not outlawing financial incentives to the surrendering of union rights, the UK was in violation of Article 11 ECHR.<sup>63</sup> More recently, in 2013, the EAT in *Miller v Interserve Industrial Services Ltd*<sup>64</sup> held that on the facts of that case an employer, who steadfastly refused to appoint certain former union stewards despite having been

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placed under unacceptable pressure to do so, had acted solely in a negative response to that pressure rather than because of their membership or activities. As the Blacklist Regulations were also in play and they cover activities and membership, the EAT were not addressed on the question of whether section 137 extended to activities, on which Underhill J noted there was a good deal of law.<sup>65</sup> However, he does refer to ‘activities’ rather than membership in his conclusion.<sup>66</sup>

The reference to manifestation of union membership echoes the situation with regard to religion or belief. While the right to have a religion is absolute under Article 9(1) ECHR, the freedom to manifest it is conditional under Article 9(2) as it may have an impact on others.<sup>67</sup> As there is no distinction between direct and indirect discrimination in the ECHR one may think that in national law holding a belief falls into the direct category whereas questions of manifestation would lead to an indirect claim. Manifestation is certainly covered, a contention fortified following the case of *Eweida v UK* (2013),<sup>68</sup> but as the EHRC Code of Practice on Employment (2011) makes plain it ‘would usually amount to indirect discrimination’, and thus may sometimes amount to direct discrimination.<sup>69</sup> Indeed, there are numerous cases where direct discrimination has been claimed in the alternative and the EAT in *Grace v*

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*Places for Children*<sup>70</sup> appears to contend that had Mrs Eweida brought her claim today (rather than in 2007) she would have succeeded in direct discrimination.<sup>71</sup> If brought as indirect discrimination, then the practice could be justified (as would be the case on health and safety grounds where a nurse refused to remove a crucifix),<sup>72</sup> but if brought as direct discrimination such balancing of considerations are not available; however it would be open to a tribunal to hold that inappropriate manifestation of the belief is not protected as then it is neither the holding nor ability to manifest it that is the reason but the way in which it was manifested (as was the case in *Grace*).<sup>73</sup> It is among this background, that the response to the ECHR's 2012 decision in the political membership case of *Redfearn v United Kingdom*<sup>74</sup> was made.

### *Membership and Redfearn*

*Redfearn* concerned the dismissal of a minibus driver for the disabled following his election as a local councillor for the British National Party (which was then a whites-only party committed to reversing non-white immigration). Mr Redfearn's employers, Serco, cited health and safety concerns. A large proportion of the disabled clientele were of Asian origin, as were a substantial number of his colleagues. The

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safety concerns were threefold: fear of violence by other employees, fear of the anxiety caused by the reaction of his ‘patients’, and the more general annoyance or anger which Serco or Mr Redfearn may face by virtue of his publicised membership of the BNP.<sup>75</sup> They were also concerned that their reputation and the possibility of retaining contracts with public sector clients would be threatened.<sup>76</sup> Mr Redfearn had not worked long enough to be able to claim unfair dismissal, so brought a race discrimination claim instead. The tribunal, in February 2005, dismissed both the direct and indirect claim, holding that the wide definition of direct discrimination encompassing associative discrimination did not stretch so far as to cover him and that any indirect discrimination was justified. The EAT, in July 2005, reversed the tribunal on both points, holding that the authority which allowed associative discrimination bound the tribunals in this very different case and that justification had not been sufficiently considered. The Court of Appeal in turn reversed the EAT (in May 2006), holding that such an interpretation of direct discrimination was ‘incompatible with the purpose’ of the legislation, as it would mean someone dismissed for racial abuse would also be able to say the dismissal was on grounds of race,<sup>77</sup> and that while the consideration of justification for indirect dismissal lacked detailed scrutiny it did not matter as the claimant had not shown a provision, criterion

