DISCRIMINATION

WHAT NOT TO WEAR – ONGOING UK CASE LAW DEVELOPMENTS ON DRESS CODES

*By Charles Wynn-Evans**

Introduction

The issue of the prescriptions which employers can legitimately impose on their employees' dress and appearance at work has been a live issue in employment law for some considerable time. Some might argue that what is appropriate work wear is affected as much by fashion trends and economic circumstances as by legal developments – an example being the varying perception of the appropriateness of business casual dress in City. Nonetheless, employers need to be aware of potential problems to which they expose themselves if they seek to establish and enforce dress codes, particularly where sensitive issues arise in relation to religious issues.

Dress codes have regularly spawned litigation in recent years over requirements, for example, for men to wear ties or not to wear earrings or have ponytails or women to wear skirts. The early litigation was principally based on sex and race discrimination legislation. The introduction into UK law in 2003 of protection against discrimination on grounds of religion and belief has subsequently brought into particular focus circumstances where dress codes conflict with a desire to express religious identity. This article summarises the issues which have arisen in the key cases in this area.

Claims of unlawful discrimination and unfair dismissal can lead not only to significant awards of compensation (not least in view of the fact that compensation of unlawful discrimination is unlimited). The reputational issues arising from such issues can be very material as the publicity surrounding the recent religious discrimination cases summarised later in this article demonstrates.

Sex Discrimination

Many of the early cases in this area were brought under the Sex Discrimination Act 1975 on the basis of a claim that the provisions or application of a dress code or uniform policy constituted or led to less favourable treatment of one sex over the other. The leading case is the Court of Appeal decision in *Smith v Safeway plc*[1] which dealt with the issue of a

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1. [1996] ICR 868.

male delicatessen assistant who was dismissed for having a ponytail. This breached the employer's appearance rules which required tidy hair, not below collar length and no unconventional hair styles.

The complainant employee argued that he had been treated less favourably on grounds of his sex because female staff were allowed to have their hair long. The Court of Appeal, endorsing the EAT's approach in the earlier case of *Schmidt v Austicks Bookshop,*[2] found that an employer's code governing the appearance of employees was *not* required, in order to avoid unlawful discrimination, to make provisions which applied identically to men and women. The prohibition of ponytails for male employees did not constitute less favourable treatment of men than women because the same standard of conventional appearance was applied to both sexes. The required approach was to consider the effect of the code overall, not item by item. A code which implied conventional standards was, was between men and women, unlikely, as a whole, to produce sex discrimination. This decision was followed by *Cara v Hackney*[3] where a requirement that employees be "appropriately dressed" permitted an employer to prohibit a male transvestite from wearing female clothes at work.

A similar approach was adopted in *Burrett v West Birmingham Health Authority.*[4] Discrimination under the Sex Discrimination Act 1975 was avoided on the basis that, although under the employer's dress requirements treatment of men was different from that of women, it was not less favourable. A female nurse complained that the requirement that female nurses (but not male) wore a hat was discriminatory. The Court of Appeal found that men and women were treated equally because they both faced similar restrictions (even though they varied in some respects).

Other cases have adopted a similar approach. In *Fuller v Mastercare Service & Distribution*,[5] a dress code specifying that males had to have their hair neatly groomed and conservatively cut with no long hair or ponytails was not, taken as a whole, discriminatory. That said, it was noted that was open to complainants to seek to undermine the agreement that a dress code was not discriminatory on an overall basis if a particular aspect of the code went beyond the imposition of the conventional.

In *Cootes v John Lewis Plc,*[6] a challenge was made to a dress code applying to staff working in a department store who had contact with customers. Men were required to wear a dark business suit, shirt and tie, whereas women were required to wear a blue suit and green blouse made of a polyester material. The complaint was that what the men were required to wear made them appear to be more senior than the women. The Employment Appeal Tribunal upheld the employment tribunal's

2. [1978] ICR 85.
3. EAT/326/95.
4. [1994] IRLR 7.
5. EAT/0707/00.
6. EAT/1414/00.

finding that this did not amount to less favourable treatment of the female staff than the employer's male staff.

