

Appeal No. UKEAT/0134/07/DM

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 3 October 2007

**Before**

**THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)**

**MRS C BAE LZ**

**MR D JENKINS OBE**

---

MR J HARRIS

APPELLANT

NKL AUTOMOTIVE LTD

FIRST RESPONDENT

MATRIX CONSULTANCY UK LTD

SECOND RESPONDENT

---

Transcript of Proceedings

JUDGMENT

---

## **APPEARANCES**

For the Appellant

MISS MELANIE ANN PLIMMER  
(of Counsel)  
Instructed by:  
Kirklees Law Centre  
Units 11 & 12 Empire House  
Wakefield Old Road  
DEWSBURY  
WF12 8DJ

For the First Respondent

MR COLIN BOURNE  
(of Counsel)  
Instructed by:  
Nat West Mentor Services  
(Employment Law Litigation)  
2<sup>nd</sup> Floor Sapphire West  
550 Streetsbrook Road  
SOLIHULL  
West Midlands, B91 1QY

For the Second Respondent

Not represented

## **SUMMARY**

### **Religion or Belief**

Claimant brought a claim for direct and indirect discrimination on the grounds of his philosophical beliefs, and also victimisation discrimination. He was a Rastafarian and claimed that he had been discriminated against for that reason. It was accepted that this was a philosophical belief falling within the terms of the **Employment Equality (Religion and Belief) Regulations**. The Tribunal rejected all these claims. He appealed against the finding that there was no indirect discrimination and alleged that the tribunal had not given proper consideration to the victimisation discrimination claim. The Respondent conceded the latter but held that the finding of unfair dismissal was justified. The EAT agreed, notwithstanding some unsatisfactory features of the Tribunal's analysis. Their findings of fact precluded any possibility of a finding of indirect discrimination. Accordingly the case was remitted to the Tribunal to consider victimisation discrimination only.

**THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)**

1. The Appellant, whom we shall call the Claimant, as he was below, worked as an executive driver for the first Respondent, NKL Automotive Ltd. (“the Company”) He was provided to that Company by an employment agency, the second Respondent. He alleged that he had been unfairly dismissed by the Company and had been discriminated against contrary to the **Employment Equality (Religion and Belief) Regulations 2003** on the grounds that he is a Rastafarian. It was common ground before the Tribunal that this constituted a philosophical belief, which was similar to a religious belief and therefore fell within the scope of the Regulations. (The Regulations now cover philosophical beliefs whether similar to religious beliefs or not, but that was not the position when the events in this case occurred).

2. The Tribunal concluded, contrary to the submissions of the Company, that the Claimant was an employee of the Company but that he did not have sufficient continuity to bring his unfair dismissal claim. They also rejected his claims of discrimination. These were advanced both as claims for direct, indirect and victimisation discrimination. He now appeals against the finding that there was no indirect discrimination or victimisation discrimination, but he does not seek to challenge the finding that there was no direct discrimination.

3. The Company initially sought to argue in a cross-appeal that the Tribunal had erred in concluding that he was an employee. However, before us the Company has indicated that it does not wish to pursue the appeal. It is at best of marginal relevance in the victimisation claim. We should emphasise that the Company does not accept that the Tribunal was correct in its conclusion, and we recognise had the appeal been pursued, there would have been very serious arguments for us to consider.

*The background*

4. We draw this from the Tribunal's decision, but we have to say that the factual findings are not always as clear as they might have been.

5. The Claimant worked as a driver from April 2004 to 22 February 2006. Between October 2005 and February 2006 he worked on a regular basis. At that time the Company expressed concerns to Mr Jones, who was employed by the agency, that his hair was untidy and that he did not represent the Company well.

6. Sometime around the 17 February 2006 the Claimant complained to Mr Jones about not being allocated work for the following week. In fact, only two agency drivers were allocated work that week. He told Mr Jones that he believed that he was being discriminated against because of his hair. The Claimant also complained that unlike some of the other drivers supplied by the agency, he was not being transferred by the Company to be taken on as a full time employee.

7. The Company told the Tribunal that they took the view that he did not meet all the criteria which would have justified that step being taken; he was sometimes abrasive, flouted dress rules (quite apart from hair), and he had made himself unavailable for work for a period.. But he told Mr Jones that he thought that the real reason was his hair. Specifically, his case before the Tribunal was that he had his hair in dreadlocks, in accordance with his Rastafarian beliefs, and the Company objected to this.