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or practice and so the claim should not have been considered in the first place.<sup>78</sup> Mr Redfearn subsequently (in November 2006) complained to the ECtHR which, in its November 2012 judgment in *Redfearn v UK*, found by a 4:3 majority that his Article 11 right to freedom of association had been violated as the UK had not taken reasonable measures to protect employees from dismissal on grounds of political affiliation.<sup>79</sup> This could be remedied either by adding political affiliation to the list of dismissals which do not need to meet the qualifying period for unfair dismissal [50] or through a claim for unlawful discrimination on grounds of political opinion or affiliation. Presented with this choice, the government opted for the former and inserted section 108(4) into the Employment Rights Act 1996 with effect from June 25, 2013. Significantly, unlike the other dismissals which do not require the qualifying period, dismissal for political opinion or affiliation is not automatically unfair, nor (unlike some) is compensation unlimited.<sup>80</sup> If such a situation happened today, Mr Redfearn could potentially still have been fairly dismissed but he would at least have had the chance to argue his case in the tribunal. If the government had gone down the other route, it could have further opened up the holding/manifesting debate and employers would have lost the defences available to them under unfair dismissal. However, as political ideology (if it is worthy of respect in a democratic



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society and is compatible with human dignity), as opposed to membership, is already protected under belief within the Equality Act 2010,<sup>81</sup> it does open some divergence of protection.

## **Conclusion**

The different treatment of the various rights discussed above can be seen, at least in some cases, as being due to the underlying intent behind them or their being part of a wider mechanism (such as the Rehabilitation of Offenders Act 1974). Nonetheless, other jurisdictions, albeit to varying extents, embrace these wider areas within mainstream anti-discrimination law and courts and tribunals within Britain and Europe can be seen to elide principles notwithstanding the original intent.

Furthermore, there is if not a hierarchy of rights then certainly, still, a disparateness of protections within the Equality Act 2010<sup>82</sup> and so different mechanisms or aims need not necessarily preclude incorporation within the Act.

It was open recently to the government, following the decision of the ECtHR in *Redfearn*, to have made political membership a protected characteristic within the

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Equality Act 2010. However, as the definition of direct discrimination generally allows for no justifications (outside of occupational requirements), this would have allowed members of any political party – however objectionable – to be protected.<sup>83</sup> The impolitic implications of this would, it is contended, have most likely led to the political opinion characteristic joining age as a protected characteristic for which justification of direct discrimination could be available. This in turn could have led to the seemingly inherent conflict between religion and belief and sexuality – already marked in the exclusion of them from some of the harassment provisions – being resolvable through those two characteristics joining the list of characteristics where direct discrimination could be justified.<sup>84</sup> In such circumstances, and even if it stopped short of going that far, there would be a stronger case to bring trade union membership and past criminal offences into the fold as is the case in other jurisdictions.

As things stand, however, with the government having opted to amend the protection available through the unfair dismissal legislation, there is an enhanced critical mass of non-Equality Act 2010 ‘discriminations’. This disparate treatment does not mean these are necessarily lesser protections (although the absence of any enforcement

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process under the RoOA 1974 may reflect either a moral ambivalence to the matter or a legislative slip). These other pieces of legislation along with the protection afforded to atypical workers, currently, can continue to stand on their own and show that equality – or non-discrimination – law in Britain is not simply that contained within the Equality Act 2010. The question may not be closed, however, as freedom of association extends beyond the narrow confines of ‘employment’ as defined for unfair dismissal purposes and those seeking the provision of goods and services and even those who are in quasi-employment situations remain unprotected. The means of protection, and the number and nature of the protected characteristics within the Equality Act 2010, may thus yet be revisited.

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## Notes

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<sup>1</sup> See, for example, the green paper (Department for Communities and Local Government, 2007) and Hepple, 2010. Furthermore, the number of statutory instruments relating to the Equality Act 2010 (including commencement orders and amendments) is already nearing 40.

<sup>2</sup> Baroness Warsi, for example, described 'the main thrust and purpose of the Bill' as 'simplification and consolidation' (*Hansard* HL, vol 715, col 1411, 15 Dec 2009). See further, e.g., Hepple, 2011; Hand, Davis & Feast, 2012.

