

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 8 March 2007
Judgment handed down on 30 March 2007

Before

THE HONOURABLE MR JUSTICE WILKIE

MR P SMITH

MR S YEBOAH

MRS A AZMI

APPELLANT

KIRKLEES METROPOLITAN BOROUGH COUNCIL

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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SUMMARY

Religion or Belief

ET findings that a decision to suspend a teaching assistant for refusing an instruction not to wear her veil when in class with pupils assisting a male teacher: was not direct discrimination on the grounds of religion or belief; and, though it was indirectly discriminatory on that ground, was lawful, being proportionate in support of a legitimate aim, upheld by the EAT.

THE HONOURABLE MR JUSTICE WILKIE

1. This is an appeal by Mrs Azmi against decisions of the Employment Tribunal at Leeds in a reserved decision promulgated on 19 October 2006. By that decision, her claim to direct religious discrimination against Kirklees Metropolitan Council was dismissed; her claim of indirect religious discrimination was dismissed; her claim of harassment on the grounds of religion or belief was dismissed. Her claim of victimisation succeeded, and the Respondent was ordered to pay the Claimant the sum of £1,000 for injury to feelings and, by reason of the fact that the Respondent failed to comply with the statutory grievance procedure, that award was uplifted by 10%. The adverse findings against the Respondent in respect of victimisation and the statutory uplift are not subjects of appeal.

2. Although there were some disputes of fact concerning the detail of events, their broad thrust was not in dispute. Those fact as found by the Tribunal are as follows.

3. The Appellant at all material times worked at the Headfield Church of England (Controlled) Junior School, Thornhill Lees, Dewsbury, a school controlled by the Respondent. There were approximately 530 children at the school aged between 7 and 11, of whom 92% were Muslim of minority ethnic origin, mainly Indian and Pakistani. There were about 70 staff, of whom approximately 25 were Muslim and/or of ethnic minority origin.

4. The Appellant was employed as a bi-lingual support worker (BSW), of which the school had eight. Her job description required her to work as part of a team to support the learning and welfare of pupils and to assist in the educational activity relating to children from ethnic minority backgrounds. The key areas were described as: teaching support; pupil

support for targeted minority ethnic pupils at risk of under achieving, and team activities. The specific needs of the children at school meant that they received additional funding through an ethnic minority achievement grant which allowed the school to employ BSWs. The Appellant was employed on a fixed-term contract commencing 1 September 2005 and terminating on 31 August 2006.

5. When she applied for the post, the Appellant was 22 years old, studying for a degree in English and Arabic at the University of Leeds. She had, since 2002, worked as a teacher at a girls' high school until March 2005, when she took up a position as a support assistant at a Church of England primary school in Dewsbury specialising in children aged 5 to 7.

6. On 18 July 2005 she attended an interview for the BSW post. She was interviewed by the head teacher, Mr Smith, and Mrs Maher. She was suitable for the job and had glowing references. She performed well in the interview, was articulate and enthusiastic. Mrs Maher telephoned her to offer her the post. At that stage she asked if, instead of working for 37 hours a week, she could work for 20 hours because she had child care commitments. As she was such a strong candidate this request was agreed. She was to work from 8.45am until 12.45pm. Because of these reduced hours, she was allocated to the year 6 team (children aged 10 to 11) since part time hours could be accommodated better with older children, whose support needs were less than the younger age groups.

7. Year 6 had five classes and five class teachers: Mr Williams (the team leader), Mr Lee, Mrs Spark, Mrs Sharrock and Mrs Hardy. In addition to the Appellant there was another BSW (Nazia Ahmed), a learning mentor, an educational teaching assistant, and a special needs support assistant allocated to year 6.

8. The Appellant is a devout Muslim. Since the age of 15 she has worn a long dress (the jabbah) and has also usually worn a veil which covers all of her head and face, save for her eyes, when in the presence of adult males. At her interview, the Claimant had worn a black tunic and headscarf; her face was not covered. At no time during the interview did she indicate that her religious beliefs required her to wear a veil or placed any limitation on her working. She attended the training day on 1 September 2005 in advance of term starting. On that occasion she dressed in a similar manner without her face being covered. At the hearing, the Claimant was asked the reason for her apparent change in practice and she explained that her husband had suggested to her that she should go unveiled.

9. During the first week of term, the Appellant telephoned Mrs Maher to ask if she could wear the veil when teaching with male teachers, or whether arrangements could be made so she would not have to work with male teachers at all. Mrs Maher referred the matter to the headmaster and she discussed it with him on 9 September. They concluded that it was not possible to isolate the Appellant from male staff, since all the classes had some male teachers and, in addition, the Claimant was required to liaise from time to time with other male members of staff. Mr Smith spoke to the Claimant on that Friday to inform her that it was not possible to re-arrange her duties because of the substantial timetable changes that would be required. The Appellant then asked if she could consider the matter over the weekend.

10. On Monday 12 September, the Appellant spoke to Mr Smith and informed him that she was willing to work with male teachers but, to accord with her religious beliefs, she would have to wear a veil at all times when in the presence of male colleagues. This would include when she was speaking to and communicating with the children. Mr Smith had not encountered this issue before, since the other female Muslim staff wore the traditional

headscarf but not a veil. He sought advice from the education department of the Respondent. They had no existing guidelines, though a similar situation at another Kirklees primary school had just been referred to them. The Respondents began holding meetings and conducting enquiries concerning the impact on staff wishing to wear a veil when carrying out educational duties at the Respondent's schools. There already existed a pack of material, provided to new teachers and assistants, in which there is reference to children learning a second language and which compares it to the way in which they acquire their first language. In particular it states:

“Gesture and body language including facial expression reinforce the spoken word.”