In *Department of Work & Pensions v Thompson*,[7] the introduction of a new dress code requiring male staff to wear a collar and tie to work was successfully challenged before the employment tribunal as constituting unlawful direct sex discrimination. The complainant had been the subject of disciplinary action for failing to comply with the dress code in circumstances where he had no contact with the public, there were no mandatory items of clothing for women and several women were allowed to wear clothing which was not of the requisite standard of business dress (in terms of t-shirts and the like). An appeal to the EAT succeeded on the basis that Mr Thompson had not been treated less favourably (as distinct from differently) than female staff. The Tribunal had applied a "but for" test; *i.e.,* but for the difference in sex, would men and women have been treated the same way? However, this test of whether unlawful discrimination had occurred only applied to ascertain whether conduct complained of was discriminatory. Once less favourable treatment was established – the employment tribunal had failed properly to consider the relative treatment of men and women against the background of the overarching requirement for all staff to dress in a professional and business-like way. The proper question for the employment tribunal to consider was, applying contemporary standards of conventional dress wear, whether the required level of smartness could be achieved by requiring a collar and tie to be worn.

Religious Discrimination

The Employment Equality (Religion or Belief) Regulations 2003[8] came into force in December 2003 to give effect to obligations under the EU Framework Directive.[9] This legislation prohibits, in an employment context, discrimination on the basis of an employee's or worker's religion or belief. Unlawful discrimination on grounds of religion or belief can be direct, indirect, or by way of harassment or victimisation. There have now been a number of cases addressing the application of the religious discrimination legislation to dress codes, which the remainder of this article addresses.

Regulating the Tidiness of Beards

In *Mohmed v West Coast Trains Ltd,*[10] the religious beliefs of a Muslim customer services assistant required him to maintain his beard at least at one fist's length. He was regularly requested to keep his beard trimmed and tidy in order to comply with the employer's uniform code. The em-

7. EAT/0254/03.
8. SI 2003/1660.
9. 2000/78/EC.
10. EAT/0682/05.

ployee argued that he was dismissed because of his maintenance of his beard and that this dismissal constituted direct and indirect discrimination on grounds of his race and religion. The employer argued that the dismissal was not unfair or discriminatory on the basis that the reason for it was lack of enthusiasm for his work rather than his race or religion.

Whilst the *Mohmed* case principally addressed the issue of the applicable burden of proof, the EAT held that a *prima facie* case of discrimination could not be established. Whilst the uniform policy required employees to keep their beards neatly trimmed and smart, the employer had agreed that this requirement could be complied with in respect of a beard of the length which the employee was required to maintain for religious reasons. Moreover, a Sikh fellow employee had not been required to trim his beard, but rather to keep it smart. Neither the provisions of the policy nor the way in which it was applied constituted unlawful religious discrimination.

Requiring the Removal of the Veil

In *Azmi v Kirkless Metropolitan Council,*[11] claims of religious discrimination and harassment on religious grounds were brought by a teacher against a school which had asked the employee to remove her veil (which she wished to wear when in a classroom with a male teacher). The basis for this request was the contention that it had made it difficult for some students to understand her during English language lessons. Her refusal to comply led to her suspension.

The employee claimed that the school had committed direct discrimination on the grounds of her religious belief on the basis that the school had treated her less favourably than it would treat others by requiring her to remove her veil (a practice which she believed was required as part of her observance of her religion). The employment tribunal, upheld by the EAT, rejected the employee's claim of direct discrimination. It held that she was not less favourably treated than the appropriate comparator (*i.e.,* an employee of any religion who covered her face) would have been - any person covering their mouth would have been suspended (as the employee was) due to the educational consequences by way of a barrier to effective learning.

The claim of indirect discrimination contended that (as required to establish indirect discrimination) the school had applied a "provision, criterion or practice" in relation to the removal of her veil which put her at a particular disadvantage due to her religious beliefs. Indirect discrimination was clearly established on the basis that the apparently neutral dress code put those of the complainant's religion at a particular disadvantage when compared with others. The question then became whether the employer could defend the indirect discrimination claim on the basis that the policy could be justified.

11. EAT/0009/07.

On appeal it was accepted that the employer had a legitimate aim in terms of raising educational achievement especially for those with English as a second or additional language. The issue was then whether the means chosen were proportionate. Consideration had been given by the employer to addressing the employee's wish to wear a veil when in a classroom with a male teacher by alternative arrangements such as the use of a screen, her keeping her back to her colleague and changing the timetable but none of these were considered practicable. The employer's "stringent investigation of the alternative means of achieving the aim" by not imposing a requirement to remove the veil were considered to have satisfied its statutory obligations and led to the conclusion that the policy was justified.