<sup>3</sup> Unification is preferred as consolidation suggests an absence of substantive changes (see e.g. [lawcommission.justice.gov.uk/areas/consolidation.htm](http://lawcommission.justice.gov.uk/areas/consolidation.htm)).

<sup>4</sup> [2012] ECHR 1878, [57].

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<sup>5</sup> Cp. Bell, 2012.

<sup>6</sup> Sex Discrimination Act 1975 (SDA 1975), Equal Pay Act 1970, Race Relations Act 1976 (RRA 1976), Disability Discrimination Act 1995 (DDA 1995), Employment Equality (Religion or Belief) Regulations 2003 (RB Regs 2003), SI 2003/1660 (and Equality Act 2006 which, inter alia, extended coverage of Religion or Belief to the provision of goods and services, etc), Employment Equality (Sexual Orientation) Regulations 2003 (SO Regs 2003), SI 2003/1661 (and Equality Act 2006 (Sexual Orientation) Regulations 2007, SI 2007/1263 which similarly extended the coverage of Sexual Orientation to provision of goods and services, etc), Employment Equality (Age) Regulations 2006 (Age Regs 2006), SI 2006/1031.

<sup>7</sup> e.g. the SDA 1975 and the RRA 1976 covered a range of protected activities whereas the RB Regs 2003 and other Employment Equality Regulations covered the wider-Employment area only.

<sup>8</sup> The DDA 1995 is to quite an extent a different piece of legislation, much amended and with specific and unique provisions, but has some broad similarity with the standard model.

<sup>9</sup> Explanatory Notes to the Equality Act 2010 para 61.

<sup>10</sup> e.g. *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425 (where a white woman could claim race discrimination because of an instruction relating to her customers' race). For the expansion of associative discrimination to disability, in the face of the wording of the Disability Discrimination Act 1995, see *EBR Attridge Law LLP (formerly Attridge Law) v Coleman* [2010] ICR 242.

<sup>11</sup> The Explanatory Notes to the Equality Act 2010 state that it is 'technically no longer treated as a form of discrimination' but ignores the effect of *Chief Constable of West Yorkshire Police v Khan* [2001] 4 All ER 834 when stating 'there is no longer a need to compare treatment...with that of a person who has not made or supported a complaint under the Act' (note 103) (Connolly expressed surprise back in 2002 that the definition of the comparator as excluding those 'who had the temerity to sue [the employer] for anything' (non discrimination-related) – to quote Lord Scott at [72] – was still an issue to be put before their lordships: Connolly, 2002: 163-164. Middlemiss, 2013 takes a different view and treats the broad less favourable approach as, in effect, remaining).

<sup>12</sup> Equality Act 2010, ss.20-21 and 15 respectively.

<sup>13</sup> Equality Act 2010, ss.17-18 and s.19(3). Section 25 purports to summarise references to particular strands of discrimination and for pregnancy/maternity only lists s.17 and 18 whereas s.13 is mentioned for all the others.



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<sup>14</sup> See, e.g., Hand, 2012.

<sup>15</sup> Equality Act 2010, s.13(2).

<sup>16</sup> And even lower for premises as that part does not apply to age (s 32(1)(a)) and lower still for schools as that chapter does not apply to age (s 84(a)) and the prohibition of harassment within it further delists gender reassignment (s 85(10)(a)).

<sup>17</sup> Equality Act 2010, s.212(5).

<sup>18</sup> Human Rights Joint Committee *Twenty-Sixth Report. Legislative Scrutiny: Equality Bill* (2008-09) paras 108 – 114.

<sup>19</sup> Equality Act 2010, Schedule 9, para 3.

<sup>20</sup> Viz. so as to comply with the doctrines of that religion or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (Equality Act 2010, Schedule 9, para 2).