11. The Respondent's education service prepared and produced advice to head teachers on the wearing of the veil during October 2005. It confirmed the Respondent's commitment to valuing cultural and religious diversity. It also referred to their responsibility to ensure that all members of staff were able to undertake their duties effectively. It stated:

“We believe the following principles are appropriate to our circumstances.

Obscuring the face and mouth reduces the non-verbal signals required between adult and pupil, both in the classroom and other communal parts of the School. A pupil needs to see the adult's full face in order to receive optimum communication.

Schools are professional settings where communication is vital, both between adults and pupils and between adults.

It follows that for teachers or support workers wearing a veil in the workplace will prevent full and effective communication being maintained. In our view the desire to express religious identity does not overcome the primary requirement for optimal communication between adults and children.”

12. Mr Smith had agreed that, pending receipt of advice, the Appellant could wear the veil even when teaching the children. He decided to undertake an observation of her work. This took place on 21 September when she was supporting a male class teacher, Mr Lee, in a literacy session. He concluded that it was readily apparent that the children she was working

with were seeking visual clues from her which they could not obtain because they could not see her facial expressions. He also thought that her diction was not as clear as it would have been if she were not wearing a veil. There were occasions when the Claimant had to speak at the same time as the teacher which meant that she had to be able to speak quietly but clearly to her group of children.

13. Mr Smith discussed his findings with the Appellant and indicated that his professional assessment was that she would be able to carry out her role more effectively if she were not wearing the veil when working directly with the children. The Appellant maintained that her religious belief required her to be veiled when in the presence of adult males. Mr Smith told her that she should not wear the veil when working directly with children in a classroom.

14. On 4 October, Mr Smith met the Appellant to remind her that he had requested that she not wear her veil when working with the children. He confirmed she could wear the veil in open areas when walking around the school. The Appellant asked for time to consider the position. When they met again the following day, 5 October, the Appellant indicated that she could not work in accordance with Mr Smith's instructions. She requested permission to go home to consider the matter and she was very upset. Mr Smith gave her the telephone numbers of various contacts in the Respondent's education department.

15. There were further contacts between Mr Smith and the Respondent's education department including Ms Birring and a personnel officer called Tracey Russell. At this point, there appeared to be advice from Tracey Russell that the Appellant should be permitted to be veiled when in the presence of male staff or male parents.

16. Ms Birring is the head of ethnic minority achievement and quality. Her role was to provide advice and support for schools and their governors on a range of management issues. In November, she had a meeting with the Appellant. The Appellant explained her religious belief and why she had decided to wear the veil in school. There was a dispute at the Tribunal about certain things which Ms Birring is said by the Appellant to have asked her during that conversation. She said that Ms Birring had asked her to remove her jabbah so she could see the clothes she wore underneath. Ms Birring denied this and said that the Appellant had volunteered the fact that she normally wore western style clothes underneath but that Ms Birring had expressed concern at the length of her jabbah because she was wearing high heels and there could be a risk of her slipping and falling when moving around slippery floor surfaces or when climbing the stairs. The Appellant had made no complaint about this alleged incident at the time. It was not mentioned in her IT1 but was first referred to in further particulars of her claim dated 24 May 2006 ordered at a case management discussion.

17. Following the meetings with Ms Birring, Mr Smith was told that further observations should be made of the Appellant's performance of her duties. These were carried out by Mrs Maher on 7 November. Her observations were recorded on a standard form used for assessing the performance of support worker during lessons. Mrs Maher observed two lessons, one with Mr Lee on literacy when the Appellant was veiled, and the other with Mrs Spark, a maths lesson, when she was not. Mrs Maher concluded that the Appellant's level of support to the children in the maths lesson was good. She made reference to her lovely friendly smiling manner with the children and how they responded well to this. She commented on the difference between this and the other lesson less than two hours later. Mrs Maher found that the Appellant was much quieter and did not talk as much. Furthermore, the children did not engage with her to the same extent as they had done in the earlier lesson. She noted that the

children did not react to the Appellant's verbal praise since they were not able to obtain visual clues from her facial expression. The Appellant was informed of Mrs Maher's findings. She disagreed with the conclusion relating to the literacy lesson but indicated she would try to use more verbal communication and a louder verbal praise when she was veiled. This was recorded on the form as action to be taken.

18. On 4 November 2005 Mr Smith sent the Appellant a letter indicating that now that they had received the local education authority advice to head teachers on the wearing of the veil he would like a follow up meeting. The Appellant was advised that if she wished she could bring a friend, colleague, or union representative to that meeting, which was arranged for 9 November. The meeting was attended by the Appellant, Mr Smith and Ms Birring. An employee of the Respondent attended to take a note. The meeting discussed the paper from the LEA and reference was made to the classroom observations of the Appellant by Mrs Maher. Ms Birring pointed out:

“...that the purpose of the AA [Appellant] in school as a Bilingual Support Worker was to support bilingual children at risk of under-achieving in order to raise standards, making verbal and non-verbal communication/facial expression/eye contact vital. Within the context of raising the achievement of children, it was felt that wearing a veil in class had an adverse impact on AA's ability to perform her job effectively and impedes her effectiveness in supporting teaching and learning in the classroom.”

The note of the meeting concluded with the Appellant being given a management instruction that she should be “unveiled in school”. She was given a week to decide what to do and told she would be expected to be “unveiled at school” from 16 November.

