

BRITISH AIRWAYS STAFF MEMBER WINS ECHR RELIGIOUS DISCRIMINATION CHALLENGE

The European Court of Human Rights has delivered its judgment in the case of *Eweida and Others v the United Kingdom* finding that the domestic courts failed to protect practising Christian Ms Eweida's right to manifest her religion by wearing a cross, in breach of its obligation under Article 9.

Article 9 of the European Convention on Human Rights provides that everyone has a right of freedom of thought, conscience and religion, which includes the right to manifest this religion or belief. It further provides that the right to manifest this religion or belief is subject to "*such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*"

Ms Eweida, a member of British Airways' check-in staff, was sent home from work because of her refusal to conceal her cross, in breach of the company's uniform code. A little over a month later she was offered an administrative job which would not have required her to wear a uniform. However, she did not accept the offer and remained at home without pay for a number of months until British Airways amended its uniform code and allowed her to display the cross. British Airways refused to compensate her for lost earnings during the period when she had chosen not to work.

In the view of the Court, the fact that the dress code had been in force for some years and had caused no known problem to the applicant or any other member of staff; that the issue was addressed by British Airways and resulted in a subsequent relaxation of the dress code; and that Ms Eweida was offered an administrative post during the grievance process and subsequently reinstated in her old job were all factors that could be taken into account in considering the extent of interference suffered by Ms Eweida. It also held that, in weighing the proportionality of measures taken by a private company in respect of its employee, the national authorities, and in particular, the courts, operate within a margin of appreciation.

However, it concluded that in weighing up the competing interests of the parties - on the one hand, Ms Eweida's wish to manifest her religious belief and on the other hand, the rights and interests of others (which, in this case, was British Airways' desire to project a certain corporate image) - the domestic courts had accorded the latter too much weight. Ms Eweida's cross was discreet and would not have taken away from her professional appearance, and there was no evidence that the wearing of other authorised clothing (such as the hijab) had had any negative impact on British Airways' image. In such circumstances, the State had failed to protect Ms Eweida's Article 9 right to manifest her religion.

The Court considered three other applications brought by British nationals against the United Kingdom in respect of Convention rights. Ms Chaplin, a nurse, also sought to wear a cross in breach of her employer's uniform policy. The Court found that the refusal of her employer to allow her to remain in post while wearing the cross was an interference with her freedom to manifest her religion. However, it held that there was no violation of Article 9 because the interference was necessary in a democratic society for the protection of health and safety.

Ms Ladele and Mr McFarlane complained about sanctions taken against them by their employers as a result of their concerns about performing services (respectively, registrar of civil partnerships and psycho-sexual counselling) which they believed condoned same sex relationships, in conflict with their religious beliefs.

In both these cases, the Court held that national authorities have a wide margin of appreciation when striking a balance between competing Convention rights (i.e. freedom of religion as against protection from discrimination on the grounds of sexual orientation), and that in these circumstances, the national authorities had not exceeded the margin of appreciation available to them.

In the past, in a number of cases involving restrictions placed by employers on an employee's ability to observe religious practice, the European Commission on Human Rights has held that the possibility of resigning and changing employment meant that there was no interference with the employee's religious freedom. In this case, the Court departed from that precedent and found that, given the importance of freedom of religion in a democratic society, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

Practical Consequences

These cases highlight the following points:

1. There is clearly still a distinction between the right to hold a religious belief (which is unqualified) and the right to manifest it (which is qualified).
2. Increased recognition should be given to the right to manifest religious or other beliefs provided that they do not conflict with the other potentially competing rights recognised in Article 9.

3. Where staff wish to manifest their religious belief, for instance, either through worship in work time or the wearing of clothing or jewellery, careful consideration should be given to their desire to manifest their religious belief as against any competing rights. A weighing of rights should occur.

4. In cases such as this, the outcome is likely to be materially affected by the facts of the particular case and it is important in the circumstances to seek advice in the event that these issues arise.

Link to judgment: <http://www.bailii.org/eu/cases/ECHR/2013/37.html>

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