Appeal No. UKEAT/0123/08/LA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT LONDON EC4Y 0DS

At the Tribunal
On 14/15 October 2008
Judgment handed down on 20 November 2008

Before

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

MR B BEYNON

SIR ALISTAIR GRAHAM KBE

MISS N EWEIDA

APPELLANT

BRITISH AIRWAYS PLC

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SARAH MOORE (of Counsel) Instructed by: Messrs Ormerods Solicitors Green Dragon House 64-70 High Street CROYDON CR0 9XN
For the Respondent	MS INGRID SIMLER (One of Her Majesty's Counsel) Instructed by: Messrs Baker & McKenzie LLP 100 New Bridge Street LONDON EC4V 6JA

SUMMARY

RELIGION OR BELIEF DISCRIMINATION
The claimant was a Christian who objected to BA's policy of requiring jewellery to be worn concealed by the uniform. There were exceptions for those whose religions required them to wear items that could not be so concealed. She brought claims of direct and indirect discrimination on grounds of religious belief, as well as harassment discrimination. All these claims failed. She appealed against the finding of indirect discrimination only. The Employment Tribunal had held that there was no such discrimination because there was no evidence that a group of Christians were put at a particular religious disadvantage when compared with non-Christians. The EAT dismissed the appeal and held that this was a cogent and justified conclusion displaying no error of law.

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

1. Ms Eweida is a devout practising Christian who regards the cross as the central image of her faith. She worked part time for British Airways plc as a member of the check-in staff from 1999. Her job requires her to wear a uniform. She wished to wear plain silver cross (not a crucifix) which was between 1 and 2" high and would be visible over her uniform. She accepted that it was not an article of her faith to wear the cross in that manner. However, she saw it as a personal expression of her faith.

2. BA's rules forbade this. BA had adopted a uniform policy which permitted an employee to wear any item which he or she wished under the uniform, provided it was not visible. The only circumstances in which religious items could be visibly worn outside the uniform were if wearing the item was a "mandatory" scriptural requirement and the item could not be concealed under the uniform, and even then the wearing required management approval. Examples of such items given management approval included the hijab, the turban, and the skull cap which some

Muslims, Sikhs and Jews respectively believe they are obliged to wear.

3. When the claimant insisted on wearing the cross in a visible manner, having been unambiguously warned that she should not, she was sent home. This was on 20 September 2006. Attempts were made to resolve the issue but they were unsuccessful. For example, BA offered the claimant work which would not involve her wearing the uniform so that she could visibly wear her cross, but the offer was rejected.

4. The claimant remained at home until 3 February 2007 following a decision by BA to amend its policy so as to permit staff to display a faith or charity symbol with the uniform, subject to a detailed application procedure. BA provided for the immediate approval of the cross and Star of David as authorised symbols, again subject to the particular item being deemed appropriate. This policy change followed extensive adverse publicity, arising from the claimant's actions, which put BA's uniform policy at the centre of public debate. Some reports even suggested that BA was anti-Christian and had banned the wearing of crosses at work. As the Tribunal noted, both statements were inaccurate.

5. The claimant alleged before the Employment Tribunal that she had been subjected to direct and indirect religious discrimination contrary to the **Equality (Religion or Belief) Regulations 2003**, and also that she had been harassed. She also alleged that there had been an unlawful deduction of wages resulting from the refusal of BA to pay her for the period of her absence.

6. In a careful and detailed judgment, the Tribunal rejected all her claims. There is no appeal against the finding that there was no direct discrimination or harassment. However, the claimant

does appeal the finding that she was not subject to any indirect discrimination.

7. It is common ground between the parties that if the claimant succeeds in establishing that there was unlawful indirect discrimination then her claim for unlawful deduction of wages also succeeds, but not otherwise. Accordingly, we will act on that premise.

The relevant law.

8. The 2003 Regulations give effect in part to Council Directive 2000/78, known as the "Framework Directive." Regulation 2 specifically provides that "religion means any religion" and that "belief means any religious or philosophical belief". (It is also made clear that a reference to religion and belief includes a lack of religion or belief, but it has not been suggested that this is material in this case.)