8. The Tribunal found, however, that no mention was made in that conversation with Mr Jones of the Claimant being a Rastafarian, or wearing a tam (the hat worn by Rastafarians), or having dreadlocks. Mr Jones assumed that the Claimant at that stage was alleging that there

had been sex discrimination on the grounds that a woman with hair of that length would not have been discriminated against. Indeed, such a claim was initially brought, but subsequently dropped. The Tribunal found that it was never intimated to Mr Jones at that stage that there may be a claim based on the grounds of the Claimant's philosophical or religious beliefs.

9. The Tribunal accepted that the Claimant was incensed by what he understood to be a reference to his long hair. They also found, however, that although the Company would not employ him, they were prepared to continue to use him as an agency driver. Mr Jones was prepared to visit the Claimant's home to discuss the matter, but the Claimant took the view that there was no way round the problem. He notified the agency on the 22 February that he was signed off from work for a month because of stress. On that date he was told by the agency that he would be sent his P45. This was in accordance with the practice of the agency because they did not pay statutory sick pay and it enabled him to claim benefit. The Claimant considered this termination of the agreement to constitute a dismissal from his employment with the Company.

10. He raised a grievance with both Respondents, alleging that he was both an employee of the Company – which was being denied by them – who had been unfairly dismissed, and also that he had been discriminated against because of his Rastafarian beliefs. He made reference to his long hair but did not in any of his grievance letters complain that the Company had discriminated against him specifically because his hair was in dreadlocks.

11. The Tribunal found that the Company did not know of his Rastafarian beliefs until he wrote the first grievance letter on 27 February. When initially interviewed for the post, he had long hair which was tied back in a pony tail. The Tribunal found that the Company did not at any stage know that the Claimant had his hair in dreadlocks. Indeed his own witness gave evidence that the Claimant had long curly hair tied back whilst at work, and made no mention

of dreadlocks. However, the Tribunal noted that whether he did have dreadlocks or not when at work “even on the Claimant’s evidence his hair, as it grew more matted, must have reached a stage where it was unacceptably untidy in terms of NKL’s dress code”.

12. Mr Bourne points out that this is not in fact a finding that it was matted, but an observation that even if the Claimant was right in his evidence, it had reached a stage where it was in the Company’s view unacceptably untidy. The Tribunal found that the Company did not object to long hair as such; indeed, they accepted the Claimant and other drivers notwithstanding their long hair, but they did insist upon a tidy appearance. The dress code provided, amongst other matters, that drivers “should have a smart professional haircut and should ensure hair is tidy”. The Company gave evidence that they did not object to drivers wearing caps if they so wished, and that some drivers did so after discussion, although this possibility was not written into the dress code as such.

13. . The Tribunal rejected the allegation of direct discrimination. That is hardly surprising, given their conclusion that the Company did not know of his Rastafarian beliefs.

14. The Tribunal then considered the question of indirect discrimination. The definition is found in Regulation 3 and is as follows:

**3.-(1) For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if –**

**on grounds of religion or belief .....**

**(a) 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.**

15. The Tribunal set out their conclusions on this aspect of the case somewhat summarily in the following way:

**13. On the issue of indirect discrimination – Regulation 3(1)(h) – the Tribunal had to consider what “criterion or practice” had been applied that potentially disadvantaged the Claimant when compared with others;**

**13.1 That criterion or practice must have been long hair, or, at the most favourable to the Claimant, the wearing of dreadlocks.**

**13.2 In terms of long hair the Tribunal conclude that no such criterion or practice was applied – the Claimant was taken on with long hair; came back to NKL in April 2005 after a break with long hair and was not denied the opportunity of continuing as an agency driver in February 2006 with long hair – the provision was that it was tidied up.**

**13.3 In relation to dreadlocks, there was no such practice or criterion – on the Claimant’s own evidence, he wore his hair in dreadlocks in April 2004 and throughout and until February 2006.**

**13.4 Further if NKL did apply such a criterion it did so to impose a standard of appearance according to convention – a general standard of tidiness which applied to all drivers and would have applied to any driver wearing dreadlocks whether or not of Rastafarian belief.**

**13.5 Further, the Tribunal took the view that to require “tidy hair” is a proportionate means of achieving the aim of a presentable appearance to NKL’s customers/clients.**

**14. The Tribunal concluded that no criterion or practice was applied which could disadvantage the Claimant when compared with a hypothetical person wearing dreadlocks but not of Rastafarian belief.**

**The legitimate purpose of the dress code as applied was to impose an acceptable standard of appearance.**

16. We read paragraphs 13.1 to 13.3 as making a finding in terms that there was no criterion that either long hair or dreadlocks were considered unacceptable, at least provided they were tidy.

16. Finally, the Tribunal turned to consider the question of victimisation. They concluded that there had been no victimisation by the agency and that finding is not appealed. However, although an allegation of victimisation had also been made with respect to the Company, that was not determined by the Tribunal. They did, however, conclude that the Company had adopted a “dismissive and an unfortunate approach when dealing with his grievance in a somewhat peremptory way”.