<sup>21</sup> Harriet Harman described the Act as 'incomplete' and 'unfinished business' in an interview on the BBC News Channel, stating that if 'you know it is anachronistic, out of date and it discriminates against women, you can actually amend the Equality Act to make sure that does not happen and we will give that backing' *Harman urges ban on all-male clubs in Muirfield row* <http://www.bbc.co.uk/news/uk-politics-23355533>. Para 12.12 of the *The Equality Bill – Government Response to the Consultation* (Cm 7454) (2008), however, made plain that single-sex clubs along with other single-characteristic clubs would remain lawful and that 90% of respondents agreed with that, recognising that is 'important for groups of people to have their own space' although such clubs should be for a positive, supportive benefit rather than for the purposes of segregation.

<sup>22</sup> *Egan v Canada*, 1995 CanLII 98 (S.C.C.), [1995] 2 SCR 513 and *Salguero da Silva Mouta v Portugal* (2001) 31 EHRR 1055 (sexual orientation); *Miron v Trudel* [1995] 2 SCR 418 and *In re P* [2008] UKHL 38.

<sup>23</sup> As discussed by O'Connell (2009), the wide interpretation has seen the Court hold that a distinction based on former membership of the security services fell within Article 14 (*Rainys and Gasparavicius v Lithuania* (App Nos 706651/01 and 74345/01, 7 April 2005 and & 7 July 2005)) as did membership of the Freemasons (*Grande Oriente d'Italia di Palazzo Giustiniani v Italy* (App No 26740/02, 31 May 2007) among other things. However, this is by no means consistent and, to take one example, the Court has recently held that difference in treatment based on the nature and duration of an employment

contract was not sufficiently related to personal choices (e.g. religion, sexual orientation) or inherent personal traits (e.g. sex and race) and thus did not fall within Article 14 (*Peterka v Czech Republic* (App. No. 21990/08, 4 May 2010). See further Gerards, 2013.

<sup>24</sup> Equality Act 2010, s 9(5). For the agreement of the amendment inserting the power see *Hansard HL*, vol 717, col 1345 – 1350, 2 Mar 2010 (as previously suggested re sub category by Mark Harper *Hansard* Equality Bill Deb 11 June 2009, col 178). There is first instance authority that caste falls within race in any case (*Tirkey v Chandok and another* (ET/3400174/2013); cp. *Naveed v Aslam* (ET/1603968/11)).

<sup>25</sup> The charter was originally reported at 2000/C 364/01 and has been restated at 2010/C 83/02 (the relevant article being Art 21 in both cases) as part of the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. The UK ‘opt out’ is in Protocol (No 30) to the TFEU. On the effect of the charter and the UK ‘opt out’ see Beal and Hickman, 2011 and Anderson & Murphy, 2008. With regard to the equality provisions there is equivalence to Art 14 ECHR, reducing the effect of any opt out.

<sup>26</sup> Employment Rights Act 1996, s.43B (as inserted by Public Interest Disclosure Act 1998, s.1).

<sup>27</sup> Employment Rights Act 1996, ss.43M – 47G.

<sup>28</sup> Employment Rights Act 1996, ss.98B – 107 (protected disclosures are at s.103A).

<sup>29</sup> Employment Rights Act 1996, s.108(3)(ff).

<sup>30</sup> Employment Rights Act 1996, s.124(1A). The others being health and safety cases (s.100) and redundancy connected to health and safety or protected disclosure (s.105(3),(6A)).

<sup>31</sup> Public Concern at Work, 2013.

<sup>32</sup> *Ibid*, para 7.

<sup>33</sup> *Ibid*, p.26.

<sup>34</sup> Lewis, 2013.

<sup>35</sup> Following *Parkins v Sodesho Limited* [2002] IRLR 109, EAT; see also e.g. *Millbank Finacial Services Ltd v Crawford* [2014] IRLR 18, [31].

<sup>36</sup> Following the CA in *Fecitt v NHS Manchester* [2012] ICR 372 reversing the EAT on this point.

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<sup>37</sup> Via Enterprise and Regulatory Reform Act 2013, ss.17-19.