9. Regulation 3 (1)(b) deals with the concept of indirect discrimination in the following way:

> **Discrimination on grounds of religion or belief**
> **"(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B)" if – ….**
>
> **(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, and**
>
> **(ii) which puts B at that disadvantage,**
>
> **and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.**

10. This definition of indirect discrimination has also been adopted with respect to discrimination in the employment field on other prohibited grounds, such as sex, race, age and sexual orientation. It

is to be noted that there have been four different concepts of indirect discrimination which have been adopted at various times with respect to different kinds of discrimination. It is not necessary to explore the intricacies of these definitions. Suffice it to say that in a number of respects this definition is cast in different and wider terms than the concept of indirect discrimination which was originally adopted with respect to race and sex discrimination. That defined indirect discrimination in terms of an unjustified requirement or condition which a considerably smaller proportion of the protected group than the non protected group could comply with, and which caused detriment to the claimant because he or she could not comply with it. Many of the cases on indirect discrimination relate to that definition. The application of the newer concept is in certain respects problematic, and there is some debate as to how far it has widened the protection. We discuss some of the difficulties later in the judgment.

11. At this stage we make two observations about this definition. First, like the earlier definitions, it envisages that the operation of the provision, criterion or practice must have what is commonly called a "disparate impact" on the adversely affected group. The claimant must be placed at a disadvantage, and it must be a disadvantage suffered by others who share her religion or belief. In this sense it is unlike the concept of reasonable adjustment found in the **Disability Discrimination Act**. That requires an employer to focus on the particular disability of the individual and make reasonable adjustments which would mitigate or remove the disadvantage which stems from that disability. That approach was not adopted with respect to religious discrimination, notwithstanding (as we shall see) that someone's religion or belief may be highly personal.

12. The second observation is that the onus is on the claimant to establish the requisite disparate impact: see **Nelson v Carillion Services Ltd** [2003] IRLR 428, followed in **Redcar and**

Cleveland Borough Council v Bainbridge [2008] IRLR 776. There has been some criticism of the **Nelson** case but we are bound by it. In any event, it must surely be necessary at the very least for a claimant to present an arguable case that the provision in issue has disparate impact. The alleged disparate impact may depend on the pool chosen, and there is often more than one pool which can be adopted. It would be surprising, and somewhat Kafkaesque, if an employer had to prove a negative and demonstrate that there was no disparate impact with respect to any pool which the employee might conceivably put forward.

The Tribunal's findings on indirect discrimination.

13. The Employment Tribunal found that the respondent applied the following provision, criterion or practice (which we shall hereafter term a "provision") both to the appellant and to persons not of the Christian religion:

> **"That personal jewellery or items (including any item worn for religious reasons) should be concealed by the uniform unless otherwise expressly permitted by BA."**

14. The Tribunal did not accept that the provision put Christians at a particular disadvantage compared to other persons. They summarised their reasons for this conclusion as follows (paras 33.3-33.6 at page 42/43):

> **"We turn to the question of whether the provision, as defined, puts Christians at a particular disadvantage compared with other persons. Ms Simler reminded us of the judgement of Baroness Hale in *Rutherford v Secretary of State for Trade and Industry* [2006] IRLR 551, describing the rule or requirement in that case as creating a barrier for a group of people who want something, and who are selected for disadvantage compared with others."**

15. Then after observing that the claimant's own evidence was that the visible wearing of the cross was a personal decision and not required by scripture or as an article of faith, the Tribunal found that there was no disparate impact in terms which suggest that this would have been their conclusion irrespective of where the burden of proof lies:

> **"There was no evidence in this case that might support any suggestion that the provision created a barrier for Christians, and ample evidence to the contrary. Mr Marriott stated that this was the only case which he had encountered of a Christian complaining of the uniform policy. Certainly there was no evidence of Christians failing to apply for employment, being denied employment if they applied for it, or failing to progress within the employment of the respondent.**
>
> **Taking these matters together, we do not consider that the provision put Christians at a particular disadvantage, and that being so, there is no disadvantage to which the claimant as an individual was put. The complaint of indirect discrimination therefore fails."**

16. This penultimate sentence is at first blush a little puzzling since it suggests that the claimant was not put at a disadvantage, whereas in our judgment she plainly was. Once she insisted on the right visibly to wear the cross, BA's equal insistence that she should not do so operated as a barrier to her being able to work and to be paid. The effect of the provision, given her stance, was that she could not work. However, we think that the Tribunal was simply saying that since the relevant disadvantage must be one which is shared by a group, and the evidence did not sustain the claim that it was, there was no relevant particular disadvantage within the meaning of the legislation.

