SUMMARY

2015/41 No discrimination where Muslim candidate was told not to wear a jilbab that could pose a risk to health and safety (UK)

<p>In a case involving a claim for indirect discrimination on grounds of religion or belief, the Employment Appeal Tribunal (EAT) agreed that an employer’s uniform policy, which required that no garment worn by an employee should present a tripping hazard, did not indirectly discriminate against Muslim women who wore jilbabs (long, flowing garments which cover the body).</p>

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Background Law

Section 19 of the Equality Act 2010 (EqA 2010) prohibits indirect discrimination on grounds of religion or belief. Such discrimination takes place where:

A applies to B a provision, criterion or practice (commonly known as a 'PCP');
A applies, or would apply, that same PCP to people who do not have the same religion or belief

as B;
the PCP puts or would put someone of B's religion or belief at a particular disadvantage when compared with other people; and
the PCP puts or would put B at that disadvantage.

Religion or belief means also a lack of religion or belief – so it is equally unlawful to discriminate against someone because they do not share a particular religion or set of beliefs.

If indirect discrimination has taken place, an employer can still defend a claim by showing that such discrimination is objectively justified, i.e. that it is a proportionate means of achieving a legitimate aim. The employer would have to show that their objective corresponds to a real need on the part of the employer, is appropriate with a view to achieving the objective in question, and is necessary to that end.

Facts

Ms Begum is an observant Sunni Muslim whose religion requires that she dress modestly: her manifestation of this is to wear a jilbab. In 2011, she applied for a modern apprenticeship as a nursery assistant with a Montessori nursery. At the time of Ms Begum's application, the nursery had 16 employees, of whom 4 were Muslim women who wore hijabs (head coverings) and one wore a full-length jilbab. The nursery also allowed Muslims time off for Ramadan and facilitated prayer times.

On 18 October 2011, Ms Begum attended a half-day trial at the nursery wearing a jilbab. Following the successful trial, Ms Begum was invited for interview and, ultimately, was offered the apprenticeship. She was again wearing a jilbab. At the interview, Mrs Jalah, the manager of the nursery, and Ms Begum discussed the nursery's policies and procedures, including uniform. Ms Begum was informed that she needed to wear non-slip footwear.

Whilst discussing this, Mrs Jalah looked at Ms Begum's shoes and realised she could not see them because they were covered by her jilbab. (Ms Begum was sitting down and so her jilbab was lower than it would have been if she had been standing up.) Mrs Jaleh got the impression that the jilbab was longer than ankle length and, as a result, she considered that Ms Begum's jilbab could be a health and safety risk to the nursery and asked Ms Begum if she might wear a shorter jilbab to work. Mrs Jaleh believed that it was imperative that clothes did not present a tripping hazard for the wearer, the children or for other staff. They had a discussion about the fact that other Muslim women at the nursery wore shorter jilbabs at work and then changed into longer ones after work. Ms Begum said that she would need to discuss with her family the possibility of wearing a shorter jilbab and would revert to Mrs Jalah. She did not seem insulted or offended by the conversation.

Ms Begum never took up the job at the nursery. Instead, she brought a claim in the Employment Tribunal (ET) that she had been subjected to a detriment on grounds of religion or belief. She claimed that Mrs Jalah had told her that she could not work at the nursery if she were dressed as she was at the interview. She also claimed that the uniform policy discriminated indirectly against Muslims and could not be objectively justified.

ET decision

The ET dismissed the claim on the facts, finding that Ms Begum had not at any point been told that she could not wear a jilbab while working at the nursery. It held that asking Ms Begum whether she was willing to wear a jilbab that did not present a tripping hazard was not a detriment.

Ms Begum claimed that the PCP was a refusal to allow staff to wear full-length clothing in the form of a jilbab, that this applied to her and disadvantaged her and other Muslim women and that it was then up to the nursery to prove that this could be objectively justified. The ET held that the nursery's PCP was that all members of staff must dress in ways that did not endanger the health and safety of themselves, their colleagues or of the children in their care: no garment should present a trip hazard. That PCP applied equally to staff of all religions and did not put Muslim women at a disadvantage. The tribunal referred in its decision to sections of the Qu'aran and the Hadith which had been quoted in the hearing and stipulated that Muslim women should wear garments that covered their bodies from neck to ankle. The tribunal considered that Muslim women could wear a full length jilbab that was not a trip hazard (because it did not cover the shoes) and still meet these criteria.

The ET also held that the PCP did not place Ms Begum at a disadvantage. Crucially, it held that Ms Begum was never told that she could not wear a full-length jilbab to work. Merely raising the question as to whether Ms Begum could wear a shorter jilbab to work was not and could not be a detriment. Ms Begum chose not to proceed with her application for a placement at the nursery: she was not prevented from working there.

If the ET was wrong, and the application of the PCP meant that Ms Begum was disadvantaged (by not being able to take up the position of trainee nursery assistant), then any indirect discrimination was objectively justified as a proportionate means of achieving the legitimate aim of ensuring and protecting the health and safety of staff and children. The ET was satisfied that Mrs Jalah had sufficient experience to be able to decide whether a garment constituted a potential tripping hazard. There was a real need for the nursery to safeguard the health and safety of the staff and children.