19. The meeting was followed up by a letter drafted by the LEA but in the name of Mr Smith. The letter set out the advice to head teachers on the wearing of the veil which:

“obscures the face and mouth, reduces the non-verbal signals required between adult and pupil, both in the classroom and the communal parts of the School. A pupil needs to see the adult’s full face in order to receive optimum communication.”

It then stated:

“It follows that for teachers or support workers, wearing a veil in the work place will prevent full and effective communication being maintained. In our view, the desire to express religious identity does not overcome the primary requirement for optimal communication between adult and children.”

The letter went on to repeat the management instruction that, based on the advice from the LEA and the classroom monitoring, wearing the veil:

“...is having an adverse impact on our aims. I must therefore ask you to be unveiled whilst in School.”

It confirmed that the Claimant could continue to wear the hijab and jilbab but that she should ensure that the length did not compromise her safety.

20. The instruction referred to in the minutes and the letter went beyond that which Mr Smith and Ms Birring stated in their evidence was given to the Appellant, namely, that while working with children she should be unveiled. Mr Smith emphasised in his evidence that at no time had she been informed that in other areas of the school, providing she was not communicating with the children, she could not wear whatever she wished including the veil.

21. On 16 November the Appellant had a meeting with Mr Smith. She indicated she could not obey his instruction and was very upset. Mr Smith asked her to return the lap top which she had. His explanation, accepted by the ET, was that this request was so that other members of staff could use it, it was not by reason of her being suspended. Had that been the case he

would have asked her to return her pass key and the suspension would have been confirmed in writing.

22. On that afternoon, Mr Smith rang the Appellant to enquire about her welfare and during the conversation suggested that she should see her doctor and/or take counselling. On 18 November the school received a medical certificate in which the Claimant was signed off work for two weeks because of stress. On 28 November, Mr Smith wrote to the Appellant confirming the management instruction but this time stating:

“I said I would write to you regarding the Management instruction requiring you to be unveiled whilst working with children”.

He then referred to the medical certificate and her proposed date of return to work.

23. On 6 December the Appellant wrote to Mr Smith. She maintained that the instruction given by Ms Birring was that she should be “unveiled upon reaching Reception” whereas his letter referred to her being unveiled “whilst working with the children”. She then referred to her first Monday in school when she understood Mr Smith had said that she could wear the veil as long as she did not let it interfere with her delivering her role. She maintained that she and the children worked well together and they had understood everything she had taught them. She disagreed with his view that the veil was hindering her communicating with the children. She requested a period of unpaid leave for “a few solid weeks” on the grounds that she did not want the hassle of having to keep supplying sick notes or being contacted by the school. She also hinted that she might undertake some hours of counselling. She concluded:

“Thank you for all your thoughtfulness and consideration. I hope to return back to School the way I always used to, looking forward to my students and the staff”.

24. On 9 December Mr Smith wrote sympathetically to her about the request for unpaid leave but advised her she might be better, if she could obtain the medical certificate, to use sick leave. He also advised her that, as an employee, she could access counselling through the health care unit. There was further medical certification, dated 9 December, advising the Appellant to stay off work for four weeks because of stress.

25. On 8 December a letter was sent to Mr Smith on behalf of the Appellant which appears to have been from the Kirklees Law Centre. The letter was invoking a grievance “about the manner in which I have been discriminated against in regards to wearing my veil due to my religious beliefs”. The letter alleged she had been unfairly treated and that on 17 November she had been suspended. That grievance was only acknowledged on 23 December and indicated that the Chair of Governors would contact her concerning the next step. In the letter she had requested not to be contacted until after 3 February, and the letter of response acknowledged this. It is in relation to the Respondent’s failure to deal properly with this grievance that the findings of the ET in respect of victimisation were made. As this conclusion is not the subject of an appeal we do not refer to this aspect of the matter further.

26. On 27 January 2006 a further letter was sent to the Appellant, drafted by the LEA but in Mr Smith’s name. It referred to a lack of communication since 10 January when she had telephoned the school to seek unpaid leave. It concluded:

“I have to inform you that unless you either present yourself for work or submit a sick note to cover your absence since 6 January 2006, I would have to assume that you have resigned from your post at Headfield Junior School with immediate effect.”

She was given a time limit until 3 February.

27. On 2 February the Appellant had telephoned Mr Smith to say that she was to have a doctor's appointment that afternoon. She hoped to return to work on 6 February. Mr Smith told her she would need a sick note backdated to 6 January to cover her absence. A medical certificate dated 2 February backdated to 6 January was sent, indicating that she should not work for a period of six weeks because of stress.

28. She returned to work on 20 February 2006. Mr Smith discussed with her the instruction not to wear the veil when she was in class communicating with the children. The Appellant said she was unwilling to comply with this instruction. Following further discussions, Mr Smith arranged for her to be placed in year 3 on a temporary basis since one of the other BSWs in that year was off sick. This meant that for most of the time the Appellant would be able to work with female class teachers and would not need to be veiled when communicating with pupils. Mr Smith asked her to consider being unveiled at all times in the classroom, although he confirmed that she could continue to wear her veil in communal areas of the school, the library and the shared area. But the Claimant was not prepared to agree to this proposal.

29. Following further discussions with the Respondent's education department it was agreed that there would be a meeting with the Claimant prior to taking further action. This meeting was held on 23 February. As for the wearing of the veil, the Appellant indicated that she had been happy in the past few days in year 3 but it was pointed out that the basic management instruction remained that in the classroom she should not be veiled. The Appellant said that when working with males she would be veiled and she would not remove her veil. She was then suspended. This was confirmed by letter of the same date. Two reasons were given, first, she had not obeyed the instruction issued by Mr Smith not to be

veiled whilst communication with the children, second, a failure to keep in contact with the school and submit sick notes during her recent absence.