17. Although the issue of justification did not strictly arise, given the conclusion that there was no discrimination in any event, the Tribunal went on to consider whether, had the provision given rise to prima facie unlawful discrimination, it would have been justified. They concluded that it would not. They found that the uniform policy was designed to achieve a legitimate aim, namely that of brand uniformity. They had accepted evidence that the uniform served an important purpose in giving BA a consistent, professional and reassuring image world wide. However, they would not have found that the rule adopted was a proportionate means of achieving that legitimate aim.

18. The Tribunal summarised its approach to the issue of proportionality in the following terms (para 33.9):

> **"… We consider that a proportionate means is one which is achieved as a result of a balancing exercise between all the interests involved, recognising the importance of the business need, analysing the business case and the rationale put forward by the respondent in accordance with the guidance in *Hardys & Hanson plc v Lax* [2005] IRLR 726, and forming our own view of whether justification has been proved. We would in that context consider it important to assess whether the respondent has demonstrated that any discriminatory impact has been assessed and reduced to the barest minimum."**

19. The Tribunal commented that BA had not considered the potentially discriminatory impact of

their policy until November 2006, that is, after they had sent the claimant home for refusing to comply with the policy. As soon as the issue was squarely raised, the policy was amended without apparently any ill effects. The Tribunal recognised that it was analysing the issue with the benefit of hindsight; nonetheless it was satisfied that the requirement was not proportionate because:

> **"… it fails to distinguish an item which represents the core of an individual's being, such as a religious symbol, from an item worn purely frivolously or as a piece of cosmetic jewellery. We do not consider that the blanket ban on everything classified as "jewellery" struck the correct balance between corporate consistency, individual need and accommodation of diversity."**

20. Ms Eweida now contends that the Tribunal erred in law in finding that the provision did not put persons of the Christian faith at a particular disadvantage when compared with other persons. BA, for its part, challenges the Tribunal's conclusion that the provision adopted was not proportionate to the legitimate aim which BA was properly seeking to achieve. We will deal with the appeal and cross appeal in turn.

The appeal.

21. Ms Moore, counsel for the claimant, submits that the Tribunal erred in its approach in two fundamental ways. First, it wrongly considered that in order to amount to a disadvantage, there must be some barrier which the provision creates. That was wrong and Baroness Hale was not seeking to state a universal truth about the way in which indirect discrimination works. The relevant passage to which the Tribunal was referring was this (para 71):

> **"The essence of indirect discrimination is that an apparently neutral requirement or condition (under the old formulation) or provision, criterion or practice (under the new) in reality has a disproportionate adverse impact upon a particular group. It looks beyond the formal equality achieved by the prohibition of direct discrimination towards the more substantive equality of results. A smaller proportion of one group can comply with the requirement, condition or criterion or a larger proportion of them are adversely affected by the rule or practice. This is meant to be a simple objective enquiry. Once disproportionate adverse impact is demonstrated by the figures, the question is whether the rule or**

requirement can objectively be justified."

This was merely stating in general terms how indirect discrimination would generally operate. It was not intended to be an exhaustive statement.

22. In this case the Tribunal ought to have concluded that it was sufficient to constitute a particular disadvantage that an employee conscientiously objected on religious grounds to the imposition of the provision, even if he or she were prepared to comply with it.

23. Second, the Tribunal were wrong to say that there were no others who shared the claimant's strongly held desire to proclaim her religion. Had the Tribunal applied the right test of disadvantage, and had they properly analysed the relevant pools for comparison, they would necessarily have concluded that "persons of the same religion or belief" did share the claimant's views and were similarly disadvantaged in a particular way by the application of the provision.

24. (Given the fact that the provision did operate as a barrier to the claimant being allowed to work, at least once she insisted on visibly wearing the cross, it may be wondered why the claimant was putting the case on the alternative ground. The reason is connected with the second ground of appeal. It may be easier to demonstrate that others are adversely affected if the particular disadvantage is suffered not only by those who refuse or cannot comply with the provision, but also by those who do and can.)

25. A difficulty facing Ms Moore with respect to her first ground concerning the nature of disadvantage is that we are very doubtful whether the case was advanced below on this basis. Ms Simler QC, counsel for BA, who appeared below (and Ms Moore did not) says that it was not and

that the only disadvantage relied upon was of the barrier kind. This is supported by the fact that this alternative form of disadvantage was not in terms considered by the Tribunal. Given the conscientious approach of the Tribunal to the issues before it, this strongly suggests that the issue was raised at best *sotto voce*, if it was voiced at all. Ms Moore can, it is true, point to one or two sentences in the skeleton argument before the Employment Tribunal which could be said to trail the submission, although that does not show that it was in fact pursued. Nevertheless, we will consider the submission and see whether it would have assisted the claimant's case.

