

Religious dress and employment law



A. Maria Haines has recently converted to the muslim faith and has now insisted on wearing the appropriate religious dress which requires Maria to wear clothing revealing only her eyes. Customers have refused to deal with her - Maria is the sole Receptionist as BIS and they have told her that they will have to terminate her contract.

If BIS decides to terminate Maria's contract, then it is likely that she will commence proceeding against BIS for unfair dismissal, pursuant to section 94(1) of the Employment Rights Act 1996 (as amended). It is likely that the primary basis for her claim will be that her right to freedom of religion, under Article 9 of the Human Rights Act 1998, has been infringed by her employer's decision to dismiss her for wearing her religious head veil. Article 9(1) of this Act provides that, " Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." (Art. 9(1) HRA 1998) Maria will likely argue that in wearing a veil she is publically manifesting her religion in practice and observance. She may even try to rely upon the recent House of Lords decision in the case of R (Begum) v Governors of Denbigh High School [2006] UKHL 15 to support this argument. By virtue of section 98(1) of the Employment Rights Act 1996, the burden of proof will rest upon BIS to satisfy the Tribunal, on the balance of probabilities, that the dismissal was not unfair.

Maria may also argue that BIS has unlawfully discriminated against her on grounds of her religion and belief, in accordance with regulation 3 of the

Employment Equality (Religion or Belief) Regulations 2003. Her argument would likely be that, in dismissing her, BIS treated her “ less favourably than [it] treats or would treat other persons.” (Reg. 3(1)(a) EE(RoB)R 2003)

There are several aspects to this claim which present opportunities for BIS to mount a successful defence to these claims: The first argument that BIS might make is that the dismissal in question was not unfair, because the reason for her dismissal “ relates to [her] capability... for performing work of the kind which [she] was employed by BIS to do.” (s. 98(2)(a) ERA 1996)

There is clear evidence here that Maria could not continue as receptionist, because BIS’s customers refused to have any further dealings with her, due to her insistence on covering her face with a religious veil.

BIS can argue that Maria’s rights under Article 9(1) of the Human Rights Act 1998 are not absolute because they are qualified by Article 9(2) of that same Act, which provides that, “ Freedom 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.” (Art. 9(2) HRA 1998) BIS can argue that its right to run an effective business is one of the rights against which Article 9 must be weighed and that this latter right must prevail. There is recent and good judicial authority for this proposition; namely, in the case of *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932 which applied the earlier case of *Stedman v United Kingdom* (1997) 23 E. H. R. R. CD 168.

Maria might try to rebut this argument and distinguish these authorities on the basis that, in those cases, the employees in question refused to accept offers of alternative employment, although the success of this argument will depend upon whether or not it was viable for BIS to make such an offer in this case. In light of the fact that BIS is only a small company, it may well be the case that there did not, at the time of dismissal, exist any other vacancies for which Maria would have been suitably qualified.

BIS might also try to argue, in light of the fact that Maria has only recently converted to Islam, that her religious beliefs are not sufficiently cogent, serious or important to warrant her reliance on Article 9 of the Human Rights Act 1998; while the success of this argument will fall on the Courts interpretation of the facts, there is judicial authority, at least at the European level, that lack of real or strong religious belief precludes the operation of Article 9 of the European Convention on Human Rights 1950 (*Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293). A similar argument to this that BIS might try to rely upon is that Maria, in wearing a head veil, was not manifesting her religious beliefs, but was merely motivated to wear religious dress by those beliefs; again, there is judicial authority at the European level to support the validity of this argument (*Arrowsmith v UK* (1978) 3 EHRR 218).

BIS can distinguish the decision handed down by the House of Lords in the case of *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15 on the basis that this case concerned the treatment of a student in compulsory full-time education. Both Brooke LJ and Mummery LJ both explicitly declared

in this case that the principles in operation were not the same as those applicable in the employment context (Sandberg, 2009: 272).

In regard to the argument that BIS's dismissal constitutes discrimination under regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003: BIS can argue that, in light of the reaction of its customers to Maria's head veil, requiring her to remove the veil during working hours became a genuine and proportionate occupational requirement, in accordance with regulation 7(2) of the 2003 Regulations (Nairns, 2007: 93).

In conclusion, so long as BIS can satisfy the Court that it was not in a position to be able to offer Maria any alternative employment, where she would have been able to continue wearing her religious dress, then it is highly unlikely that any of Maria's claims will be successful.

B. Josie Rimson has been employed in BIS cafeteria to prepare staff meats. She has noticed that some of the meats and sauces are out of date, but, having raised the issue, was told: “Your job is to make the meals, just get on with it”. She has now heard that some staff are off sick with suspected food poisoning and she is afraid she will be blamed. Repeated complaints to Senior Managers at BIS have been rejected – so now she has reported the problem to Bramley Council. An item on the matter has now appeared in the Bramley Gazette. BIS has decided to discipline her, and have warned that she may be dismissed.