30. Finally, there was in the bundle before the Tribunal a letter dated 24 March 2006 which appeared to deal with the Appellant's grievance. The Appellant said she did not receive this letter and the Tribunal accepted this statement. It appeared to be a draft which had been sent to the school on 27 March.

31. As indicated above there were certain matters of detail where the ET rejected allegations made by the Appellant. These are as follows.

32. She alleged that on 1 September 2005 (the INSET training day) she found out she would be working alongside some male teachers and immediately contacted Mrs Maher to ask if she could wear the veil. She alleged that Mrs Maher then, in front of her, telephoned the team leader, Stuart Williams, who refused her request. She then said that she contacted the head teacher who said it was up to her if she wanted to resign but he wanted a decision by 4pm on that day. The Tribunal did not accept this version of events. It accepted that the Appellant first raised the issue early in the first week beginning 5 September. She spoke one afternoon to Mrs Maher who said she would speak to the head teacher. The Tribunal rejected the allegation that Mr Williams was contacted but immediately refused permission. He was not in a position to give or refuse permission, only the head teacher could do that. There was no reason why Mrs Maher, who was senior to Mr Williams, would seek his authority. The Tribunal did not accept that the head teacher demanded a decision or resignation by 4pm on the first day of term. The evidence of Mr Smith was accepted, that the Appellant requested that she be allowed to consider the situation over the weekend.

33. The Claimant alleged that at the end of September, on the first day she had to work with Mr Williams, he had commented that he thought that she would not be wearing the veil when working. She complained that he refused to make eye contact with her and had asked another person to collect her timetable instead of speaking directly to her. The Tribunal accepted that a remark was made by Mr Williams about the Appellant still wearing the veil but that this was no more than a comment passed concerning a situation which would affect the Appellant's communication with the children. The Tribunal accepted Mr William's refutation of the allegation relating to the refusal to make eye contact. He said he had to make eye contact since it was the only way he could communicate with the Appellant. As for the request for another member of staff to collect the Appellant's timetable, this was not denied but the explanation given by Mr Williams that he could not go to each of his 13 members of staff to collect their timetables was accepted by the Tribunal.

34. The Appellant alleged that Mr Smith repeatedly approached her with a view to having meetings to discuss her wearing the veil. It did not accept that there were such repeated approaches. It accepted the evidence of Mr Smith that he took the initiative to arrange a meeting on two occasions. The rest of the time it was the Appellant who came to see him. The Tribunal concluded that the Appellant had exaggerated the number of occasions Mr Smith asked to meet her.

35. The Tribunal rejected the allegation that Ms Baljit Birring humiliated her by asking her to remove her jabbah to show the clothes underneath and asked inappropriate questions about her own views and Muslim women in general. The Tribunal accepted the evidence of Ms Birring that it was the Appellant who had informed her that she wore western clothes underneath. The only discussion was about the length of the Appellant's jabbah because of

Ms Birring's concern that when wearing platform high heels she could be at risk. This was reflected in a letter of 10 November 2005 to which we have already referred.

36. The Appellant also complained about Mr Smith that when she had indicated she might resign he had asked her about her future plans and when the Appellant replied that she wanted to stay in teaching he asked her if she thought she was going to be able to do so if she continued to wear the veil. The Appellant said that this upset her because she thought he was telling her that she had no future and that no one would employ her. The Tribunal rejected that interpretation. They concluded that it was nothing more than Mr Smith trying to make her focus on the problem that job opportunities could be limited if she was in a position where she would have to wear the veil. She also complained that Mr Smith had during the course of a conversation about notice indicated that she would not be asked to work out her notice. The Appellant said "I felt like a charity case, as though he was doing me some great favour by offering to pay for the next four weeks."

37. The Tribunal could find no justification for that interpretation. It was no more than the reaction of Mr Smith trying to assist the Claimant in what was, no doubt, a very difficult and fraught situation. The Tribunal drew attention to the complimentary terms in which the Appellant had written about Mr Smith on a number of occasions. In an undated letter in October or November she concluded:

"You have been very helpful to me and very understanding".

On 6 December she wrote:

"Thank you for all your thoughtfulness and consideration".

On 12 December she wrote:

“I am very appreciative of all your help and understanding, thank you for offering me the help to find somebody who can offer counselling but I am OK with finding someone myself. I do realise that it is not your intention to place any undue stress on me”.

38. The Appellant also complained that on 16 November at 4pm she was telephoned by Mr Smith and he suggested that she go to a doctor or obtain counselling. She described herself as being:

“utterly shocked and questioning myself as to why I was being asked to go and see my doctor and somebody for counselling. I was so embarrassed by this suggestion I found it humiliating. I felt as though it was being suggested that I might have psychologically or mental problems and needed medical treatment.”

39. The Tribunal noted that this interpretation had only latterly been suggested by the Appellant and it concluded that the approach was no more than kindness and concern for her welfare being expressed by Mr Smith as reflected by the comments made in the Appellant’s own letters about that time.

The law

40. The European Union Council Directive 2000/78EC established a general framework for equal treatment in employment and occupation. We have had our attention drawn to paragraphs 1 and 4 of the recital to that Directive, in which the fundamental rights guaranteed by the European Convention of Human Rights and the universal right recognised by the Universal Declaration of Human Rights are cited as informing the Directive. Paragraphs 11 and 12 identify that discrimination based on religion or belief may undermine the achievements of the objectives of the EC Treaty and, to that end, any direct or indirect discrimination based on religion or belief should be prohibited throughout the community. In addition we have had our attention drawn to paragraphs 23 and 24 where it is recognised that, in very limited circumstances, a characteristic related to religion can constitute a genuine and determining

occupational requirement where the objective is legitimate and the requirement is proportionate.