Preliminary observations.

26. Before considering the specific grounds of appeal, we make the following preliminary observations about the scope of these provisions. First, the protection afforded to those holding a religious or philosophical belief is a broad one. The belief can be intensely personal and subjective. Some observations of Lord Nicholls in **R v Secretary of State ex parte Williamson** [2005] 2 AC 246 are on point. That case concerned Article 9 of the ECHR which protects the right to freedom of religion, rather than domestic law.

27. However, by section 3 of the **Human Rights Act** it is incumbent on domestic courts to construe domestic law compatibly with Convention rights and therefore the same (or at least no less favourable) approach must be adopted to the concept of religion and belief in the Regulations.

28. In **Williamson** some Christian parents contended that a law forbidding smacking of children in schools infringed their Article 9 rights. They relied upon such scriptural authority as "spare the rod and spoil the child." They perceived it as "loving corporal correction." Their Lordships thought that the Article 9 rights had been engaged but that the law was justified. An argument that the belief could

be tested objectively by the court to determine whether it was a

religious belief or not was roundly rejected by Lord Nicholls in the following terms:

> **"When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. As Iaccobucci J also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising…….. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held."**

29. Accordingly, it is not necessary for a belief to be shared by others in order for it to be a religious belief, nor need a specific belief be a mandatory requirement of an established religion for it to qualify as a religious belief. A person could, for example, be part of the mainstream Christian religion but hold additional beliefs which are not widely shared by other Christians, or indeed shared at all by anyone. In so far as some of Ms Simler's arguments suggested otherwise, we reject them.

30. Second, for the purposes of indirect discrimination it is not necessary that the provision, criterion or practice which causes persons of a religious group to be particularly disadvantaged should itself be incompatible with a specific religious belief. The particular disadvantage may arise out of the way in which the religion or belief is practiced. So, for example, if in a particularly remote area there were a group of Christians who could not because of transport problems combine Sunday

worship with their employer's requirement to work on Sunday, they would be disadvantaged as a body of Christians by that requirement even though they may have no religious objection to working on a Sunday as such.

31. The disadvantage in that example would be practical rather than because of an incompatibility with their religious principles or beliefs, although the practical difficulties would relate to the exercise of their religion. It would in our judgment nonetheless be capable in principle of amounting to prima facie indirect discrimination which requires to be justified. Having said that, it is far more likely to be the case that the cause of any particular disadvantage is that the claimant has specific religious objections to complying with the provision in issue - in other words that the provision is incompatible with his religious belief. An example would be a Christian who cannot work on a Sunday because this is part of his or her beliefs.

32. In this case it is not entirely clear whether the claimant's objection was itself an aspect of her religious belief. The Tribunal did not in terms make a finding about that, although the fact that she had until recently been content to comply with the provision suggests that it was not. We shall nonetheless assume in her favour that it was, although if it was, it was a personal and subjective religious belief rather than one which was held generally within the Christian community, as the Tribunal found.

The grounds of appeal.

33. We turn to consider the grounds of appeal. They raise two interrelated issues, namely what constitutes "particular disadvantage" and whether "persons of the same religion or belief" are similarly disadvantaged. We shall first focus on the question whether the claimant suffered a

particular disadvantage.

Did the claimant suffer a "particular disadvantage"?

34. As we have indicated, the Tribunal concluded that the claimant did not suffer a particular disadvantage within the meaning of the Regulations precisely because there was no group disadvantage. The Tribunal did not, however, consider whether the claimant's treatment would in principle have been capable of amounting to a particular disadvantage within the meaning of the Regulations if it had been shared by other persons of the same religion or belief. (This was, no doubt, because on the Tribunal's analysis they did not need to do so.)

35. Ms Moore submits that the provision did in fact constitute a barrier for the claimant since she was refused the opportunity to work and earn money once she insisted on her right visibly to wear the cross. As we have indicated, we accept that submission. The provision operated as a barrier which she could only surmount if she were prepared to comply with it. To that extent, she personally suffered a particular disadvantage which was not suffered by those who did not share her deep rooted objection to the provision. (Whether it was disadvantaging her because of her religion would, of course, depend upon whether her desire to wear the cross was itself a religious belief.)

