



# CIPD Law at Work newsletter

for subscribers to CIPD Employment Law for People Managers

## Controversy over workplace religious attire

**Religious symbols worn at work have been headline news in recent months as a result of high-profile cases involving a Christian worker wanting to display a cross and a Muslim classroom assistant who wished to wear a full veil. How far does the law actually require employers to go in accommodating religious attire?**

The main area of law that applies here is, of course, that of religious discrimination under the Employment Equality (Religion or Belief) Regulations 2003.

It is possible for a ban on wearing a religious symbol to be direct discrimination (which cannot be legally justified) if the ban is directed at a particular religious group. An example would be if Christians were banned from wearing crosses but other religious symbols were allowed.

However, in most cases the issue is likely to be one of indirect discrimination – the employer applies a policy or practice to everyone, but this disproportionately disadvantages a particular group. For example, a rule banning all head coverings is likely to disadvantage Muslim and Sikh employees. Indirect discrimination can be justified, but the employer has to show that the rule in question is:

- a means of achieving a legitimate aim; and
- proportionate – that is, both appropriate and reasonably necessary, there being no acceptable alternative way of achieving the aim.

### The BA crucifix dispute

Indirect discrimination is the best analysis of the widely reported case of the British Airways worker Nadia Eweida, who was prohibited from wearing a small jewellery cross outside her uniform. BA was applying its general uniform policy, but Mrs Eweida argued that this disadvantaged her as a Christian. Other types of religious symbols were allowed as they were not jewellery and so not caught by the policy.

Mrs Eweida's internal appeal was originally turned down, but BA has since reviewed its policy and announced that it will allow lapel pins with 'some flexibility for individuals to wear a symbol of faith on a chain'. If this matter had proceeded to a tribunal, and Mrs Eweida was able to show that Christians were disadvantaged, BA would have needed to show why its uniform policy was justified in order to defend a claim of indirect religious discrimination.

### The Muslim veil case

One of the first major employment tribunal rulings on this type of issue, in a case brought by classroom assistant Aisha Azmi, was also an example of indirect discrimination (*Azmi v Kirklees Metropolitan Borough Council*, Leeds Employment Tribunal, 19.10.06, Case No. 1801450/06).

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## lewissilkin

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# Clampdown on discretionary bonus challenges

A Court of Appeal judgment has greatly restricted the scope for employees to contest how employers exercise their discretion in relation to bonus payments (*Commerzbank AG v Keen* [2007] IRLR 132).

Bonus scheme rules generally give the employer broad discretion – often described as ‘absolute’ – over whether to pay a bonus and how much it should be. Nonetheless, the courts have made it clear over the years that they are prepared to step in to prevent discretion being exercised irrationally or in bad faith.

The latest case on this issue involved a breach of contract claim brought by James Keen, a City trader employed by Commerzbank, challenging the calculation of his bonus. There were two aspects to the claim:

- Mr Keen was awarded no bonus at all for the year 2005 as he was no longer employed by the bank on the payment date in March 2006 (having been made redundant in June 2005). He argued that the contractual provision depriving him of bonus entitlement was unreasonable and

void under the Unfair Contract Terms Act 1977 (UCTA), so the bank could not rely on it.

- Although Mr Keen was awarded bonuses of nearly €3 million for the years 2003 and 2004, he claimed he was entitled to more as this was less than the recommendation of his line manager.

On the first point, the court simply ruled that UCTA did not apply to employment contracts. This went against indications in previous cases and means that one possible line of attack for employees making bonus challenges has been completely wiped out.

On the second part of Mr Keen’s claim, the court confirmed the principle that it is a breach of contract for an employer to exercise its discretion to award a bonus payment irrationally. But it went on to emphasise the high hurdle an employee must overcome to succeed:

‘The burden of establishing that no rational bank in the City would have paid [Mr Keen] a bonus of less than his line manager recommended ... would require an overwhelming case to persuade the court to

find that the level of a discretionary bonus payment was irrational or perverse in an area where so much must depend on the discretionary judgment of the bank in fluctuating market and labour conditions.’

The court concluded that there was no independent evidence lending any support to Mr Keen’s claim of irrationality in respect of the 2003 and 2004 bonus awards. This robust approach arguably reverses the trend of previous case law and will undoubtedly be relied on extensively by employers in the future. The key factor is the onerous evidential requirement now placed on employees seeking to challenge discretionary bonus decisions.

On the other hand, the court did strongly suggest that the duty of trust and confidence in the employment relationship required any exercise of discretion to be explained to the employee. This is another key message for employers to take from the case. Clear and straightforward communication about bonuses may well alleviate confusion and concern amongst staff and nip potential disputes in the bud.

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## Annual leave increase this autumn

Workers’ holiday entitlement under the Working Time Regulations 1998 (WTR) is set to increase from 4 weeks to 4.8 weeks in October 2007 and then to 5.6 weeks in October 2008.

The DTI’s firm proposals to increase statutory paid annual leave are contained in a second consultation document on the issue, which includes draft Regulations. Government research indicates that the changes will benefit nearly six million workers and cost businesses around £4 billion per year.