41. The provisions of the Directive which are relevant are as follows:

“Article 1 Purpose

The purpose of the Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief... as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2 Concept of discrimination

1. For the purposes of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1—

(a) direct discrimination shall be taken to occur when one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.

(b) indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular religion or belief... at a particular disadvantage compared with other persons unless—

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means for achieving that aim are appropriate and necessary...

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 4 Occupational requirements

1. Notwithstanding article 2(1)and(2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of the adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall not thus prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

42. It is of note that Article 2.5 replicates, in virtually identical terms, Article 9(2) of the European Convention on Human Rights, Article 9(1) of which protects the right to freedom of thought, conscience and religion.

43. The Employment Equality (Religion or Belief) Regulations 2003 is the United Kingdom's attempt to pass domestic legislation giving effect to the general framework for equal treatment Directive in the sphere of religion and belief. Insofar as is relevant its provisions are as follows:

"2 (1) In these Regulations "religion or belief" means any religion, religious belief or similar philosophical belief.

3 (1) For the purposes of these Regulations a person ("A") discriminates against another person ("B") if –

(a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but –

(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,

(ii) which puts B at that disadvantage, and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

...

(3) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in one case are the same, or not materially different, in the other."

44. Regulation 6 concerns discrimination in employment and vocational training. In particular, it provides that it is unlawful to discriminate in the arrangements the employer makes for the purpose of determining to whom he should offer employment, by refusing to

offer employment, in opportunities afforded for promotion etc by refusing to afford him such opportunity or by dismissing him.

45. Regulation 7 makes provision for there to be an exception in the cases falling under Regulation 6, to which we have referred, for a genuine occupational requirement. Sub-paragraphs 2 and 3 of Regulation 7 replicate in their effect the provisions of Articles 4(1) and (2) of the Directive.

46. Regulation 26 provides as follows:

“(1) Where—
(a) any person applies to a Sikh any provision, criterion or practice relating to the wearing by him of a safety helmet while he is on a construction site; and
(b) at the time when he so applied the provision, criterion or practice that person has no reasonable grounds for believing that the Sikh would not wear a turban at all times when on such a site,
then, for the purposes of regulation 3(1)(b)(iii) the provision, criterion or practice shall be taken to be one which cannot be shown to be a proportionate means of achieving a legitimate aim.”

47. There is no equivalent in the Regulations of Article 2.5 of the Directive replicating Article 9(2) of the ECHR.

The issues

48. The ET at paragraph 5 of its reasoned decision identified nine issues. Of those the following are relevant to this appeal:

1. Does the wearing of the veil by the Claimant, which is a manifestation of her religious belief, come within the provisions relating to direct religious discrimination?
2. Who is the appropriate comparator?

3. Can inferences of religious discrimination be drawn from the Respondent's conduct?
4. Was the requirement that the Claimant should be unveiled when communicating with children in the classroom a provision, criterion or practice which was applied to all but which put persons of Muslim faith at a particular disadvantage?
5. If there had been indirect discrimination can the Respondent show that the requirement was a proportionate means of achieving a legitimate aim?...
7. Did the behaviour of the Respondent's employees amount to unwanted conduct which had the effect of violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for her and was this on the ground of the Claimant's religion?...
9. Should the claim relating to direct religious discrimination be referred to the European Court of Justice?

Direct discrimination

49. The ET identified, in paragraph 9.2, the less favourable treatment relied on by the Appellant on her eventual suspension because she refused to comply with the headmaster's instructions. The question arose under the Directive whether, by suspending the Claimant in these circumstances, the Respondent treated the Appellant less favourably than another would be treated in a comparable situation, and whether that less favourable treatment was on the grounds of religion or belief.

50. The questions which the Regulations require to be answered are: first, whether the Respondent treated the Appellant less favourably than it would treat another person in the same or not materially different circumstances and second, whether the less favourable treatment was on grounds of religion or belief.

51. The ET decided that this was not a case of direct discrimination. Its main reason for doing so was set out in paragraph 9.13. The Claimant had failed to show that she had suffered less favourable treatment than a comparator in similar circumstances. The Tribunal also found that there was no evidence of any prejudice or motivation which would cause the Tribunal to conclude that discrimination on the ground of her religion must exist.

52. There was a dispute before the ET as to the characteristics of the comparator. The Appellant argued that the comparator should be another Muslim woman who covered her head but not her face. The ET rejected that contention. It concluded that the comparator should be a person, not of the Muslim religion, who covered her face for whatever reason. On that basis the Tribunal concluded, having regard to the documents which were before it concerning the Respondent's teaching methodology for children reading English as a second language, that any such comparator would also have been suspended since that person's face and mouth would be obscured, which would be a barrier to effective learning by those children in circumstances where the Respondent's policy was that the education of children was paramount.

53. Mr O'Dempsey has maintained his argument before the EAT. He reminds us of the statement by Lord Nicholls in his speech in **Shamoon v Chief Constable of the RUC** [2003] ICR 337 at paragraph 4:

“It stands to reason that, in making this comparison with a view to deciding whether a woman who was dismissed received less favourable treatment than a man, it is necessary to compare like with like. The situations being compared must be such that, gender apart, the situation of the man and the woman are in all material respects the same.”