The main issue here is whether or not a dismissal of Josie by BIS would be deemed unfair under the Employment Rights Act 1996, as amended by the Public Interest Disclosure Act 1998, an Act which inserted into the 1996 Act

clause 103A, which provides that, “ An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.” (s. 103A ERA 1996; s. 5 PIDA 1998)

The term ‘ protected disclosure’ is defined by sections 43A and 43B of the Employment Rights Act 1996 (as amended) as, “...any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following— (...) (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (...) (d) that the health or safety of any individual has been, is being or is likely to be endangered (...) (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.” (s. 43A & 43B ERA 1996)

In the present case, it is reasonably clear, on the facts, that the reason Josie reported this matter to the Bramley Gazette was because she felt that her Senior Managers were trying to conceal or, at least, disregard the possibility that the instances of staff poisoning were the result of their consuming out of date food in the staff canteen, in which case section 43B(f) of the Employment Rights Act 1996 would likely be deemed satisfied. It may also be the case that Josie felt, in light of the despondence of BIS’s senior managers, that unless she reported this incident to the Bramley Gazette, the events giving rise to these incidences of food poisoning would repeat themselves in the future, in which case section 43B(d) of the Employment Rights Act 1996 would likely be deemed satisfied. If the Tribunal is satisfied

(1) that Josie 'reasonably believed' that there had been malpractice on the part of her Senior Managers (Babula v Waltham Forest College [2007] EWCA Civ 174); and, (2) that Josie's disclosure was the reason for her dismissal (Kuzel v Roche Products Ltd [2008] EWCA Civ 380), then it is highly likely that Josie will be able to bring a successful claim against BIS for unfair dismissal.

BIS might try to argue that Josie is being dismissed for gross negligence, in preparing staff meals using foods which were out of date, and that when the Senior Managers told her "Your job is to make the meals, just get on with it," they were merely reminding her that it is within her job capacity to make decisions in regard to which food stuffs to use and which to discard. While this argument might have had some merit if Josie's Senior Managers had commenced disciplinary proceedings after Josie admitted that the recent outbreak of food poisoning was potentially attributable to her having served out of date food stuffs in the staff canteen, the fact that such proceedings were only initiated after the article was published in the Bramley Gazette, renders this version of events highly improbable.

C. Harriet Jameson has recently returned from sick leave following a serious car accident, which required her to have extensive surgery for major facial injuries. The surgery left her with very visible red scarring on her face. BIS has interviewed her and suggested removing her from her post as Manager of the company creche because the children of the employees have refused to attend: they have been having nightmares, and this is affecting attendance of the female employees at work. Harriet has refused her relocation to the personnel Department, claiming discrimination.

The main issue which falls for determination here is whether or not Harriet, if dismissed from her position as Manager of the company crèche, will be able to mount a successful claim against BIS for unfair dismissal.

We have been told that Harriet is claiming that she is being discriminated against on the basis of her facial disfigurement. However, in order for this argument to have legal validity, it is necessary that Harriet can satisfy the Tribunal that her facial scarring qualifies her for protection under the Disability Discrimination Act 1995.

For the purposes of this Act, a ‘ person with disability’ is defined as follows:

“... a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.” (s. 1(1) DDA 1995)

While there is no doubt that Harriet’s purported disability is physical in nature, in order for her to argue that it is a qualifying impairment, she must satisfy the Tribunal that it is having substantial adverse effects, that those substantial adverse effects will likely remain for the long-term and that they

affect her ability to carry out normal day-to-day functions or activities (Department for Work and Pensions, 2005: 3).

The Guidance issued by the Secretary of State on the definition of disability, pursuant to section 3 of the Disability Discrimination Act 1995 confirms that, with some limited exceptions (e. g. for self-inflicted scarring, piercing or tattoos), bodily scarring or disfigurement will be deemed to have substantial adverse effects on a person's ability to undertake normal day-to-day activities (Department for Work and Pensions, 2005: 6; Adams, 2008: 375). To satisfy the ' long-term' criterion of the 1995 Act, the scarring must either have been present for 12 months or be likely to remain for that period (Adams, 2008: 375). In this present case, while the surgery was only recent, it seems likely, due to its severity, that the scarring will remain for at least this length of time.

Having established that Harriet qualified for protection under the Disability Discrimination Act 1995, it is now necessary to consider whether or not she has been discriminated against on the basis of her disability. '

Discrimination' is defined by section 5 of the 1995 Act: " For the purposes of this Part, an employer discriminates against a disabled person if— (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified." (s. 5(1) DDA 1995).

While it is certainly the case that BIS has asked Harriet to accept a lateral move on the basis of her disability, BIS will seek to show that this did not

constitute discrimination because it was not appropriate for her to remain working with children, in light of the effect that her disfigurement has had on them, in practice. In the opinion of this author, BIS has acted reasonably and proportionately in asking Harriet to relinquish her role as Manager of the company crèche and to accept an alternative employment position in the company. As Adams (2008: 367) argues, albeit in a slightly different context, “ An employer... may be justified in refusing to employ as a model for cosmetics someone who suffers from a disfiguring scarring...”

In conclusion, if Harriet refuses to accept BIS's offer of alternative employment, BIS will be entitled to terminate her contract, without fear of any legal repercussions under the Employment Rights Act 1996 or the Disability Discrimination Act 1995.

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