Crucifixes

The most recent and high profile case in this area, albeit not an appellate decision, is *Eweida v British Airways plc.*[12] A check-in worker claimed that she was forced to take unpaid leave after her refusal to remove or conceal a small crucifix on a necklace. Her claim before the Tribunal was that the airline had discriminated against her as a Christian by not allowing her openly to wear a symbol of her faith, in contrast to Hindu and Muslim employees who were permitted to wear religious dress which applied to them.

So far as the dress code was concerned, the employment tribunal rejected Ms. Eweida's direct discrimination complaint – she did not suffer less favourable treatment than a comparator in identical circumstances. BA's dress policy required any item of adornment which could be concealed to be concealed. Any item which was both worn as a result of the mandatory religious requirement and which could not be concealed under the uniform would (if approved) be permitted. Consequently, Ms. Eweida would have been treated in the same way as a person not of the Christian faith who displayed a cross for cosmetic, rather than religious, reasons or a symbol of some other faith or indeed in the same way as an employee who wore a visible necklace of any kind without religious adornment. To the extent that a religious symbol could not be concealed, then if the dress code permitted it to be visible, the example which the employment tribunal focused on being the Sikh bangle when worn by a member of staff wearing a short sleeved shirt. Ms. Eweida could not compare herself with an adherent of the Sikh faith on this particular point as the bangle is mandatory whereas the employment tribunal found that the cross is not mandatory for Christians. Ms. Eweida's harassment claim failed because the airline simply sought to enforce its dress policy rather than to engage in unwanted conduct towards the employee on grounds of her religion or belief.

12. Case No. 2726089/06.

The employment tribunal's decision is most interesting in relation to Ms. Eweida's indirect discrimination claim which it rejected on the basis that there was no evidence that the "provision, criterion or practice" constituted by the dress code created a barrier for Christians. Since the employment tribunal considered that to wear the cross visibly was a personal choice of the employee, rather than a requirement of scripture or of the Christian religion, it held that the policy did not put Christians generally or Ms. Eweida specifically at a particular disadvantage. There was therefore no indirect discrimination. This suggests that an adherent to a religion can only be discriminated against indirectly where the limitation placed on the complainant relates to mandatory rather than optional items of clothing or adornment.

The Challenge of Justification

The employment tribunal also found that, had indirect discrimination been established, that the defence of justification would not have been made out. Whilst the policy's objective of brand consistency was a legitimate aim, the employment tribunal did not consider it not to be a proportionate means of attaining a legitimate aim. In reaching that conclusion the employment tribunal (somewhat controversially) relied on the fact that the airline changed the policy after this dispute arose without any adverse consequences. It may be seen as harsh to judge the employer by reference to its change of policy *after* the relevant dispute arose. That said, the employment tribunal's view that the failure in BA's policy to distinguish between religious symbols and cosmetic jewellery did not strike the correct balance between corporate consistency, individual need and the accommodation of diversity is a clear warning to employers of the need to construct dress codes carefully.

Human Rights

Dress codes also give rise to human rights issues. The European Convention on Human Rights, Art 9(1) provides that "everyone has the right to freedom of thought, conscience and religion . . . either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." This right is tempered by Art 9(2) which finds that to "manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

To date, little headway has been made by challenges to dress codes based on human rights issues. In *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*[13] a school student com-

13. [2006] 2 All ER 487.

plained about being forbidden from wearing the full jilbab at school, which she said infringed her right to manifest her religion. The House of Lords held that the school had not interfered with the claimant's right to manifest her religion on the basis that the decision to prohibit the jilbab could be justified as a proportionate means of reaching its legitimate aim of protecting the rights and freedoms of other students.

Conclusions

The case law over recent years indicates that those employers who need or wish to adopt dress codes need to do so with considerable care and flexibility, not only in the drafting of the policy in question but also its enforcement in order to avoid claims of constructive and unfair dismissal, unlawful discrimination and victimisation. Previous cases should be treated as useful guidance rather than binding precedents given that it is regularly made clear in the case law that each situation will be assessed on its particular facts. In seeking to limit the exposure arising from the operation of a dress code, the key challenges for an employer are to seek to limit as far as possible the adverse impact of the policy on those who have characteristics protected by the discrimination legislation and, to the extent that this cannot be done, to have cogent and objective justification for the relevant requirement. Identifying why particular requirements are to be imposed and what the less discriminatory alternatives could be will be an essential part of drafting a justifiable policy. Consultation with employees about the introduction and detailed operation of a dress code will also facilitate its acceptable by the relevant workforce.