Under the proposals, the WTR holiday entitlement for a full-time worker will go up from the current 20 days to 24 days from 1 October 2007 and to 28 days from 1 October 2008 (pro-rata for part-time workers). Twenty-eight days will be the maximum entitlement, irrespective of whether a worker works longer than a five-day week.

The extra eight days are clearly understood to be in respect of bank holidays: there are eight permanent bank and public holidays annually in Great Britain. However, the draft Regulations make no reference at all to bank holidays. Workers will therefore have no statutory right to take leave on a bank holiday, although they may be entitled to do so under the terms of their employment contract.

### Check your holiday terms

There could be a trap for some employers here. If there is a contractual clause stating that a worker is entitled to statutory holiday entitlement plus bank holidays, then contractually the worker will become entitled on 1 October 2007 to 24 days (under the WTR) and eight bank holidays in addition, making a total of 32 days. The draft Regulations would not give the employer the right unilaterally to change the contractual right to bank holidays in

addition to statutory holiday entitlement simply because the latter is increased.

Whether this is a problem for employers will depend on the wording of their provisions, although clauses providing simply for ‘statutory entitlement plus bank holidays’ are not unheard of.

### Carrying leave over

Employers will not be permitted to pay workers in lieu of the additional holiday entitlement under the proposed Regulations, except on termination of employment. It will, however, be possible to reach agreement with workers that some or all of the extra leave can be carried over from one holiday year to the next. (At present, carrying over is prohibited by the WTR.)

The consultation document is available at: [www.dti.gov.uk/files/file36449.pdf](http://www.dti.gov.uk/files/file36449.pdf) and the deadline for responses is 13 April 2007.

# Compulsory retirement age referred to European Court

## NEWS ROUND-UP

The High Court has asked the European Court of Justice (ECJ) for a ruling on whether the compulsory retirement age of 65 in the Age Discrimination Regulations is legal under EU law.

If the mandatory retirement age turns out to be unlawful, employers will face age discrimination and unfair dismissal claims if they force workers to retire at 65. Indeed, for some employers, these claims are a real possibility already.

### The basis of the challenge

Under the Employment Equality (Age) Regulations 2006, there is an exception which allows employers to force employees who are 65 (or older) to retire without risking claims for age discrimination or unfair dismissal, so long as they follow the correct procedures. This exception has been challenged by Heyday, an organisation set up by Age Concern which supports people at, or nearing, retirement.

Heyday argues that it is unlawful because the EU Directive on which the Regulations are based does not allow it. If this is the case, someone aged 65 or over who is forced to retire can bring both direct age discrimination and unfair dismissal claims.

It will be many months before the ECJ hears the case and makes its ruling, so what should employers do in the meantime? On the face of it, they can continue to retire people at 65: the Age Regulations are the law until the Court rules otherwise. But it may not be that simple, particularly for public sector employers.

### The risk in the public sector

Employees in the public sector, unlike their private sector equivalents, can bring employment tribunal claims alleging that their employer has breached the terms of a European Directive. This is because public sector employers are treated as being part of 'the State' and, as the State is responsible for implementing EU Directives properly, such employers are not allowed to benefit from a failure to do so. Private sector employees cannot rely directly on EU laws in this way, unless their employer is classified as an 'emanation of the State' under European law (because they are carrying out a public function).

If imposing a retirement age of 65 is ultimately found to be in breach of the Directive, it is

possible that public sector employers will be liable for age discrimination even though they were acting in accordance with the UK Regulations. So a public sector employee who is made to retire at 65 or above could issue a tribunal claim now – although any such claim is likely to be 'stayed' until the ECJ makes its ruling.

### The risk in the private sector

Lawyers have always believed that employees in the private sector do not have the option to claim directly under European Directives and must bring their claims under UK law. However, this may no longer be true. In a German case last year (*Mangold v Helm* [2006] IRLR 143), the ECJ appeared to suggest that national courts could set aside laws that were incompatible with the requirements of 'European Community law', even in a case against a private employer.

That goes against a lot of previous EU case law, and may not be what the ECJ intended. However, there remains some risk that private sector employers will find themselves in the same position as public sector employers – with age discrimination claims against them stayed pending the ECJ's ruling, and ultimately decided in the employee's favour. It is far from clear whether European law has actually been changed by the *Mangold* case, and tribunals will need to be persuaded about this before they will even accept any claims that are issued now.

### How can employers play safe?

Employers who want to impose a compulsory retirement age of 65 or above will need to consider how they will defend claims if the exception for retirement at age 65 or over is held to be void. They have two options:

- terminate employment for a genuine and potentially fair reason other than retirement; or
- argue that retirement is objectively justifiable under the general age discrimination rules as being a proportionate means of achieving a legitimate aim.

Many private sector employers are likely to take the view that the risk of claims against them is very limited, however, and will choose simply to rely on the provisions on retirement set out in the Regulations.

### Compensation limits up

The limits on various employment tribunal awards went up with effect from 1 February 2007. The main changes are:

- the limit on a 'week's pay' – which is used to calculate statutory redundancy pay and the basic award for unfair dismissal – has increased from £290 to £310;
- the maximum unfair dismissal compensatory award has risen from £58,400 to £60,600.