<sup>38</sup> [2011] ICR 476.

<sup>39</sup> Ibid, [47], [64]. The CA upheld the earlier instances regarding the similarity to discrimination regarding causation.

<sup>40</sup> Human Rights Act 2010 (Newfoundland and Labrador), s.14(1).

<sup>41</sup> Human Rights Code [RSBC 1996], s.13(1).

<sup>42</sup> Anti-Discrimination Act (Northern Territory), s.19(1)(q), Anti-Discrimination Act 1998 (Tasmania), s.16(q); for exception see e.g. Anti-Discrimination Act 1998 (Tasmania), s.50.

<sup>43</sup> Discrimination Act 1991 (ACT), s.7(1)(o) and Spent Convictions Act 1988 (WA), s29 providing the Commissioner and Minister with power to act as if such discrimination were a form of discrimination under the Equal Opportunity Act 1984 (WA), respectively.

<sup>44</sup> A conviction may become spent after a period of time (depending on the seriousness of the crime). English and Welsh Law, following a change to the law on 10 March 2014, allows convictions of over 30 and up to 48 months to be spent after seven years following the completion of the sentence (Rehabilitation of Offenders Act 1974, s.5(2) (as amended by Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.139)).

<sup>45</sup> Pitt-Payne, 2011: 11; there is however a criminal penalty (a fine not exceeding the statutory maximum) for requiring disclosure of past offences if not required by law and not in the public interest (see Data Protection Act 1998, ss.56 and 60).

<sup>46</sup> *Hendry v Scottish Liberal Club* [1977] IRLR 5, ET (where incompetence, lack of attention to duties, lack of control of staff and unauthorised and unexplained absence were tainted as reasons when the panel took into account a spent cannabis offence and failing that then it was not reasonable to dismiss on the stated grounds); *Property Guards Ltd v Taylor & Kershaw* [1982] IRLR 175 (concerning security guards with spent convictions unfairly dismissed notwithstanding the nature of the business).

<sup>47</sup> Pitt-Payne, 2011: 25. Mujuzi and Tsweledi, 2014 suggest a discrimination approach should also be adopted in South Africa.

<sup>48</sup> ie a fine not exceeding level 4 (or level 5 depending on the circumstances) on the standard scale, Rehabilitation of Offenders Act 1974, ss.9(6), 9(7).

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<sup>49</sup> *Grainger v Nicholson* [2010] ICR 360 and *Hashman v Milton Park (Dorset) Ltd (t/a Orchard Park)* ET/3105555/09 respectively. With regard to sexual orientation, while many would view orientation as not being a choice, the ECHR described it, as well as religion, as being so in *Peterka v Czech Republic* (App No 21990/08, 4 May 2010) ('il peut s'agir des raisons tenant à des choix personnels reflétant des traits de la personnalité de chacun, comme la religion, les opinions politiques, l'orientation sexuelle...'); see also *Cadek v Czech Republic* [2012] ECHR 1962, [94].

<sup>50</sup> Article 14 and Article 1 of Protocol No. 12 (the latter not signed or ratified by the UK).

<sup>51</sup> Article 21.

<sup>52</sup> Anti-discrimination Act 1998 (Tas), s.16(1)&(m); Anti-discrimination Act (NT), s.19(1)(k)&(m).

<sup>53</sup> [2012] ECHR 1878.

<sup>54</sup> Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992), s.152 and s.146.

<sup>55</sup> e.g. TULR(C)A 1992, s.146(1)(b) and (ba).

<sup>56</sup> TULR(C)A 1992, s.148(1).

<sup>57</sup> SI 2010/493.

<sup>58</sup> Reg. 5 of the Employment Relations Act 1999 (Blacklists) Regulations 2010, SI 2010/493; using similar terminology to Equality Act 2010, s.136(2),(3).

<sup>59</sup> *Harrison v Kent CC* [1995] ICR 434, 443.

<sup>60</sup> *Associated Newspapers v Wilson* [1992] ICR 681, 695 and 697.