36. However, Ms Moore further contends that the disadvantage was more fundamental than that and would be shared by other like minded Christians whether or not the provision constituted a barrier in their case. Those who shared the view that they should be entitled visibly to wear a cross manifesting or proclaiming their faith suffered a disadvantage even if, unlike the claimant, they were, or would have been, reluctantly prepared to go along with the provision. The Tribunal erred in asserting that the disadvantage had to result from the imposition of some sort of barrier. That might

have been so under the earlier concept of indirect discrimination because indirect discrimination was defined in terms of the imposition of a requirement or condition which adversely affected the claimant because she could not comply with it. However, the current definition is differently cast and allows a tribunal to find that a particular disadvantage has been suffered even where the employee can and does comply with the provision.

37. Ms Moore also submitted that the Tribunal erred in failing to identify the relevant pool against which to asses the comparative impact of the provision. Had they done so, they might have identified two different forms of disadvantage. If comparison were made with those from certain other faiths who were, as an exception to the general rule, permitted to wear religious items, the claimant and other employees of a Christian persuasion suffered a particular disadvantage because they could not share the experience of openly wearing such items. They could not proclaim their faith whereas many Hindus, Moslems and other religious groups could do so.

38. Even if that were not the appropriate pool, and it consisted of all those who were adversely affected by the provision because they wished to wear jewellery and were forbidden to do so (which would include all who might wish to wear jewellery openly for appearance sake), there was still a particular disadvantage suffered by the claimant and others sharing her religious views. BA's uniform provision impinged on the claimant's freedom to express her faith in a way which was characteristic of that faith. Whilst others may have equally suffered a restriction on their freedom, it would not have been of the same qualitative nature. It would have been for cosmetic reasons rather than more deeply held reasons connected to religion.

39. Ms Moore supported the submission that these could constitute a particular disadvantage by

reference to the very wide definition of "detriment" adopted in relation to the earlier concept of indirect discrimination. In **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] ICR 337, a case concerning alleged sex discrimination, Lord Hope of Craighead observed that the concept of detriment had been broadly construed by the courts. He said this (para 34):

> **"As May LJ put it in *De Souza v Automobile Association* [1986] ICR 514, 522G, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work."**

His Lordship used the concept of detriment and disadvantage interchangeably, and the latter concept must be at least as broad as the earlier one. It cannot be supposed that there was any intention to cut back on the protection which the older concept of indirect discrimination law afforded.

40. The claimant submits that this could readily be established here. Even if persons were prepared to go along with the provision, they would readily be able to establish that that their objection was one which a reasonable person might adopt. They were disadvantaged in the circumstances in which they had to work by not being permitted to manifest their religion.

41. Ms Moore derived support for this proposition from the decision of the High Court in **R (on the application of Watkins-Singh) v Aberdare Girls' High School Governors** [2008] EWHC 1865 (Admin.) In that case the claimant was not allowed to wear to school a Kara, a small plain steel bangle worn by Sikhs and which the claimant considered was an essential requirement of her religion. She insisted on doing so and as a consequence she was not allowed to attend school. The judge found that there was unlawful indirect discrimination and identified the "detriment" or "particular disadvantage" which she suffered as not being allowed to wear the Kara to school (para 66 - although one might argue that a stronger disadvantage in this case was being refused to attend school.) Similarly here, says Ms Moore, the particular disadvantage is not being allowed visibly to

wear the cross, and that is a detriment suffered by those who do comply with the provision and attend work as much as those who do not and are barred from working.

42. Ms Simler accepts that the claimant would suffer a particular disadvantage in so far as she could not comply with the provision (although she supports the Tribunal's conclusion that it would not be a relevant disadvantage within the meaning of the Act because not shared by others). However, she submits that there was no relevant disadvantage to those - in fact everyone else in BA - who did comply with the provision and attended work. Even if they retained a strong objection, rooted in or connected with their religion that would not constitute a "particular disadvantage" within the meaning of the legislation. In any event, it was not a disadvantage suffered by reason of their religion.

43. In this context we note in passing that Ms Simler relied upon an observation of Lord Hoffmann in the case of **R (SB) v Governors of Denbigh High School** [2006] 2 WLR 719. That case involved the question whether a school had infringed the claimant's rights under Article 9 of the ECHR by imposing a requirement to wear a particular uniform which meant that she could not wear a jilbab, which she said her religion required. Lord Hoffmann pointed out that "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing." We do not, however, think that Lord Hoffmann was intending to say anything about whether the claimant had been disadvantaged. Indeed, it seems to us that she clearly had, although not in that case in circumstances involving a breach of Article 9.

