

October 2009

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Features

Religion and belief: out of the corner and into the spotlight

Background

In this article, we consider individuals' freedom to manifest their religion at work, and when jokes go too far. An earlier article (published in May 2009) explored the scope of the Employment Equality (Religion or Belief) Regulations 2003, and the conflict between protection on grounds of sexual orientation and religion or belief.

Freedom to manifest a religious belief

Followers of a particular religion may wish to dress in a particular way, and this can conflict with dress codes and uniform policies.

The decided cases show that the attitude of the employer to working out the problem in conjunction with the employee, and trying to find an answer which suits everyone can be crucial. For example, in *Azmi v Kirklees Metropolitan Borough Council* [2007] IRLR 484, a bilingual support worker at a junior school wore a niqab (a form of veil covering the lower part of the wearer's face) whilst at work and in contact with male colleagues. The school at which she worked reviewed the situation and concluded that her niqab prevented her communicating effectively with the children she was employed to support, as her voice was muffled and only her eyes could be seen. The school permitted her to wear the niqab in the corridor and the staff room, but said that she should not wear it in direct contact with her pupils. Ultimately, both the EAT and the Tribunal found that there was no direct discrimination against Ms Azmi, and no indirect discrimination because the policy applied to all employees and its effect was proportional because the school had only insisted on the removal of her veil in certain situations when its wear would be most damaging.

This can be contrasted with a more recent Tribunal case concerning veils (*Noah v Desrosiers t/a Wedge* 2201867/07) in which a job applicant for a hairdressing position was rejected because she wore a veil and therefore her own hair would not be visible. The hairdressing salon could not demonstrate that the rule was a proportionate means of achieving a legitimate aim (in this case, to avoid damage to the salon's trendy image) and drew a distinction between this case and the Azmi case because it is not physically necessary to show one's hair when cutting another person's hair, but it necessary to show one's face when teaching and supporting children.

Perhaps the most well known case in this area is that of *Eweida v British Airways* [2008] EAT/0123/08/2011, which had a dress code prohibiting employees from wearing visible religious symbols or items unless they were mandatory for that religion and could not be concealed. In this case, a member of the check-in staff insisted on wearing a small silver cross pendant. Ms Eweida lost her case for direct and indirect discrimination because she was not able to prove that a religious group as a whole was put at a particular disadvantage by the rule as wearing a cross is not a requirement of the Christian faith. In addition, she was unable to prove that anyone but her had been placed at a disadvantage.

However, the EAT also found that British Airways' ban on any "jewellery" whatsoever was disproportionate as it did not strike the right balance between corporate image, individual need, and diversity. Although an appeal in this case is due to be heard by the Court of Appeal early next year, in any event, the publicity (including criticism by MPs and clergy) about the internal proceedings alone led to British Airways amending its uniform policy so employees are now permitted to wear religious symbols.

The Eweida case can be contrasted with the case of *R v Aberdare Girls' High School Governors* [2008] EWHC 1865, where the only Sikh pupil in the school was told that due to a dress code which prohibited any jewellery other than two stud earrings and a watch, she could not wear the Kara (a steel bangle considered to be one of the five "K"s central to Sikh belief) which she considered to be particularly important. Her case was brought under the Race Relations Act 1976 and the Equality Act 2006 and not religion or belief discrimination, but similar principles apply. The judge concluded that the school's refusal (which was on grounds of health and safety, it being discriminatory to other pupils, or that it would "open the floodgates") to allow her to wear the Kara was not justified. She was in a special category because of the importance of the Kara to Sikhs, which meant she could show that there was a particular group disadvantage, and the court held that it was sufficient to show only a disadvantageous impact rather than an absolute inability to comply.

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This is to be contrasted with the recent employment tribunal finding that a Sikh policeman who was ordered to remove his turban whilst undertaking riot training for the Greater Manchester Police had suffered a single case of indirect racial and religious discrimination which was a "violation" of his "dignity". After the policeman refused to remove his turban, his superior had asked him whether his turban could be "modified" to allow him to take part in the training. An employment tribunal awarded him £10,000 in damages comprising £3,500 for indirect discrimination and £6,500 for harassment after suffering psychological damage, injury to feelings and personal injury.

Similar cases continue to come before the tribunals, for example that of Fata Lemes (a Bosnian Muslim) who worked for the Rocket Bar in Mayfair for only eight days before resigning when she was asked to wear a form-fitting red dress which, in her words, "made her look like a prostitute". She was awarded nearly £3,000 for lost earnings and injury to feelings, although the tribunal described her original claim for £17,500 for injury to feelings as "manifestly absurd".

Employers with dress codes – either formal uniform requirements or more general standards of business dress - need to consider cultural forms of dress when formulating their policies, and whether other concerns (such as health and safety, or the ability to do the job) outweigh these.