<sup>61</sup> *Associated Newspapers v Wilson* [1995] 2 AC 454, e.g. 484 – 487 (Lord Lloyd).

<sup>62</sup> *Ibid*, 478.

<sup>63</sup> *Wilson v United Kingdom* (2002) 35 EHRR 20, [47]-[48].

<sup>64</sup> [2013] ICR 445.

<sup>65</sup> *Ibid*, footnote 5.

<sup>66</sup> *Ibid*, [20].

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<sup>67</sup> *Eweida and ors v United Kingdom* [2013] ECHR 37, [80].

<sup>68</sup> *Eweida and ors v United Kingdom* [2013] ECHR 37.

<sup>69</sup> Para 2.61.

<sup>70</sup> [2013] UKEAT 0217\_13\_0511.

<sup>71</sup> It is not clear whether this a typographical error. The judgment refers to section 13 and 21(3) of the 2010 Act and the latter section is clearly mistaken as that relates to adjustments relating to disability [6]. It also refers to s.15(4) of the Equality Act 2010 rather than 2006 Act when considering the statutory backing to the Code of Practice [5]. Nonetheless claims for both direct and indirect include: the four cases within *Eweida* (*Eweida*, *Ladele*, *Chaplin* and *McFarlane*), *Bull v Hall* [2013] UKSC 73, *Azmi v Kirklees MBC* [2007] IRLR 484, *Black v Wilkinson* [2013] 1 WLR 2490. In *Drew v Wallsall NHS Trust* [2013] UKEAT 0378\_12\_2009 the direct claim was solely (and unsuccessfully) pursued.

<sup>72</sup> *Chaplin* within *Eweida and ors v United Kingdom* [2013] ECHR 37, [99]-[100].

<sup>73</sup> See also Lord Bingham in *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [23].

<sup>74</sup> [2012] ECHR 1878.

<sup>75</sup> *Redfearn v Serco Ltd* [2005] IRLR 744, [10].

<sup>76</sup> *Ibid*, [7].

<sup>77</sup> [2006] ICR 1367, [43], [46].

<sup>78</sup> *Ibid*, [50]-[57].

<sup>79</sup> *Redfearn v UK* [2012] ECHR 1878, [57].

<sup>80</sup> *Collins and Mantouvalou* (2013: 921-922) consider that simply applying unfair dismissal damages without allowing compensation for injury to feelings or affront to dignity could be incompatible with the ECHR.

<sup>81</sup> *Grainger v Nicholson* [2010] ICR 360, [28] (where Marxism, Communism and Capitalism were considered to be capable of meeting the definition whereas membership of connected parties would

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not). This is fortified by the ECtHR's observation in *Redfern* that Art. 11 extends to those whose views 'offend, shock or disturb' [56].

<sup>82</sup> with various characteristics being de-listed from various protections and some such as pregnancy and maternity, disability and equal pay between the sexes being subject to individual and sometimes quite detailed treatment (see e.g. Equality Act 2010, ss. 17, 18 (pregnancy), 26(5), 29(8), 32(1), 33(6) (limitation re definition of harassment and some connected prohibitions), Part V, Chapter 3 (Equality of Terms i.e. pay between the sexes/pregnancy)). For consideration of whether there is a hierarchy see e.g. Gibson, 2013: 588; McColgan, 2007: 74; Havelková, 2014: 211.

<sup>83</sup> Such a conclusion is fortified by the ECtHR's observation in *Redfern* that Art. 11 extends to those whose views 'offend, shock or disturb' [56].

<sup>84</sup> See, for example, the related discussion (regarding sex discrimination rather religion) in Bowers and Moran, 2002, Gill and Monaghan, 2003 and Bowers, Moran and Honeyball, 2003 (a dialogue which predates the days of religion or belief discrimination), McColgan, 2009 and Pitt, 2011. The minimum coverage of religion or belief and sexual orientation is dictated by EU law, unlike political membership, but that is not an insurmountable obstacle and reform could take place at EU level given the conflict of rights.