Grounds of Appeal

Ms Begum appealed to the EAT on five grounds:

Ground 1: That the ET had made a perverse finding of fact about the perceived or actual length of the jilbab Ms Begum wore to her interview;
Ground 1A: That the ET failed to provide adequate reasons for its factual finding on the perceived (and/or actual) length of the jilbab Ms Begum wore to interview;
Ground 2: That the ET failed to make a critical finding of fact as to the length of Ms Begum's jilbab (whether perceived or actual) whilst she was standing up and/or moving around: the length of the jilbab was relevant to the PCP;
Ground 3: That the ET failed properly to identify the PCP and/or the indirectly discriminatory nature/effect of that PCP;
Ground 4: That the ET misapplied the law when dealing with the question of detriment/disadvantage and/or failed to take into account relevant evidence: just because Ms Begum chose not to take up the post did not mean she had suffered no disadvantage; and
Ground 5: That the ET failed properly to consider the question of justification and/or give adequate reasons for its conclusion on that issue, namely that there was no proper assessment of the nature or severity of the risk to health and safety.

The EAT Judgment

The appeal was dismissed.

As a general principle, the wearing of a jilbab is a manifestation of Ms Begum's religious belief. Therefore, a PCP that might prevent the wearing of a jilbab can engage the protection of section 19 of the EqA 2010, unless the employer can show that the PCP is objectively justified. It was for the ET to determine whether or not the jilbab Ms Begum wore constituted a risk to health and safety and whether, if Ms Begum was prevented from wearing her jilbab, the nursery's aim of protecting health and safety was objectively justified.

This case clearly turned on its facts. In relation to grounds 1 and 2, the EAT found that it was likely that there was some confusion about the exact length of the jilbab given that Ms Begum was sitting down. However, it was impossible for the EAT to say that the finding of the ET was perverse. The ET had expressly rejected Ms Begum's submission that she was required to wear a knee-length jilbab. It is for the ET to decide which evidence to accept and which to reject; in this case, the ET was entitled to prefer Mrs Jalah's evidence to Ms Begum's. The perversity test is a very high threshold that Ms Begum had not managed to overcome. It was not necessary for the ET to determine the precise length of the jilbab that Ms Begum wore to interview. The ET had made findings that Ms Begum was never instructed not to wear any

particular jilbab – she could wear a full length jilbab if she wished, provided it was not a tripping hazard. The EAT held that the ET's findings were not perverse – the ET had given reasons for its findings and had evidence to justify them. The EAT could not reverse findings the ET had made.

As for ground 3, the ET was entitled to have regard to the evidence of Mrs Jalah, an experienced nursery teacher and manager, as to the justification for the PCP that prevented the wearing of garments that could constitute a tripping hazard. Mrs Jalah took her health and safety obligations very seriously. The EAT was of the opinion that the PCP formulated by the ET was patently not wrong or unreasonable. Moreover, a PCP can be informal and there is no requirement to define it carefully or in great detail.

The law required that a broad meaning should be given to "detriment": was the treatment of such a kind that a reasonable worker would or might take the view that, in all the circumstances, it was to his or her detriment? However, the EAT found that ground 4 could not be relevant given that the PCP had been found not to have been discriminatory. If there is no discriminatory PCP, Ms Begum cannot have suffered a detriment or been placed at a disadvantage.

The ET's reasons were not inadequate (ground 5), it was entitled to rely on Mrs Jalah's experience and to assess her reliability. The ET's reasons were clear from the judgment.

Commentary

The EAT said that this case turned on its own facts. Fatal to Ms Begum's appeal was the fact that she was attempting to revisit findings of fact made by the ET. Although the decision seems to be the correct one, it is perhaps surprising that the ET did not seek more detailed evidence of an assessment of the risk that Ms Begum's jilbab could have presented if she wore it at the nursery, rather than relying on what Mrs Jalah perceived from the other side of a desk, albeit that Mrs Jalah was experienced in such matters.

In addition, whilst a sensible and measured discussion about the nursery's uniform could not constitute a detriment, it is easy to see how such a discussion, if handled insensitively or poorly, could lead either to a detriment (e.g. if the candidate does not go ahead with her application and therefore does not get a job) or even to an act of harassment if the conduct has the purpose or effect of violating the candidate's dignity.

Comments from other jurisdictions

Greece (Harry Karampelis): Following the review of the case and EAT's reasoning, two issues

arise: the issue of whether there was discrimination on ground of religion and the issue of proportionality. On the first issue, since (i) at the time of Ms Begum's application, the nursery had 16 employees, of whom four were Muslim women who wore hijabs and one who wore a full-length jilbab, and the nursery also allowed Muslims time off for Ramadan and facilitated prayer times; (ii) it was imperative that clothes did not present a tripping hazard; (iii) the nursery only suggested that Ms Begum should not wear a jilbab covering her shoes; (iv) Mrs. Jalah had sufficient experience to decide whether a garment was a tripping hazard and there was a real need to safeguard children and staff; and (v) Ms Begum chose not to proceed with her application (she was not prevented from working there), the EATs decision seems to have correctly ruled that there was no indirect discrimination. A Greek Court would have ruled similarly under Greek law.

The court needed to balance the light to express religious beliefs with the right to safety at the nursery. Based on the facts, the right to safety weighed more heavily, particularly given that there was evidence that the nursery had put appropriate practices in place and was a respecter of diversity.

Subject: religious discrimination

Parties: Begum; Pedagogy Auras UK Ltd (t/a Barley Lane Montessori Day Nursery)

Court: Employment Appeal Tribunal

Date: 19 November 2014

Case number: UKEAT/0309/13/RN

Creator: Employment Appeal Tribunal
Verdict at: 2014-11-19
Case number: UKEAT/0309/13/RN