Jokes that go too far

Banter and joking are common between colleagues – the question is at what point those jokes can go too far. This can be hard to identify, particularly if the victim is happy to play along. In *Taj v GBM Services Limited* EAT/0063/09 the Muslim claimant took part in the joking, even those about Muslims, and had not complained at the time. However, another employee's repeated offering of sausage and bacon butties to his Muslim colleagues, even during Ramadan, was deemed to be beyond the acceptable level of 'joking' the EAT held.

English v Thomas Sanderson Limited [2008] EWCA civ 1421, a Court of Appeal case, shows how wide protection from harassment or discrimination "on grounds of" a particular protected characteristic – sexual orientation in *Thomas Sanderson* – can be. In this case, the employee's colleagues thought it funny to tease him for being homosexual, even though everyone was aware that he was not gay. For a claim to succeed, all that has to be shown is that the protected characteristic is the reason for the treatment. The principle of the case extends the scope of all discrimination claims hugely, as evidenced in *Dhaliwal v Richmond Pharmacology* [2009] EAT/458/08 – in that case, one comment to an employee who had already resigned that she might be "married off in India" resulted in an injury to feelings award of £1,000. The EAT noted that in deciding whether or not behaviour is harassment, a tribunal can look at the purpose or effect of the behaviour, although there is also room to consider whether the employee is prone to taking unreasonable offence in coming to a conclusion.

Conclusion

The cases show that the EAT has drawn a distinction between the strongly held views of an individual which may relate to his or her religion (as in *Eweida*) and the requirements of a particular religion that apply to a group, such as in *R v Aberdare*. Employees are protected more in the second category of cases.

If religious beliefs conflict with the requirements of a job, the employer may be able to defend a claim of indirect discrimination by showing an objective justification that those requirements are necessary.

As so often in employment law, the key words are "flexibility" and "balance". Employers should be open-minded to requests for adjustments to working practices and by considering all the options, this should ensure that when it is necessary to refuse a request, that refusal is more likely to be lawful.

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Practical advice for employers:

- offensive banter is unacceptable, and is not a defence to say that an employee was "only teasing". It makes no difference whether the person actually holds a particular religious belief or not if the remarks have some reference to a particular religion or belief.
- Employees should not be permitted to exercise their religion or belief in a way that breaches the law in other respects.
- Employees should not be permitted to impose their religious views on others especially if this may cause offence or breach internal policies and procedures.
- A legitimate business aim of the employer will outweigh the discriminatory effect of a particular provision on a religious group and a particular member of that group, provided the employer can show that there is objective justification for the aim and no less discriminatory way of achieving that aim. If there is not, then the employer should consider how to accommodate the religious group.
- for example, when formulating dress codes consider cultural forms of dress and whether other concerns (such as health and safety) outweigh this.

What's coming up?

Ladele v London Borough of Islington (mentioned on May 2009 edition) is due to be considered by the Court of Appeal in early November 2009 and, if permission to appeal is granted, the appeal itself will follow immediately.

By Rachel Farr

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UK accelerates rollout of ID cards for foreign nationals

The UK Government may have scrapped the compulsory ID card scheme for British nationals, but it remains alive and well for foreigners.

On 24 September 2009 the Home Office announced that non-European workers who apply to extend their working visas under Tier 2 of the Points Based System (PBS) will be issued with an ID card from January 2010. This will affect any existing work permit holders or other non-EU workers who apply for a sponsored Tier 2 permission after January next year.

While not a new scheme, the rollout has been accelerated by three months. It is thought that ID cards for Tier 2 workers will add around 30,000 foreign nationals a year to those currently being issued with identity cards.

The plan is that by April 2011, any migrant extending their stay or applying to come to the UK for more than six months will need to apply for an identity card as part of their immigration application. To help achieve that, as well as speeding up the rollout of ID cards to sponsored workers, the introduction of ID cards for highly skilled migrants under Tier 1 will be brought forward from April 2011 to the end of 2010.

What is an ID card?

[An identity card](#) is a card holding unique biometric data – it is being introduced to help combat illegal working and reduce illegal immigration. The plan is that a migrant's immigration status will be recorded on that card rather than on a visa stamp in the passport. If an ID card holder travels outside the UK during their stay, they must show the card together with their passport when they leave and return to the UK.

Obtaining an ID card

Applicants will be able to enrol their biometrics at a range of biometric enrolment centres around the United Kingdom. They will need to book an appointment by telephone or online. From this month, the UK Border Agency is also rolling out trial technology at 17 Post Offices to provide foreign nationals applying for identity cards with alternative and more accessible venues where they can enrol their fingerprints.