17. The Claimant alleges that this was because of his Rastafarian beliefs – of which the Company had by then become aware- but the Company denies that. It is common ground that as the Tribunal did not deal with the matter, it will have to be remitted to them to be determined afresh. The only outstanding question, therefore, is whether the Tribunal erred in its analysis of the indirect discrimination claim.

*Submissions and discussion.*

18. It is submitted that the Tribunal erred in two respects. First, it is said that having concluded that the hair must have become more matted, the Tribunal was making a finding that it had become dreadlocked and therefore was untidy as a consequence of being dreadlocked. Ms Plimmer, counsel for the Claimant, referred us to a document obtained from the web and which tells people how to grow dreadlocks, which states that dreadlocks are matted hair. The discrimination was, therefore, she submits because of the dreadlocks.

19. We do not accept that. First we accept Mr Bourne’s point that the finding is that even on the Claimant’s case it was matted in an untidy way; it is not a clear acceptance of that fact that it was ever matted. But apart from that, the Tribunal found in para.13 that there was no evidence that the Company did object to dreadlocks as such. It is not obvious to us, and it was plainly not obvious to the Tribunal, to say that hair being matted is the same as hair being

UKEAT/0134/07DM

dreadlocked. It may be that all dreadlocked hair is matted, but it does not follow that all matted hair is dreadlocked. As we have said, the Tribunal found that the Company had no objection to long hair as such and there were a number of drivers, apart from the Claimant - including one who was an employee - who had long hair. Accordingly, the submission based on the premise that the Company discriminated against those with dreadlocks fails on the facts.

20. Ms Plimmer submitted that in any event, anyone growing dreadlocks will inevitably in the process have unkempt and matted hair, and that accordingly to discriminate against those with matted hair will necessarily involve discrimination against Rastafarians, even if one can distinguish between matted and dreadlocked hair. The difficulty with this argument is that it was not advanced below at all and the Company has had no opportunity to deal with it.

21. Ms Plimmer suggests that simply raises a legal argument on the established facts, but we do not accept that. We do not know, for example, whether there might have been a dispute over disparate impact had the case been argued on this more limited basis. Nor was the issue explored whether hair in the process of being converted into dreadlocks might be kept tidy. It would be quite wrong for us now to assess this argument when potentially relevant factual matters have not been determined below: see the observations of the EAT (HH Judge McMullen QC presiding) in **Secretary of State for Health v Rance** [2007] IRLR 665, para. 50.

22. It is then submitted that the requirement to have tidy hair itself is prejudicial to Rastafarians. That presupposes that the Company takes the view that dreadlocked hair is necessarily untidy. For the reasons we have just given, that submission must fail on the facts also. If dreadlocks are compatible with tidy hair, or can be kept in a tidy manner, then the

criterion does not in any way discriminate against those with dreadlocks. The finding of the Tribunal in terms was that the Company did not object to wearing dreadlocks at least if tidy.

23. In view of these findings, the appeal cannot succeed. We briefly refer to another ground of appeal which is that the Tribunal gave an inadequate analysis of the justification issue when it determined that even had the Company objected to dreadlocks, this would have been justified because of the desire to ensure a conventional appearance. It is submitted that this conclusion is insufficiently reasoned. We would have been minded to uphold this ground. On the assumption that the Company did object to dreadlocks on the grounds that they were inevitably untidy or too unconventional, we would have expected the Tribunal to carry out a fuller analysis of the employer's approach to the issue of proportionality. An obvious point would be whether wearing a hat might have been a more proportionate response. The Company had given some consideration to that and allowed it on occasions, and it would have had to be explored further in any careful assessment of justification.

24. We also have concerns about paragraph 14 of the Tribunal's decision, set out above. This appears to suggest that there can be no indirect discrimination because the Company would treat persons who wore dreadlocks but did not have Rastafarian beliefs in the same way as Rastafarians. That is irrelevant if the effect of the criterion is adversely to impact on Rastafarians. A height requirement may adversely impact on women even although men who fail to meet the criterion are also adversely affected by it and are treated in precisely the same way as the women.

25. Accordingly, whilst we have some reservations about the Tribunal's approach to the question of indirect discrimination, such errors as they have made do not affect the clear finding that there was no indirect discrimination because the Company did not apply a criterion of the  
UKEAT/0134/07DM

kind relied upon by the Claimant. He was therefore not disadvantaged in the way he alleged. It follows that the appeal fails on this ground.

*Disposal.*

26. The appeal on indirect discrimination fails. The matter will be remitted to the same Tribunal to consider the question of victimisation discrimination.