Mr O’Dempsey says that this is the principle to be adopted but substituting the phrase “religious belief” for “gender”. He also reminds us of the statement of principle in **Showboat Entertainments Centre Ltd v Owens** [1984] IRLR 7 at paragraph 20 where the EAT, in the judgment of Browne-Wilkinson J (as he then was) said:

“Although one has to compare like with like in judging whether there has been discrimination, you have to compare the treatment actually meted out with the treatment which would have been afforded to a man having all the same characteristics as the complainant except his race or his attitude to race. Only by excluding matters of race can you discover whether the differential treatment was on racial grounds. Thus the correct comparison in this case would be between Mr Owens and another manager who did not refuse to obey the unlawful racist instructions.”

54. Mr O’Dempsey says that the religious belief in question, which the ET accepted as genuine and held by a sizeable minority of Muslim women, was:

“...that they should only be in the presence of unrelated adult males when they are veiled. They regard this injunction as a requirement of their religion which requires them to dress modestly and decently.”

(paragraph 9.4).

55. In our judgment, Mr O’Dempsey’s contention is wrong. The purpose of the comparison is to illuminate the answer to the question whether there has been less favourable treatment on grounds of religion or belief. The less favourable treatment in question was suspension for refusing to accept an instruction. Looking one step back in the process, it could have been said that less favourable treatment was receiving the instruction. In our judgment, for the comparison to be such that the relevant circumstances in the one case are the same and not materially different from the other, save for the element of religious belief identified by the

ET, must involve a person to whom such an instruction has been given (the earlier stage), or a person who has refused to accept such an instruction (the trigger of the less favourable treatment complained of in this case). Of necessity, that must involve, in our judgment, a woman who, whether Muslim or not, for a reason other than religious belief wears a face covering. In our judgment it would be unrealistic, and would not comply with the requirements of the law, to pose a comparator who does not cover her face and who would not receive such an instruction or be exposed to risk of suspension for refusing it. Such a comparison would not illuminate the answer to the question.

56. The ET, having chosen, in our judgment, the correct comparator, concluded, on the evidence before it, that such a person would have been issued an instruction and, if she had refused to comply with it, would have been suspended. Accordingly, it concluded that the claim for direct discrimination failed. In our judgment it was entitled so to conclude and did not err in law in so doing.

57. That conclusion disposes of the appeal in respect of direct discrimination, which must be dismissed. We return below to an issue which the ET did not consider necessary to determine in order to decide the case. We agree with the ET in this respect.

Indirect discrimination

58. The Tribunal had to consider whether there was a provision, criterion or practice (PCP) which the Respondent applied, or would apply, equally to persons not of the same religion or belief (the Regulations) or was apparently neutral (the Directive).

59. This required the Tribunal to identify what the PCP was which the Respondent was applying and which affected the Appellant. The ET, at the outset of the hearing, permitted the Respondent to amend its grounds of resistance in order to set out the PCP it relied upon in the following terms:

“1. The requirement not to wear clothing which covers, or covers a considerable part of, the face and/or mouth and/or

2. The requirement not to wear clothing which interferes unduly with the employee’s ability to communicate appropriately with pupils”.

60. There was an issue whether this was the PCP which was in play or, if so, whether it was adopted with the intention of “targeting” the veil.

61. The ET considered this argument at paragraphs 9.6 to 9.12 of the decision and repeated its conclusions at paragraph 12.

62. We have had the opportunity to consider the document produced by the Respondent’s education department providing guidance to headmasters. It is clear to us, as it was to the ET, that, although the occasion for considering the question of a dress code for workers in schools was the request by the Appellant and another person in another school on grounds of religious belief, to wear the veil whilst in class where there was also an adult male, the policy which was developed was of general application and identified general principles. Those principles were accurately summarised in the statement of the PCP, which found its way eventually into the Respondent’s pleaded case. Far from it targeting the veil, the policy statement, whilst recognising that it would impact potentially on the wearing of the veil, made it clear that each case should be considered on its merits in the lights of the principles identified in the document. In our judgment the ET was entitled to conclude as it did that the PCP was

“apparently neutral”, alternatively, that the Respondent would apply it equally to persons not of the same religion or belief as the Appellant.

63. That being so, the ET had to consider whether the PCP put persons of the Appellant’s belief at a particular disadvantage when compared with others. It was not in dispute that it did and that the reason for that was that the Appellant believed that she was required by her religion to wear the veil, whereas persons of another religion or no religion would not have such a requirement. Accordingly, the ET found that there was a potential case of indirect discrimination and proceeded to consider whether the Respondent was able to show that the adoption of the PCP in this particular case was a proportionate means of achieving a legitimate aim.

64. Although, in the grounds of appeal, the Appellant sought to question whether the ET was correct to conclude that the need to raise the educational achievements of the children in the school, in particular the support given to targeted pupils from minority ethnic backgrounds for the majority of whom English was a second or additional language, was a legitimate aim of the policy, Mr O’Dempsey, correctly in our judgment, did not pursue that argument.

65. The argument on this aspect of the case was focussed on whether the ET had erred in law in concluding that the means chosen were proportionate. The ET addressed this at paragraphs 18 to 25 of its decision. It referred back to the history of the matter, in particular the fact that the requirement was not imposed by the school immediately, but the Appellant was permitted to wear the veil, when she considered it appropriate, at all times up to 16 November 2006.

66. Second, the ET took into account the fact that, by confining the instruction that she must remove her veil to those occasions when she was teaching the children, and concluded that the means adopted were proportionate. The Claimant had the freedom to wear the veil at all other times, in particular when she was moving to different parts of the school. Any earlier confusion there may have been about this had been sufficiently clarified by Mr Smith in his relevant letter.

