



# NeTWork

## Employment Law Update

July 2016

This month we talk about:

- Ban on Islamic headscarf was direct discrimination
- National minimum wage enforcement
- New illegal working offence comes into force
- SOSR Dismissals and the ACAS Code
- Protected Disclosures

### Ban on Islamic headscarf was direct discrimination

#### *Bougnaoui v Micropole SA.*

The Advocate General has given an opinion that a French employee's dismissal for wearing an Islamic headscarf at work, in breach of a direct instruction not to do so, was direct religious discrimination.

Ms Bougnaoui, a Muslim woman, worked for Micropole SA as a design engineer. When she was recruited, Micropole made it clear that due to the customer facing nature of her role, she would not be permitted to wear a headscarf.

Despite Micropole's instruction, Ms Bougnaoui wore her headscarf at work and when she visited clients. The headscarf covered her head but left her face exposed. Following a complaint from a client who requested that there should be "no veil next time", Ms Bougnaoui was asked not to wear her headscarf when visiting clients. She refused to do so and was subsequently dismissed.

Ms Bougnaoui brought a claim for religious discrimination in the French Labour Court. Her claim was unsuccessful and on appeal, the French Court referred questions to the Court of Justice of the European Union (CJEU). The French Court asked for a ruling on whether Micropole's policy requiring an employee to remove her headscarf when in contact with clients was a "genuine and determining occupational requirement" under Article 4(1) of the Equal Treatment Directive.

Under Article 4(1) of the Equal Treatment Directive,

a difference in treatment based on a protected characteristic will not be direct discrimination where such a characteristic constitutes a genuine and determining occupational requirement, provided that the requirement can be justified as a proportionate means of pursuing a legitimate aim. It should be noted that in the UK the general occupational requirement exception is only available where, having regard to the nature or context of the work, being of a particular sex, race, disability, religion or belief, sexual orientation or age is an occupational requirement and the application of the requirement is a proportionate means of achieving a legitimate aim.

The Advocate General stated that, in her opinion, the dismissal of Ms Bougnaoui was an act of direct discrimination. Although Ms Bougnaoui had not been dismissed because she is a Muslim, she had been dismissed because of her manifestation of that religion (in that she refused to remove her headscarf while visiting customers). The Advocate general considered that she had been treated less favourably on the ground of her religion than a comparator would have been treated. A design engineer who had not chosen to manifest their religious belief by wearing particular apparel would not have been dismissed.

The Advocate General added that discrimination would only be lawful if it was an "occupational requirement", which must be "genuine" and limited to matters which are absolutely necessary in order to undertake the professional activity in question. For example, it would be proportionate to exclude, for health and safety reasons,



a Sikh employee who insisted on wearing a turban for religious reasons from working in a post that required the wearing of protective headgear. The Advocate General did not consider that Ms Bougnaoui had been hindered in her performance of her duties by wearing a headscarf. The Advocate General also stated that although Micropole sought to rely on its relations with customers to justify its approach to headscarves, this had to be balanced against the rights of Ms Bougnaoui.

The Advocate General also considered that if Ms Bougnaoui had brought an indirect discrimination claim, it was unlikely that the ban on headscarves could be justified in the circumstances of this case.

This opinion is in contrast to the opinion of the Advocate General in *Achbita v G4S Secure Solutions NV* which we reported on in [June 2016](#), which concluded that prohibiting the wearing of a headscarf can be justified by an employer's general policy of neutrality and where the ban applied consistently to all visible signs of religious or philosophical beliefs.

Dress codes have generally been challenged as indirect discrimination on the basis that they apply equally to all staff but may have an adverse impact on a particular group of staff. However, it is possible to objectively justify indirect discriminatory dress codes.

This opinion appears to widen the concept of direct discrimination to cover not only less favourable treatment because of religion but also less favourable treatment because of manifestation of religious belief. This is potentially significant because it is not possible to justify direct discrimination except in very limited circumstances where an occupational requirement applies. This means that employers who ban religious apparel may have no defence to a claim for direct discrimination.

The Advocate General's opinion is merely an opinion and is not binding on the CJEU, which could reach a different conclusion.

### New illegal working offence comes into force

The new illegal working offence created by section 34 of the Immigration Act 2016 came into force on 12 July 2016. This creates a new offence of illegal working which will enable the earnings of illegal workers to be seized under the Proceeds of Crime Act 2002.

Section 35 of the Immigration Act 2016 also came into force on 12 July 2016 and extends the existing criminal offence of knowingly employing an illegal migrant to the situation where an employer has a reasonable cause to believe that a person is an illegal worker. Conviction on indictment for this offence will increase from two to five years.

The government has published guidance which includes a guide on how to carry out right to work checks and a factsheet on illegal working.

### Protected Disclosures

#### *Royal Mail Group Limited v Jhuti*

In this case the Employment appeal tribunal (EAT) considered whether it is automatically unfair to dismiss an employee for making a protected disclosure if the person who made the decision to dismiss had incomplete knowledge of the protected disclosure, and was deliberately misled by senior management regarding the reason for the dismissal namely poor performance.