What to take away

This will only affect those employers that hold an immigration licence under PBS. A UK business cannot sponsor non-EU workers unless it has first been granted a sponsorship licence, but current processing delays mean that it may take several months to be granted the licence and the subsequent working visa under Tier 2. If your UK business is considering whether to recruit foreign migrants or transfer staff from your overseas offices, please contact us to discuss how to achieve this – proper planning is essential to achieve the required results.

To avoid penalties all UK employers must ensure that their employees have the legal right to work in the United Kingdom by undertaking prescribed document checks. For certain non-EU workers hired after 1 March 2008, these checks must be repeated at least once every 12 months. In relation to ID cards, employers will need to ensure that they comply with Government guidance on undertaking these checks and keeping up-to-date records.

By Charlie Pring

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Case law update

The "Heyday" case – the High Court rules that a default retirement age of 65 is lawful (for the time being)

R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills [2009] EWHC 2336 (Admin)

Why care?

The Heyday challenge to the way in which the 2006 UK Regulations on age implemented the earlier European directive has bounced from the High Court to the ECJ and back again. There has been uncertainty for more than three years about whether or not the ability to justify direct age discrimination and retire employees at a particular age would survive scrutiny by the courts. This case has to a certain extent resolved that uncertainty by maintaining the status quo. As a result, businesses can still require that their staff retire at the age of 65.

This may change over the next few years, as the Government has committed itself to bringing forward the scheduled review of the legislation from 2011 to 2010.

The case

The High Court held that although the default retirement age ("DRA") of 65 was direct age discrimination, the Government had proved that it had social policy concerns in protecting the integrity of the labour market and that they were legitimate concerns within the principles of the Directive and the case law of the ECJ. The DRA had been introduced to pursue legitimate social policy objectives and that was a proportionate measure.

The Court also referred several times to the volume of consultation that had been carried out by the Government prior to the introduction of the domestic Regulations. There had been four consultation exercises that included a number of specific questions relating to whether or not there should be a mandatory retirement age.

The High Court's remit was to consider the matter on the basis of circumstances in 2006, when the Regulations came into force and it found that at the time, a DRA of 65 was proportionate and appropriate. However the Court indicated had a DRA of 65 been adopted for the first time in 2009, it would have rejected it as being disproportionate.

The judge found particularly relevant the Government's stated intention to move the review of the Regulations forward to 2010 from 2011. He recommended that if that review concluded that a DRA was still necessary, it must give particular consideration to whether keeping it at 65 could possibly be justified. There were, in his view, powerful arguments for adopting a higher age. These were creating a change of culture and keeping the DRA at an age greater than the state pension age so that those who could work longer could if they wished, but those who did not want to would not be penalised.

He noted that the pensionable age is due to go up to 68 and also that after the Government review of DRA in 2010 he "cannot presently see how 65 could remain as a default retirement age after the review". In the judge's view, 68 would continue to allow legal certainty, workforce planning opportunities and would balance continued employment for older employees with the need to grant younger employees access to more senior roles.

What to take away

For the time being, employers can continue to lawfully retire employees at 65 and over, provided the statutory procedure is followed, without becoming the subject of age discrimination or unfair dismissal claims. Employers who do this as a matter of course should start to consider the impact that a higher DRA might have on their business in terms of cost and succession planning.

Justification of discrimination, whether direct or indirect, should highlight the aim that the employer is trying to achieve and explain why the measure taken is proportionate to achieve that aim. As mentioned above, justification based solely on cost is unlikely to be good enough.

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Employment Tribunal claims currently put on hold pending this decision are likely to be dismissed or withdrawn, unless the claims additionally relate to procedural failings in the statutory retirement procedure. The precise process to follow has not yet been established.

Whether or not the legislation is reviewed in 2010 and what conclusion that review comes to may of course be disrupted by a General Election. Bearing in mind the judge's comments about the impact the Government's announcement had on his thinking, if a new Government stalls over the review, Age UK may feel the need to revisit this issue in the courts. For the time being, it has shown no indication of any intention to appeal the decision.

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Working Time Directive does not force employees to take scheduled holiday during sickness absence – ECJ rules in Spanish case

Francisco Vicente Pereda v Madrid Movilidad SA C-277/08

Why care?

The ECJ has again reviewed the issue of sick leave falling during a period of annual leave. In this Spanish case it considered the extent to which national provisions or collective agreements can stop an employee from taking that annual leave at a time different from the one originally scheduled and outside the current holiday year, if necessary.

The case

Mr Pereda was allocated holiday from 16 July to 14 August 2007. He had an accident at work on 3 July 2007 and so was not able to work until 13 August 2007. This meant that all but two days of his annual leave had coincided with a period of sickness absence from work. He then requested his employer to allow him to take his scheduled holiday at a later date but this was refused.

Like English law and the Working Time Directive 2003/88 (the "Directive"), Spanish law states that annual paid leave cannot be replaced by an allowance in lieu and should not be less than 30 calendar days. Periods of leave are to be scheduled by mutual consent and may be subject to planning provisions in collective agreements. It is up to the court to set dates of leave if there is a dispute between the parties.