The new rates apply in cases where the dismissal takes effect on or after 1 February 2007. Where the dismissal occurred before 1 February, the old limits will still apply irrespective of the date on which compensation is awarded.

### Review of statutory disciplinary and grievance procedures

Last December, the DTI confirmed that there would be a review of the options for simplifying and improving all aspects of the statutory employment dispute resolution scheme introduced in October 2004. The independent review is being led by Michael Gibbons, a member of the Better Regulation Commission. Recommendations for change are expected this spring, although it is not yet clear when any reforms will be implemented.

### Consultation on workplace representatives' facilities

The DTI has issued a consultation document on the facilities and facility time provided to workplace representatives (available at: [www.dti.gov.uk/files/file36336.pdf](http://www.dti.gov.uk/files/file36336.pdf)). Amongst other things, it considers the consistency and adequacy of rights to paid time off. The deadline for submissions is 29 March 2007 and the Government intends to respond to the consultation in the summer.

## Workplace smoking ban imminent

The Government's forthcoming ban on smoking in enclosed public spaces, including most workplaces, will be effective in Wales from 2 April 2007 and in Northern Ireland from 30 April 2007 – slightly ahead of England where it comes into force on 1 July 2007.

Under the Health Act 2006, smoking tobacco will be banned in virtually all enclosed public places. Some exceptions are likely to be carved out in regulations for hotels, care homes and prisons, amongst other places, and also 'for those participating as performers ... if the artistic integrity of the performance makes it appropriate for them to smoke'.

## Discrimination Law Review proposals due

This spring, the Government's Women and Equality Unit has promised to publish its Green Paper outlining proposals following on from the Discrimination Law Review. Ultimately, this process is expected to lead to the introduction of a Single Equality Bill. It remains to be seen whether this will merely be a consolidation of existing discrimination laws or a more radical programme of reform.

## Review of minimum wage and volunteers

The DTI has announced that it will be undertaking a review of the national minimum wage (NMW) in relation to voluntary workers, including exploring whether any changes are necessary to the National Minimum Wage Act 1998. Under the 1998 Act at present, volunteers who provide their time and effort completely freely do not need to be paid the NMW because they are not 'workers', whereas volunteers who receive remuneration in return for their work may be entitled to the NMW.

# Controversy over workplace religious attire

*Continued from page 1*

Ms Azmi was asked not to wear a full veil while teaching, on the ground that this inhibited her ability to communicate with the children. The tribunal found that the school's requirement was justified and so there had been no unlawful discrimination, although there was a small award for injury to feelings for victimisation as the internal grievance process had not been followed correctly.

Ms Azmi, who has since been dismissed for refusing to comply with the instruction, is pursuing an appeal to the Employment Appeal Tribunal against the rejection of her discrimination complaint.

### Justification depends on circumstances

Cases of indirect discrimination in this area will always turn on their specific facts. In particular, the *Azmi* decision should not be taken as a general ruling that employers

can ban the wearing of veils where communication is a job requirement.

An employer will always need to show that it is trying to achieve a legitimate aim (ie that there is a genuine and important reason for its policy) and that the policy is proportionate (ie that it is reasonable and necessary and there are no appropriate, less discriminatory alternatives). These issues will depend on the details of the job and the individual's own requirements and ways of communicating.

These first cases are only the beginning. Employers will need to be very clear about the reasons behind their policy on clothing or religious symbols, discuss the issues carefully with affected employees and explore alternatives if they are to avoid successful claims of religious discrimination.

# Clampdown on discretionary bonus challenges

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### Implied anti-avoidance term?

Notwithstanding the pro-employer line taken in Mr Keen's case, there is another legal bonus dispute waiting in the wings which might give employees an alternative string to their bow (*Takacs v Barclays Services Jersey* [2006] IRLR 877).

Oliver Takacs, an investment banker formerly employed by Barclays Services Jersey Ltd, has brought a High Court claim asserting, amongst other things, that there is an implied contractual term preventing an employer from terminating an employee's contract with notice if the reason for the

termination is to avoid an obligation to make conditional bonus payments.

At a preliminary hearing last summer, the High Court decided that Mr Takacs had a real prospect of succeeding in establishing such an 'anti-avoidance' implied term. The judge refused to strike the claim out and allowed it to proceed to trial – due to take place later this year. (In *Commerzbank v Keen*, the Court of Appeal expressly left open the possibility that an employer might be acting unlawfully by dismissing an employee early solely in order to avoid its bonus payment obligations.)

# Revised benefit rates

The Government has announced new upper limits for sick and family-related absence pay (effective from 1 April 2007) as follows:

- statutory sick pay = £72.55 per week (for 28 weeks in any 3 years);
- statutory maternity pay = 6 weeks at 90% of normal weekly earnings; then £112.75 a week or 90% of normal weekly earnings if lower for 33 weeks (the same rate applies to maternity allowance and statutory adoption pay for 39 weeks, and statutory paternity pay for 2 weeks).