Ms Jhuti was employed by Royal Mail Group Limited from September 2013 until October 2014 when she was dismissed. Her team leader was Mr Widmer.

Soon after she joined Royal Mail she accompanied another employee to a meeting with one of Royal Mail's customers. As a result of things said and done at this meeting, Ms Jhuti suspected that her colleague had breached Royal Mail's rules and also the requirements of its regulator, Ofcom. She sent e-mails to Mr Widmer telling him that she suspected breaches and then met with him. In response, Mr Widmer questioned her understanding of the rules and requirements which she claimed had been breached. He advised her to admit that she had made a mistake and to send an e-mail retracting her allegation. Upset by his reaction, but fearing that she might lose her job, Ms Jhuti sent the e-mail.

Following this meeting, Mr Widmer asked Ms Jhuti to attend weekly meetings to monitor her progress and set her an "ever changing unattainable list of requirements". Ms Jhuti contacted HR to complain about how she was being treated but nothing was done. After more meetings with Mr Widmer, Ms Jhuti contacted HR again to complain that she was being harassed and bullied as a result of her disclosures. Ms Jhuti then went on sick leave and raised a grievance. Royal Mail responded by offering her a termination package worth one year's salary, which she rejected.

Another manager, Ms Vickers, who knew nothing of the background history was appointed to review Ms Jhuti's case, excluding her grievance. Ms Vickers was not given any of Ms Jhuti's e-mails containing the disclosures but became aware that she was upset about something. Ms Vickers discussed the issue with Mr Widmer, and he told her in the briefest terms that Ms Jhuti had alleged that there was improper conduct at Royal Mail but that she had subsequently retracted her allegations on the basis that she had misunderstood the situation. Ms Vickers accepted what Mr Widmer said and did not see Ms Jhuti as she was unwell. Ms Vickers terminated Ms Jhuti's employment for poor performance.

Ms Jhuti lodged an appeal, which was rejected. She complained to an employment tribunal that she had been automatically unfairly dismissed as a result of making protected disclosures.



The tribunal found that Ms Jhuti had made protected disclosures and that she had been subjected to detriments, in the form of bullying and harassment by Mr Widmer, and the offer to leave Royal Mail in return for 12 months' salary. However, it found that Ms Jhuti was not automatically unfairly dismissed. Ms Vickers had not been provided with the e-mails which formed the basis of her protected disclosures and genuinely believed that Ms Jhuti was a poor performer. The employment tribunal considered that a claim for automatic unfair dismissal could only succeed if Ms Vickers had herself been motivated by the protected disclosures. That was simply not the case here. Ms Jhuti appealed.

The EAT held that a decision made by one person in ignorance of the true facts and which is manipulated by someone else in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to their employer. Therefore Mr Widmer's reason and motivation had to be taken into account. Once they had been, it was inevitable that the employer would be found to have dismissed Ms Jhuti because she had made protected disclosures.

This case highlights the importance of conducting a full and thorough investigation prior to taking a decision to dismiss an employee. Had Ms Vickers looked more closely at the matter she may not have been willing to rely on Mr Widmer's version of events.

### National minimum wage enforcement

The government has updated its policy paper on national minimum wage (NMW) enforcement, to take account of recent changes. The document covers civil and criminal enforcement strategies including "naming and shaming". Recent developments in this area include an increase in the maximum penalty for non-compliance with the NMW, which rose from 100% to 200% of the underpaid wages on 1 April 2016 (subject to an overall maximum of £20,000 per underpaid worker, which remains unchanged).

### SOSR Dismissals and the ACAS Code

#### *Phoenix House Ltd v Stockman and another*

In this case the EAT had to consider whether the Acas Code of Practice on Disciplinary and Grievance Procedures applied to a dismissal for some other substantial reason where the dismissal was attributed to a breakdown in the working relationship.

If you have any questions about these or other employment issues please call:

**Heather Cowley** (Partner & Head of Employment Law Department) on **01582 731161**.

Alternatively you can contact Heather via email at [heather.cowley@taylorwalton.co.uk](mailto:heather.cowley@taylorwalton.co.uk)

The Acas Code of Practice on Disciplinary and Grievance Procedures explicitly states that it applies to dismissals for conduct and performance and that it does not apply to dismissals for redundancy or where a fixed term contract expires without renewal. The Code is silent on whether it applies to dismissals for some other substantial reason (SOSR).

In this case, the EAT has confirmed that the Acas Code of Practice on Disciplinary and Grievance Procedures does not apply to dismissals for SOSR where the dismissal is attributed to an irretrievable breakdown in the working relationship. The EAT held that while elements of the Code are capable of being, and should be, applied to SOSR dismissals Parliament could not have intended to impose a sanction for failure to comply with the letter of the Code in this situation without stating so expressly. Therefore there should be no 25% uplift to an unfair dismissal award in these circumstances.