SUMMARY

2010/43: 'No visible jewellery' policy not (indirectly) discriminatory (UK)

<p>A claim of indirect discrimination on grounds of religion or belief must be based on actual or potential disadvantage to a group rather than a single individual. Accordingly, a Christian employee did not suffer indirect discrimination when her employer, in line with its uniform policy, insisted that a cross on her necklace be concealed.</p>

Summary

A claim of indirect discrimination on grounds of religion or belief must be based on actual or potential disadvantage to a group rather than a single individual. Accordingly, a Christian employee did not suffer indirect discrimination when her employer, in line with its uniform policy, insisted that a cross on her necklace be concealed.

Facts

Ms Eweida, a devout Christian, worked as a member of the check-in staff for British Airways plc ("BA"). Her job required her to wear a uniform with a high-necked blouse and she regularly wore a small silver cross on a chain underneath this.

In 2004, BA introduced a new uniform with an open neck and a uniform policy that prohibited employees from wearing any visible adornment around their neck. Ms Eweida came into work on three occasions wearing her cross, but concealed it when asked to do so. On a fourth occasion she refused to conceal it and was sent home.

She remained at home, unpaid, between September 2006 and February 2007. BA changed its

uniform policy to permit the display of a faith or charity symbol. Ms Eweida then returned to work and is still employed by BA.

Ms Eweida brought proceedings in the Employment Tribunal under the Employment Equality (Religion or Belief) Regulations 2003 ("the Regulations"), claiming salary etc. for the intervening period on the basis of direct and indirect religious discrimination and harassment. The definition of indirect discrimination, set out in regulation 3(1)(b) of the Regulations, requires that the employer applies a provision, criterion or practice:

- which puts or would put persons of the same religion or belief as the claimant at a particular disadvantage when compared with other persons;

- which puts the claimant at that disadvantage; and

- which the employer cannot show to be a proportionate means of achieving a legitimate aim.

The Tribunal dismissed all of Ms Eweida's claims and, in relation to the indirect discrimination claim, found that BA's uniform policy did not place Christians at a particular disadvantage. Christian faith did not mandate the wearing of a cross, which was a personal decision by Ms Eweida.

However, the Tribunal went on to state that, if it had found BA's policy to amount to indirect discrimination, this would not have been objectively justified (i.e. a proportionate means of achieving a legitimate aim).

Ms Eweida appealed to the Employment Appeal Tribunal ("EAT") on the sole issue of indirect discrimination. BA cross-appealed against the Tribunal's decision on justification.

The Employment Appeal Tribunal's Decision

The EAT upheld the Tribunal's finding that there was no indirect discrimination because Christians had not been placed at a disadvantage by the policy. It was not a requirement of the Christian religion that followers visibly display the cross. Further, nobody else (out of a uniformed workforce of 30,000) had ever complained about the policy. Therefore, there was no provision, criterion or practice which put or would put "persons" of the same religion or belief as the claimant at a particular disadvantage, as required by the Regulations.

The EAT went on to dismiss BA's cross-appeal and uphold the Tribunal's finding that

objective justification had not been established. Ms Eweida appealed to the Court of Appeal and BA once more cross-appealed the finding on justification.

The Court of Appeal's Decision

Ms Eweida argued before the Court of Appeal that evidence of group disadvantage was not necessary and "persons" could mean a single individual. The use of the conditional (" *would* put persons... at a particular disadvantage") required the tribunal to aggregate the claimant with a hypothetical peer group who would all suffer the same disadvantage.

The Court of Appeal rejected this contention, finding that use of the word "would" is simply to include in the disadvantaged group those to whom the condition potentially applies as well as those to whom it actually applies. In this case, there was no evidence that there were any others in society at large who shared Ms Eweida's beliefs and would suffer a potential disadvantage were they to be BA employees.

Ms Eweida also referred to Article 9 of the European Convention on Human Rights, which protects the right to freedom of thought, conscience and religion. Ms Eweida argued that this gave her the right to manifest her religious belief. However, the Court referred to Strasbourg jurisprudence showing a lack of support for the contention that rights are infringed when a person voluntarily accepts a position of employment. Moreover, case law showed that the Convention does not protect every act motivated by religion or belief.