Observations and conclusion.

44. The first ground raises an issue of some novelty. We would not discount the possibility that

in an appropriate case it might be open to employees to allege indirect discrimination even though the complaint is about a provision with which they have complied. As we have said, under the old concept of indirect discrimination in order for the detriment to be established, it was necessary that it should result from an inability to comply with a particular condition or requirement. That is no longer specifically required; the concept identifies particular disadvantage resulting from the application of a provision, criterion or practice, but it does not link it specifically to non-compliance with the provision or criterion in issue.

45. There is some merit in the argument that the change in wording permits a court to find a particular disadvantage even with respect to those who can and do comply with the provision. An example might be a woman who wishes for child care reasons to work part time but feels compelled to work full time, which is a job requirement, because her employer will not consider the possibility of part time work and she cannot afford to lose her job. It may well be that the current definition would permit a claim of that nature. Equally, when determining whether there is a group disadvantage, such a person could be considered to be part of the disadvantaged group notwithstanding a reluctant willingness to comply with the requirement, although we suspect that examples of people prepared to compromise strongly held religious beliefs in that way would be rare. (The issue whether the employer knew of the objection could arguably become relevant in those circumstances.)

46. However, in order to fall within the terms of the legislation, it is still necessary that the particular disadvantage relied upon should stem from the religious beliefs held by the claimant. It is not enough that persons of the same religion and belief are fortuitously affected by the provision. It must be something connected with the religion or belief that causes the adverse effect. That is so

however the pool is defined.

47. Moreover, the fact that a person holds a strong belief that jewellery should be allowed to be worn openly obviously does not make that belief a religious one. Many persons may have a strong view that they should be allowed openly to wear jewellery or some other item demonstrating their allegiance to some group or cause. For example, they might belong to a variety of groups, such as a gay rights movement or an environmental or anti-nuclear lobby and, like the claimant, consider this allegiance to represent the core of their being. They may think that they should be allowed to manifest their membership by wearing an appropriate badge. Indeed, some may simply strongly feel that it is in principle wrong for an employer to dictate to his employees what jewellery or other accessory items ought to be worn.

48. Such strongly held views are not limited to those practising religion; and they do not become religious beliefs simply because the item in question is symbolic of a particular religion rather than of some other cause. Of course, it may be an aspect of a religious belief that some religious item should be worn, but such a belief is of a different dimension. That was the position in the **Aberdare School** case where the claimant believed that she was required by her religion to wear the Kara.

49. Accordingly, whilst we would not discount the possibility that the claimant might in principle be able to establish disparate impact by including as affected employees even some who complied with the provision, it would still be necessary to for her to show that there was the relevant disparate impact suffered by those sharing the same religion or belief. That is not established merely by showing that others have a strong view that jewellery, or even crosses, should be worn. Such views do not of themselves necessarily reflect or derive from a religious belief.

Were persons of the same religion or belief put at a particular disadvantage?

50. This ground raises a fundamental issue concerning the scope of indirect discrimination. The question it raises is this: assuming that the claimant's objection is in principle capable of constituting particular disadvantage, how does the claimant demonstrate that "persons of the same religion or belief" are put at a particular disadvantage? How many persons does this envisage?

51. In most forms of discrimination the claimant is able, by establishing group disadvantage, to provide the basis for inferring that the discrimination is, at least on the face of it, on the forbidden ground. So, for example, a law which disadvantages part timers will disadvantage women because there are certain generalised assumptions which it is legitimate to make about women, namely that they are more likely to bring up children and have duties which will in practice reduce their opportunity to work full time.

52. Similarly, laws which impose educational qualifications are in some instances likely to disadvantage black students when compared with white students because of the fewer educational opportunities which typically (although not universally) black students have had. It is possible to make generalised statements about these groups (what are essentially accurate stereotypes) - indeed indirect discrimination is premised on the ability to make such statements - and it can be seen that the group is disadvantaged.

53. Furthermore, it is only because such statements can be made, and potential disadvantage can be identified in advance, that it is reasonable to expect employers effectively to audit, monitor and where possible eliminate the potential indirect discriminatory effect of certain policies. (Certain public

authorities have a statutory obligation to do this with respect to certain forms of discrimination.) Statistics will be an obvious but not the only way in which the group disadvantage, commonly referred to as "disparate impact", can be demonstrated.

