

Employment news - spring: 'Faithful servants'

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Whilst relatively few claims have been brought under the regulations prohibiting discrimination on grounds of religion or belief, the disputes that have arisen have attracted particularly high levels of interest and comment. What practical lessons can employers draw from these high profile cases?

The Employment Equality (Religion or Belief) Regulations 2003 (the Regulations) were introduced to implement the UK's obligations in respect of religious discrimination under the Equal Treatment Framework Directive. Mirroring other areas of discrimination law, the Regulations prohibit direct discrimination, indirect discrimination and discrimination by way of victimization or harassment in the workplace by reason of any religion, religious belief, or philosophical belief. Two areas have caused particular problems for employers – the impact of the Regulations on workplace dress codes and the difficulties that arise when employees with different, but equally strongly held beliefs, come into conflict at work.

Dressing for success (at work and at Tribunal)...

Many employers have dress codes in some form – uniforms, detailed guidelines setting out acceptable and unacceptable dress, loose requirements that employees 'dress down' or wear 'business casual' etc.

Direct discrimination – not the main problem...

Dress codes that come into conflict with religious requirements may potentially constitute discrimination. However the case law to date suggests that it is unlikely that dress codes will be found to constitute direct discrimination – i.e. discrimination which occurs where "on grounds of religion or belief, A treats B less favorably than he treats or would treat other persons".

For example, in the much reported case of *Azmi v Kirklees Borough Council* in 2007, the Employment Tribunal (Tribunal) rejected a female Muslim teaching assistant's claim of religious discrimination. Her claim arose from the school's refusal to allow her to wear a full veil (which covered her head and face save for her eyes) when in the presence of adult males and her subsequent suspension for insisting on doing so. The school had argued that the wearing of a full veil detrimentally affected her teaching, as it inhibited communication between her and her pupils. The school argued that it would have treated any woman who insisted on covering her face fully in the same way (where the reason was based on a religious belief or not). Therefore, it argued, it had not directly discriminated against Ms Azmi on grounds of her religious beliefs. The Tribunal and the Employment Appeal Tribunal (EAT) both accepted this argument and a similar approach has been taken in other cases.

Indirect discrimination – employers beware...

Dress codes are much more likely to be challenged successfully as constituting indirect discrimination. The Regulations on indirect discrimination preclude employers from applying a provision criterion or practice, (PCP) which is apparently neutral and universally applicable but, in practice, could disadvantage those of a particular religion or belief (and does in fact disadvantage the claimant) unless the employer can establish that the PCP is objectively justified. To establish objective justification the employer has to show that the actions taken are reasonably necessary to achieve a genuine business need and that they are the 'least discriminatory' option available to the employer.

In the recent highly publicized case of *Eweida v British Airways Plc*, the Claimant claimed that British Airways' (BA) policy for uniformed staff was indirectly discriminatory. The policy prevented employees from wearing visible jewelry and required that "any accessory or clothing item that the employee is required to have for mandatory religious reasons should at all times be covered up by the uniform" unless "impossible to do given the nature of the item and the way it is to be worn". The Claimant was a Christian who wanted to wear a 2-inch cross on a necklace as a visible symbol of her faith.

The Tribunal held that the policy did not put Christians at a "particular disadvantage" as the wearing of a visible cross was not required by Christianity or scriptures but was a personal choice by the Claimant. This decision was upheld by the EAT who agreed that the Claimant had failed to establish the necessary degree of 'group disadvantage' and that no indirect discrimination had taken place.

Whilst the outcome of the case appears favorable to employers in similar cases, practically, employers should be cautious about how they apply it. Firstly, it will often be the case that there is a fine line between whether particular dress issues are formal religious requirements or personal choices – and that may be a matter of debate or disagreement even within the religious group itself. Secondly, this issue raised so much attention and concern both inside BA and in the media that BA reviewed their policy and removed the ban.

Finally, in Eweida the EAT upheld the Tribunal's finding that, had BA's policy placed Christians at a particular disadvantage, BA could not have established that their policy was objectively justifiable as, although it sought to achieve a legitimate aim (brand uniformity), it failed to distinguish between "an item which represents the core of an individual's being, such as a religious symbol, from an item worn purely frivolously or as a piece of cosmetic jewelry" and was therefore not proportionate. Employers would be well advised to take heed of these comments when considering their dress codes.

As with all discrimination cases, employers must be careful that employees who raise concerns about dress codes and their religious beliefs are not victimized as a result through measures such as disciplinary action, cold shouldering, passing over for promotion or withholding of references after employment has ended .

Employers should also have robust policies that forbid employees from harassing colleagues because they wear dress or jewellery with religious significance and provide harassed employees with adequate redress.

Key points to remember

- Employers who have or introduce dress codes need to be aware of and give thought to their impact on employees who have particular religious beliefs. They must, if they can, take measures to minimize any adverse impact on those employees.
- Employers also need to remember that dress codes may raise issues under other branches of discrimination law, including sex discrimination, sexual orientation discrimination and discrimination on grounds of gender reassignment.
- As with all discrimination cases, employers must be careful that employees who raise concerns about dress codes and their religious beliefs are not victimized as a result through measures such as disciplinary action, cold shouldering, passing over for promotion or withholding of references after employment has ended .
- Employers should also have robust policies that forbid employees from harassing colleagues because they wear dress or jewelry with religious significance and provide harassed employees with adequate redress.
- It may be sensible for employers to carry out a survey of employee opinion and to consult with appropriate employee bodies and representatives of religious groups both within and outside the organisation prior to implementing a dress policy. This may make challenges less likely and may assist employers in persuading a tribunal that their policies are justifiable. It may also assist them in addressing difficult distinctions between religious manifestations that are prescribed by religious authorities and those that are worn out of personal choice.
- Employees should be encouraged to raise concerns internally through workplace policies such as the grievance or harassment procedures, as soon as they arise – hopefully then avoiding potentially expensive and high profile litigation at a later date.

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