67. Third, the ET took account of the fact that, before issuing the instruction there had been observations of the Claimant teaching and assisting the children. Mr Smith had observed her and was concerned about how effective her communication was. There was detailed observation by Mrs Maher on 7 November when she took detailed notes which were produced to the Tribunal. In paragraph 22 of the decision the ET said as follows:

“Although Mrs Maher did suggest that the Claimant should take other action such as raising her voice, etc, this does not mean that there would necessarily have been communication with the children which was as good and effective as if she was not wearing the veil.”

Mr O’Dempsey has focussed this particular paragraph for criticism. He says that the ET should have concluded that the Respondent failed to demonstrate that the instruction to remove the veil when in class was reasonably necessary because, had more time been given, the Appellant could have taken the action suggested by Mrs Maher and could then have judged whether the shortcomings in her communication with the children observed by Mrs Maher when wearing the veil could be sufficiently mitigated so as to obviate the need for issuing the instruction. He asked that we consider, in this context, new evidence in the form of a report in the name of a human resources officer dated shortly after the Tribunal’s promulgated decision. In that document, at paragraph 5.5, the officer writes:

“As the differences between AAs effectiveness between the lessons could have been caused by other factors, it may have been beneficial for her to be formally observed over a longer period of time”.

68. We have considered whether to admit this as evidence by reference to paragraph 8.2 of the EAT Practice Direction 2004, which identifies the following principles:

1. The evidence could not have been obtained with reasonable diligence for use at the Employment Tribunal hearing.
2. It is relevant and would have probably have had an important influence on the hearing.
3. It is apparently credible.

69. It appears to us that the new evidence satisfies conditions 1 and 3. It also satisfies part of condition 2 namely it is relevant. We doubt, however, whether it would probably have had an important influence on the hearing. The statement of opinion of a single human resources officer, not expert in matters of education, is, with due respect to her, of little weight when compared with the evidence which was before the ET from those who were expert in education. In particular, the ET had before it the actual notes made by Mrs Maher on the classroom observations of the Appellant she conducted on 7 November. This pointed up the stark difference in her performance between the two classes – respectively - when she was not wearing and when she was wearing the veil. Mrs Maher did note, as points for action, the possibility of the Claimant raising her voice and using more verbal communication. Accordingly, in our judgment, the statement of opinion of the human resources officer on 19 October 2006 does not take the point any further and we refuse to admit that new evidence.

70. The Tribunal explicitly stated that they considered the cases of **Hardy and Hansons Plc v Lax** [2005] IRLR 668 and **Bilka Kaufhaus GHMB v Weber von Hartz** [1987] ICR 110.

71. In the former case the Court of Appeal reviewed a number of previous Court of Appeal authorities, with approval, on the approach to be applied in the context of indirect sex discrimination on the question whether a PCP was justifiable. At paragraph 32 Pill LJ, in the lead judgment, said as follows:

“It must be objectively justified (*Barry*) and I accept that the word necessary used in *Bilka* is to be qualified by the word reasonably. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word reasonably reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellant’s submission (apparently accepted by the EAT) that, when reaching its conclusion the employment tribunal needs to consider only whether or not it is satisfied that the employer’s views are within the range of views reasonable in the particular circumstances.”

72. Mr O’Dempsey draws our attention to the case of **Lommers** 2002 ECR 1-2891 at paragraph 39 of the judgment of the European Court of Justice where it says as follows:

“Nevertheless according to settled case law in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the directive, due regard must be had to the principle of proportionality which required that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.”

He also draws our attention to the case of **Mangold v Helm** [2006] IRLR 143, another decision of the European Court of Justice, and in particular paragraph 65, in which it is said:

“Observation of the principle of proportionality requires every derogation from an individual right to reconcile so far as is possible the requirements of the principle of equal treatment with those of the aim pursued (see to that effect *Lommers* paragraph 39).”

He also referred us to the application of **R (Elias) v Secretary of State for Defence** [2006]

1WLR 3213, a decision of the Court of Appeal. He reminds us that at paragraph 161

Mummery LJ, in the lead judgment, said:

“A stringent standard of scrutiny of the claim of justification is appropriate because the discrimination, though indirect in form, is so closely related in substance the direct form of discrimination on grounds of national origins, which can never be justified”

and, at paragraph 165, Mummery LJ stated the well-established three stage test as follows:

“First is the objective sufficiently important to justify limiting a fundamental right, secondly is the measure rationally connected to the objective, thirdly are the means chosen no more than is necessary to accomplish the objective.”

We also note that at paragraph 178 of his judgment, where he was criticising the judge for having failed to consider and compare other means by which the legitimate aim could have been achieved, he said:

“Fourthly, as there was no proper consideration of whether there were other less discriminatory means of restricting payments to those with a close link to the UK, there is no evidential basis for finding that the birth link criteria were the only criteria that were reasonably necessary and proportionate to achieving the legitimate aim.”

73. Having regard to these various authorities, we are unable to agree with Mr O’Dempsey’s contention that the ET in the present case approached the question of proportionality erroneously. In addition to the paragraph to which we have referred, the ET reminded itself of the consideration which had been given by the Respondent to alternative ways for accommodating the Appellant’s wish to wear her veil when in the classroom with a male teacher, including suggestions that she use a screen; or that she remain with her back to the teacher; or that she remove the target group from the classroom; or that she use more hand

and body gestures; or that the timetable be changed so that she only taught with female teachers.