54. However, the same ability to make generalised statements does not necessarily apply to those with religious or philosophical beliefs. In many instances, of course, it does. For example, it will obviously disadvantage many Jews or Seventh Day Adventists to have to work on Saturday, or many Christians to have to work on Sunday. But a philosophical or religious belief may be highly personal; it may be shared by very few people indeed, as Lord Nicholls' observations referred to above demonstrate. The question arises whether in those circumstances, where group disadvantage or disparate impact cannot be established, it is possible sensibly to apply the principles of indirect discrimination.

55. Ms Moore submits that it is. She says that all that regulation 3(1)(b)(i) requires for liability to be established (subject to justification) is that persons of the same religion or belief are put at a disadvantage. This means that there need be only two people (including the claimant, apparently) who will be placed at a particular disadvantage as a result of the rule, or would be if they were employed by BA. Since it is simply inconceivable that there would not be some other Christian who would consider himself or herself disadvantaged in the same way as the claimant, the lack of statistical evidence is irrelevant.

56. There was no evidence, submits Ms Moore, to establish that the claimant was unique in strongly holding the views she does, and it would be extraordinary if she were. Many Christians wear a cross, and it is only to be expected that some, even if only a very small minority, would share

the claimant's strong desire to manifest and proclaim their religion by wearing the cross openly. It is, submitted Ms Moore, not really a matter of evidence, but logic. Given that religious convictions can be strong and evangelical, and that wearing the cross is a widely adopted practice in the Christian religion, it is virtually inconceivable that the claimant's position would be unique. Moreover, even if relatively few people might be prepared to go as far as actually refusing to comply with the provision, there would certainly be some who would object on religious grounds whilst choosing, albeit reluctantly, to comply with it.

57. As we have said, Ms Simler QC submits that the case now advanced is, in fact, different to that pursued below, and it is not fair to criticise the Tribunal for failing to address a complaint which was never raised.

58. In any event, she contended that there was no evidence that Christians as a group were adversely affected at all by the requirement. The notion that one other potential victim could be identified could not be right. The Tribunal correctly pointed out that the policy did not act as a barrier to anyone save the claimant; there was no scintilla of evidence that it had. More importantly, even if the alternative basis for alleging disadvantage had been pursued, there was still no basis for saying that there was any evidence that other Christians felt disadvantaged because they could not openly wear the cross. It was incumbent on the claimant to adduce evidence to support that contention, and there was none. There was no basis at all for saying that this was a group problem, and the claimant could not simply circumvent the lack of evidence by stating that the necessary group disadvantage was self evident.

59. We agree with Ms Simler's submission. In our judgment, the whole purpose of indirect

discrimination is to deal with the problem of group discrimination. The starting point is that persons of the same religion or belief as the claimant should suffer the particular disadvantage, distinct from those who do not hold that religion or belief, as a consequence of holding or practising that religion or belief. The claimant must share that particular disadvantage because otherwise she could not show that she was a victim; the provision would not adversely affect her. But in our judgment it is not enough for a claimant to identify a disadvantage which she personally suffers and which others not sharing her belief do not, and then establish liability merely by discovering - anywhere it seems - a like minded soul who shares her belief so that he or she would be similarly disadvantaged if employed in similar circumstances by BA.

60. In our judgment, in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group.

61. It is conceivable that a particular specialist religion, perhaps a subset of a major religion, may operate in a particular region or locality and employers in that area may have to cater for that belief even though employers elsewhere do not. But there must be evidence of group disadvantage, and the onus is on the claimant to prove this. We recognise that this means that if someone holds subjective personal religious views, he or she is protected only by direct and not indirect discrimination. There is hardly any injustice in that if the purpose of indirect discrimination is to counter group disadvantage and there is none.

62. In this case, the Tribunal found no evidence at all of group disadvantage. It is true that they

focused upon whether there was a barrier and did not consider the possibility that there may be disadvantage even with respect to some who chose to comply, or would be willing to comply, with the provision. However, in our judgment there is no possibility that the Tribunal could have found the necessary group disadvantage in any event. The claimant did not adduce any evidence that some who complied with the provision did so despite objecting to the provision on religious grounds, and in our judgment there was no proper basis for making an assumption that such persons would necessarily exist.

63. Ms Moore may be right to say that it is almost inconceivable that there will not somewhere be some other persons who share the beliefs of the claimant, but that possibility would not in our view be anywhere near sufficient to establish the necessary degree of disparate impact or group disadvantage.

