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Review

Employment

BAN ON WEARING CROSS IS NOT DISCRIMINATORY

In a case which has received a great deal of press attention, the Court of Appeal has upheld previous Employment Tribunal and Employment Appeal Tribunal decisions that British Airways' requirement that an employee remove or conceal a cross she wore on a necklace was not indirect religious discrimination. The Court of Appeal held that an indirect discrimination claim can only be based on a disadvantage to a group, not just to an individual.

Ms Eweida, a practising Christian, objected to that part of her employer British Airways' dress code which required all those who wore uniform to wear any jewellery concealed under it. There were exceptions for those whose beliefs actually required them to wear items which could not be concealed (such as turbans and hijabs). However, as Christianity does not actually require the visible wearing of a cross the policy exception that applied to those other items did not apply to Ms Eweida's cross. In 2006, Ms Eweida wore a silver cross on a necklace which was visible whilst she was working. When she refused to conceal the cross after being warned for the third time, she was sent home. She subsequently brought ET claims against BA under the Employment Equality (Religion or Belief) Regulations 2003.

"The dress code did not prevent Ms Eweida wearing her cross at all, merely from doing so visibly."

The dress code did not prevent Ms Eweida wearing her cross at all, merely from doing so visibly. Had she been content to wear it under her uniform, the issue would never have arisen. She also rejected BA's offer of an alternative role in which she would not need to wear uniform and therefore could wear her cross visibly.

The Employment Tribunal dismissed all of Ms Eweida's claims. It held that for her to show indirect discrimination, it was necessary to prove that BA's uniform policy put people of the Christian faith generally at a particular disadvantage when compared with members of other faiths, and secondly that it put Ms Eweida herself at that disadvantage. The Tribunal's judgement stated that BA's uniform policy did not put Christians at a particular disadvantage because there was no requirement of that faith to wear a cross, let alone to do so visibly. On that basis there could be no disadvantage felt by Ms Eweida. The Tribunal also rejected Ms Eweida's other claims. She then appealed to the Employment Appeal Tribunal.

The EAT upheld the Employment Tribunal's judgement. The EAT ruled that there must be evidence of disadvantage **to a group**, not just an individual, and the Employment Tribunal had not found such evidence. Ms Eweida had not produced any evidence that any Christian other than herself would feel disadvantaged by a rule against openly wearing a cross. In the EAT's view the fact that there might well be other Christians at BA who shared Ms Eweida's belief was not sufficient for Ms Eweida to succeed. Ms Eweida appealed against the EAT's ruling on the basis that even if it was only herself as an individual who was affected on religious grounds by BA's uniform policy, then this could fall within the definition of indirect discrimination.

Because of the publicity that the case had received, the Court of Appeal was careful to point out in its judgement that the issues were not about whether BA had adopted an anti-Christian dress code, whether members of other religions were more favourably treated by BA or whether BA had harassed Ms Eweida because of her religious belief, as all these claims had been dismissed at the original Employment Tribunal hearing. The widespread and often heated reporting of the case meant that sometimes it was difficult to focus on the central legal issues, i.e. what constituted indirect discrimination.

The Court of Appeal upheld the previous rulings that the part of BA's uniform policy requiring Ms Eweida to remove or conceal her cross did not amount to indirect religious discrimination. There was nothing in the legislation concerning indirect discrimination, the Court said, which provided that one person alone could be the subject of indirect discrimination.

The Court of Appeal noted that under the Regulation (3)(1)(b) of the Employment Equality (Religion or Belief) Regulations, there must be a provision, criteria or practice applied to all employees which "puts or would put persons of the same religion or belief at a particular disadvantage when compared with other persons" and noted that:

- there is no reason to depart from the natural (plural) reading of "persons" in the legislation;
- the words "would put" in the legislation did not require the Court to create a hypothetical peer group to which Ms Eweida could be deemed to belong;
- there is nothing in the EU's Equal Treatment Framework Directive (on which the Age Regulations are based) to suggest that a disadvantage to the individual should be sufficient to establish indirect discrimination; and
- the way the age legislation was drafted by Parliament indicated its intention to refer to a group of individuals, unlike wording in the Disability Discrimination Act 1995 which by comparison provides for discrimination against an individual.

"There was nothing in the legislation ...which provided that one person alone could be the subject of indirect discrimination."

As far as practical impact was concerned, the Court also noted that if an individual employee could be found indirectly discriminated against in this way, employers would face the almost impossible burden of providing for all of the individual views which people hold of what their faith requires them to do and not do and of how this should be manifested. Some of these, in any religion, are more easily accepted than others. The Court therefore upheld the previous Tribunals' finding that some identifiable group (even if it was a small one) must be shown to share the disadvantage which Ms Eweida claimed she suffered. None of BA's other 30,000 workers had raised the same complaint as Ms Eweida. Her objection to the dress code was a matter of personal conviction, her interpretation of her faith, rather than because of any real religious requirement.

The Court also rejected an argument that Ms Eweida's rights under Article 9 of the European Convention on Human Rights (freedom of thought, conscience and religion) had been breached. It took the view that the European Court of Human Rights had already ruled in cases such as *Kalaç v Turkey [1997]* that Article 9 does not protect every individual motivated or inspired by a religion or belief.

The Court of Appeal was also asked to consider the impact of Clause 19 of the Equality Bill which deals with the definition of indirect discrimination. It effectively refused to do so because the Bill has not yet been finalised. It is hard to think that its passage into law would make or have made any difference to the outcome here.

It is understood that Ms Eweida intends to appeal her case to the European Supreme Court but it must be hoped that the practical ramifications for employers of being required to accommodate the individual spins put on established faiths by staff ranging from the lapsed to the frankly bonkers will alone be enough to see this off.

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