74. In respect of each of these possible alternatives, including actions such as raising her voice, the ET in paragraph 25 concluded that it was satisfied that the Respondent had shown that the imposition of the PCP was a proportionate means of achieving their legitimate aim. They did so having explicitly reminded themselves of the approach identified most recently in **Hardy and Hansons Plc v Lax** and having conducted the kind of stringent investigation of the alternative means of achieving the aim by not imposing this requirement upon the Appellant, and having concluded that the Respondent had discharged the statutory burden upon it. In those circumstances, in our judgment, the ET did not err in law in its decision on whether the indirect discrimination that they found was justified within the terms of the statute. Accordingly the appeal on indirect discrimination fails.

A point unnecessary for the ET's decision.

75. A great deal of time before the ET, and before the EAT, was taken up by an argument between the Appellant and the Respondent whether the Appellant's wearing of the veil because of her genuinely held belief that it was a religious requirement of her to do so was a "manifestation of a religious belief" or a "religious belief" itself. It was perceived that the answer to this question determined whether the case was one of direct discrimination, without any justificatory defence, or indirect discrimination with a potential justificatory defence. As we have indicated above, the ET concluded that there was no direct discrimination by considering the comparator whom the ET concluded was appropriate, and that there was in any event no evidence of any motivation to discriminate on the grounds of religious belief. Furthermore, the ET concluded that the case was one of indirect discrimination, subject to the

justificatory defence, because the ET concluded that the PCP was apparently neutral. It was not necessary for them to express a view whether or not the manifestation of a religious belief by wearing a veil comes within the provisions relating to direct discrimination. Nor is it necessary for us to do so.

76. In our judgment, in any event, the answer to the question - religious belief or manifestation of religious belief - is not determinative either way. The question for the ET always has to be posed in terms of the Regulations or the Directive. It may be that a PCP is not “apparently neutral” or is one which the Respondent would not apply equally to a person not of the same religion or religious belief. If that were the case, then the case would not be one of indirect discrimination. In such a case we would be surprised if it were not, potentially, direct discrimination. On the other hand, we would think it equally odd were a PCP, apparently neutral or applied equally to persons not of the same religion or belief and potentially attracting a defence of the justification, at the same time to constitute direct discrimination not attracting any defence at all. These matters, however, would have to be considered on a case by case basis. We can see no reason for there to be any *a priori* position that a “manifestation” of a religious belief always has to be dealt with as indirect discrimination. We are satisfied that, in this case, the ET applying the Regulations and the Directive, were correct to reject the contention that there was direct discrimination. We are also satisfied that they were correct to conclude that there was, potentially, indirect discrimination but that the Respondent established the defence of justification.

Harassment

77. The Appellant sought to attack the conclusions of the Tribunal on harassment on a very narrow ground namely that it appeared, from paragraph 27, to focus on comments or abuse

rather than more general conduct. Furthermore, it is alleged that the ET made certain perverse findings. This was not an argument which was pursued in oral argument before us although the points were not formally abandoned. In our judgment, there is nothing in either of them. It is plain from the findings of fact and from the detailed findings set out at paragraph 26 (1) to (6) the ET was not limiting itself simply to comments or abuse. The ET reminded itself in terms of Regulation 5(2) which provides that:

“5(2) Conduct shall be regarded as having the effect specified in paragraph 1(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.”

The reference by the ET to conduct, when allied to its earlier findings of fact on all the matters of complaint, including conduct, point up that there is no error in the ET’s decision on this account. Further, in the light of the very careful findings of fact, including acceptance of some of what the Appellant said, rejection of some of what she said, and acknowledgement of her perceptions, the Appellant falls a long way short of demonstrating that there is any perversity in the conclusions of the ET. Accordingly we dismiss the appeal in respect of harassment.

Reference to the European Court of Justice

78. Article 234 of the Treaty provides as follows:

“When a question of interpretation is raised before any court or tribunal of member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the court of justice to give a ruling thereon....”

Mr O’Dempsey asks us to refer this case to the ECJ for a preliminary ruling on two points. The first concerns whether a manifestation of religion, in this case the wearing of a niqab, could constitute a form of direct religious discrimination as opposed to indirect discrimination. As we have indicated above, it was not necessary for the ET to make any decision on this point

of principle nor was it necessary for us, nor have we. Accordingly, the conditions for an application to the ECJ for a preliminary ruling do not arise.

79. The second issue sought to be referred concerns whether the phrase “an apparently neutral PCP” refers to the characterisation of the PCP only or whether other factors, such as the intention of the employer in imposing the PCP may be taken into account. In our judgment, the meaning of “a PCP which is apparently neutral” is well established. It is a matter of fact. In this case it was clear from the document produced by the Respondent’s education department and the Respondent’s application of the points of principle to the case of the Appellant that the policy was apparently neutral though applied in an indirectly discriminatory way which called for justification. In those circumstances, no reference to the ECJ for a preliminary ruling was or is necessary either for the ET or the EAT. We therefore reject the application to refer.

80. In summary therefore, the various grounds of appeal of the Appellant are dismissed for the reasons we have set out above.

81. We are aware that there are some for whom this case raises issues beyond the terms and conditions of employment of a particular person at a particular school. The press interest has been such that we were told that the Appellant felt unable to attend the hearing before the EAT. We understand her feelings and do not regard her absence as in any way discourteous. We were impressed with the measured, careful and sensitive way in which the Headmaster and the Local Education Authority dealt with what they regarded as an employment and education issue. The ET similarly treated it as such and we have endeavoured to follow their lead.