64. In the circumstances, in our judgment the Employment Tribunal was plainly right to conclude that there had been no indirect discrimination.

The cross appeal.

65. The cross appeal raises the issue whether the Tribunal was entitled to find that any discrimination was not justified. Strictly this does not now arise since in our judgment no prima facie discrimination requiring justification was established, but we shall briefly deal with the argument.

66. BA submits that the analysis of proportionality contains certain errors and also is too brief. It is accepted that the Tribunal directed itself properly as to the test to be applied, namely that set down

by Pill LJ in **Hardys and Hansons v Lax** [2005] IRLR 726. It is the application of those principles to the facts which is in issue.

67. First, it is submitted that in dealing with the question of proportionality the Tribunal appear to have assumed that there was a blanket ban on wearing jewellery, whereas of course the ban was only on wearing it visibly.

68. We reject that point. We accept that read literally that is what the Tribunal appears to be saying when dealing with proportionality. However, they plainly understood, as is clear at many points of the decision, that it was the visible wearing of the cross rather than the wearing of the cross itself that was in issue. In our judgment, it is inconceivable that the Tribunal would not have had that point very firmly in mind.

69. Second, it is submitted that the Tribunal ought to have assessed the degree and extent of any discriminatory effect. In this case the only effect was on the claimant. Even if other religious persons elsewhere may have been similarly placed, there was no evidence at all that anyone at BA was. Again, it seems to us that the Tribunal were equally aware of that fact. It was emphasised that the claimant's belief was personal to her, (although that is not to say that others may not in the future have adopted the same position as the claimant). In any event, that argument is to some extent a two edged sword. If the implications of changing a rule are minimal, that might be thought to lend support to the argument in favour of the change rather than against it.

70. Third, BA alleges that in carrying out the necessary balancing exercise the Tribunal was unfairly critical of BA's failure to analyse the potential discriminatory impact before November 2006.

The Tribunal drew an adverse inference from this fact. However, it was plain that when the provision was introduced there was a very careful analysis of the potentially discriminatory effect on persons of different religions and beliefs. Hence the modification of the policy for those whose religion required them to wear some form of item which could not be concealed.

71. Ms Simler accepts that BA does not appear to have addressed in particular the question whether Christians ought visibly to be allowed to wear the cross, but it was not apparent that there was a strong desire amongst Christians to be allowed to do so. Once the issue arose BA dealt with it relatively expeditiously and amended the policy.

72. Ms Moore submits that the finding of the Tribunal was plainly legitimate. The conclusion on proportionality can be challenged only if there is some misdirection or if the finding is perverse. In the circumstances, and in particular given that the policy has now been changed so as to be compatible with the wishes of the claimant without any apparent undermining of BA's objective, it cannot conceivably be said that the decision is perverse.

73. In particular, the Tribunal was fully entitled to treat as a relevant factor that the issue of visibly wearing the cross had not been considered until November 2006, only after it had been raised as an issue by the claimant. Moreover, once it had been raised, the policy was still applied to the detriment of the claimant because she was only paid from the date when the new policy was implemented in February 2007.

74. In our view there is a certain artificiality in this debate. We must assume for the purposes of determining proportionality that the Tribunal had found that the requirement did impose a group

disadvantage. On that premise it would have been legitimate to infer that BA ought to have been aware of the potential discriminatory consequences, and in those circumstances their failure to address the issue until it had been raised by the claimant could properly be criticised.

75. On the assumption that there was group disadvantage which ought to have been appreciated by BA, we can see nothing wrong with the Tribunal's analysis. It was perhaps expressed somewhat cursorily, but that is hardly surprising since the Tribunal was dealing with this towards the end of its judgment when considering the issue of indirect discrimination which itself had not been a prominent feature of the case argued before them. No doubt had the Tribunal found that there was prima facie indirect discrimination they would have dealt with the issue more fully. However, we consider that it is clear enough from the reasons they give why they have reached the decision they have, and we think that the conclusion that they reached was a permissible one on the evidence before them.

76. Accordingly, had we allowed the appeal we would not have allowed the cross-appeal.

Disposal.

77. The appeal fails. BA did not act in a way which amounted to indirect discrimination because there was no evidence that a sufficient number of persons other than the claimant shared her strong religious view that she should be allowed visibly to wear the cross. That was the finding of the Employment Tribunal, and it was one they were plainly entitled to reach on the evidence. In our judgment, there was no error of law in their approach.