Having found that Ms Eweida had not suffered indirect discrimination, BA's cross-appeal on justification became a moot point. Nonetheless, two out of three judges said they would have upheld BA's claim that its policy was in any event a proportionate means of achieving a legitimate aim. The leading judgement expresses this as follows:

"I have considerable difficulty in seeing how [the Tribunal] could hold that a previously unobjectionable rule had somehow become disproportionate once the claimant had raised the issue, even on the assumption that it was a rule that disadvantaged Christians as a group within the workforce...On the footing on which the indirect discrimination claim is now advanced, namely disadvantage to a single individual arising out of her wish to manifest her faith in a particular way, everything in the TribunalÕs findings of fact shows the rule, both during the years when it operated without objection and while it was being reconsidered on Ms EweidaÕs instigation, to have been a proportionate means of achieving a legitimate aim. The contrary is not in my view arguable."

Commentary

This decision has attracted criticism from religious leaders, politicians and non-governmental organisations, including Liberty (formerly the National Council for Civil Liberties) which had backed Ms Eweida's appeal. It is likely that Liberty will be supporting an application by Ms Eweida for leave to appeal to the Supreme Court (the UK's new highest court).

However, expanding indirect discrimination to cover individuals *solely* affected would be a marked departure from the established UK and EU position. Although not explicit in the judgment, some commentators have speculated that it may have been influenced by public policy considerations. The Court may have been concerned that a finding in Ms Eweida's favour may have opened the floodgates to litigation, with claimants seeking protection for their own subjective versions of their religion.

Apart from the narrow issue of indirect discrimination on which this appeal turned, the Court of Appeal's judgment may be helpful more generally to employers enforcing dress codes. It appears to draw a distinction between the wearing of items that are a *mandatory* requirement of an employee's faith and those that are merely a desired manifestation of faith (as in this case).

Nonetheless, irrespective of the legal niceties, employers would still be well advised to consider their uniform policies carefully and treat employees' requests to circumvent a rule for religious reasons sensitively and respectfully. It is noteworthy that the Tribunal in this case praised BA for changing its policy, describing it as "a substantial and thoughtful piece of work, for which all those involved deserve nothing but commendation".

Comments from other jurisdictions

Belgium (Isabel Plets): Dress codes are considered in general to be lawful under Belgian labour law. They often contain clauses prohibiting the wearing of items expressing a certain religion or belief. To be valid the rules must apply to all religions and not, for example, only Islam.

Case law already has it that such provisions are valid for security reasons, for example, wearing a headscarf can increase the risk of industrial accidents, but recent case law has also accepted this particular prohibition for commercial reasons. In another case, the employer had dismissed a Muslim employee for serious cause because she wore a headscarf, despite the fact that the employer's rules prohibited the display of religious items for employees who were in contact with clients. The employer pleaded (and the judges accepted) that the neutral, pluralistic and open image of the employer was a sufficient objective reason to overrule the

employee's right to freedom of religion. In another, similar case, the judge added that the religion criterion in the discrimination legislation does not imply the wearing of items expressing any given religion and so the court did not accept the employee's argument that she was being discriminated against because of her religion.

Germany (Dr. Gerald Peter Müller): This case would have fallen within the rules of the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz - AGG*) which is based on European Council Directives 2000/43/EC, 2000/78/EC and 2002/73/EC. The distinction between direct and indirect discrimination is pivotal under the AGG and the policy in the case at hand would probably not have qualified as a form of direct discrimination. In a similar way to the UK ruling, the difference between a detriment to a single person and a detrimental to a group of persons with a similar characteristic of relevance to the discrimination, would have been an important factor. In fact, the wording of the relevant section of the AGG speaks of "persons", not of a single individual who may subjectively consider a certain policy or rule discriminatory.

In order to find out whether indirect discrimination is at issue, it is acceptable practice in Germany to use test *groups*, if it can be shown that the members of such a group are considerably more prone to the detrimental effects of the alleged discriminatory criterion. Whether it would be sufficient for the employer to show that no other employees have ever complained about a certain - allegedly discriminatory - policy, is questionable and would depend on the size of workforce. In the case of a workforce of some 30,000, however, it would appear conclusive that there was no form of indirect discrimination but merely a form of *subjectively felt discrimination* – which is a matter that the AGG does not cover either.

Subject: Religious discrimination

Parties: Eweida - v - British Airways plc

Court: Court of Appeal (England and Wales)

Date: 12 February 2010

Case number: [2010] EWCA Civ 80

Hardcopy publication: not available yet

Creator: Court of Appeal
Verdict at: 2010-02-12
Case number: [2010] EWCA Civ 80