Mr Pereda asked the Spanish court to decide the issue. The court referred the case to the ECJ for a ruling as to whether it is contrary to the Directive for a worker on sick leave during a period of scheduled annual leave to be denied the right to take his annual leave at some other time, even after the end of the current holiday year.

The ECJ held that "a worker who is on sick leave during a period of previously-scheduled annual leave has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period that does not actually coincide with the period of sick leave". Essentially this means that a worker, who is on sick leave during scheduled holiday, has the right to take that leave at a later date. The Court had regard to the fact that holiday is designed to provide a period of rest and relaxation for health and safety reasons, whereas sick leave is to allow recovery from illness.

What to take away

The Working Time Regulations and Spanish law do not allow employers to make payments in lieu of untaken holiday. Irrespective of any such restrictions contained in national law or collective agreements the ECJ has decided that where a worker was on sick leave for all or part of the year and has not had the chance to exercise his right to take annual leave, the right to accrued paid annual leave is not extinguished at the end of the holiday year. The worker has the right to take it at a later date.

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This case builds on, and goes further than, the previous ECJ decision in *Stringer and others v HM Revenue and Customs* ECJ C-520/06 and *Schultz-Hoff v Deutsche Rentenversicherung Bund* ECJ C-350/06 which was reported in [Law at Work in February](#) this year. In that case the ECJ held that where a worker has been on sick leave for the whole or part of the year and had not had the opportunity to take their leave, their right to take annual leave had not been extinguished and a worker must be permitted to take it following their return to work, even if this means carrying it over to another holiday year.

In the public sector, some employers already permit an employee to reschedule holiday if it coincides with a period of sickness. Following *Pereda* this is now the case, even for those employers who had currently viewed this as an unfortunate event, but one that must be borne by the employee. This judgment could be open to abuse from employees, and may result in employers requesting "proof" of illness, or tightening up company sick pay policies.

As this decision is based on the European Directive, it may be relied on directly by public sector workers and employers. Workers in the private sector will have to await amendment of the WTR to give effect to this decision.

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Hot topics

New BIS guidance on dealing with discipline, dismissal and grievance issues in the workplace

The Department for Business, Innovation and Skills has issued guidance, jointly with CIPD and Acas, called "Avoiding and resolving discipline and grievance issues at work: simpler laws, better services". It contains advice for employers on how to handle workplace disputes and includes explanations of key elements of the Employment Act 2008, the Acas Code of Practice and Guidance, options for dealing with employment disputes and where employers can find further advice and information. The Guidance is [available here](#)

Government's proposals on additional paternity leave and pay

The Government has reaffirmed its goal to introduce Additional Paternity Leave and Pay before the end of this Parliament. It has announced that a consultation on [draft regulations](#) will be launched soon. Currently employed fathers can take 2 paid weeks off for paternity leave. Mothers can take off 52 weeks for maternity leave – 39 weeks are paid. The new scheme allows a father to take off 26 weeks of this period instead. However, a father can only take this time off after the mother returns to work and only during the second 26-week period of the child's first year.

This would give parents the option of dividing a period of paid leave entitlement (at the same rate as Statutory Maternity Pay) between them if taken during the mother's 39-week maternity pay period. However, It is worth noting that, if a father chooses to take 26 weeks off, not all of it will be paid. Parents would be required to "self certify" by providing details of their eligibility to their employer. Employers and HMRC would both be able to carry out further checks of entitlement if necessary, although concerns have been raised by employers' groups about the additional administrative burdens involved.

Subject to consultation and parliamentary procedure, the Government intends that the law be in force by April 2010 and will have effect for parents of children due on or after 3 April 2011, providing greater flexibility to families on the provision of childcare during maternity leave.

New vetting and barring scheme looming for those working with children and vulnerable adults

On 12 October 2009 the first of many requirements under the Safeguarding Vulnerable Groups Act 2006 came into force, requiring educational, care and other institutions to alert the Independent Safeguarding Authority (ISA) if they believe a worker to have harmed or that there is a risk of them harming, a child or vulnerable adult. The new scheme applies to both employees and volunteers.

Over the next six years various requirements will be rolled out which will ultimately lead to a comprehensive and free database (for the employer that is; workers must pay a one-off fee to register themselves). The database will be controlled by the ISA and will contain the details of those who have been vetted and therefore able to work with children/vulnerable adults, even in an administrative capacity. The duty, and the one-off fee to register, will rest with workers. However, the 2006 Act will also impose criminal sanctions and fines for organisations that take on workers who are not ISA-registered.

Registration for certain activities will become mandatory from November 2010. In preparation for this and other ISA requirements, the ISA has published a number of guides on its [website](#)

Contacts

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