Appeal No. UKEAT/0309/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 November 2014
Judgment handed down on 22 May 2015

Before

HIS HONOUR JUDGE SEROTA QC

MS K BILGAN

MRS R CHAPMAN

MS T BEGUM APPELLANT

PEDAGOGY AURAS UK LTD T/A BARLEY LANE MONTESSORI DAY NURSERY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW SMITH (of Counsel) Instructed by: Carillion Advice Services Community Legal Advice Partnership House Regent Farm Road Gosforth Newcastle Upon Tyne NE3 3AF
For the Respondent	MS KATHERINE REECE (Representative) Peninsula Business Services Ltd Victoria Place Manchester M4 4FB

SUMMARY

RELIGION OR BELIEF DISCRIMINATION

The Claimant was offered an apprenticeship (trainee nursery assistant) at the Respondent's nursery. She was an observant Muslim whose religious belief required her to wear a garment that reached from her neck to her ankles (a jilbab). She claimed that she had suffered a detriment by reason of the manifestation of her religious belief because she had been told that she would not be permitted to wear a jilbab of the appropriate length and therefore was unable to accept the post. The Employment Tribunal dismissed the claim on the facts. It held that the Claimant had not been instructed that she could not wear a jilbab of the appropriate length but held that if wrong as to that, the PCP (Provision, Custom or Practice) propounded by the Claimant applied. Staff should not wear any garments that might constitute a tripping hazard to themselves or the children in their care - it was not indirectly discriminatory to Muslim women. It applied equally to staff of all religions and if it did put some Muslim women at a particular disadvantage, any indirect discrimination was justified as being a proportionate means of achieving a legitimate aim: i.e. protecting the health and safety of staff and children.

Held by the Employment Appeal Tribunal that the Employment Tribunal had reached conclusions to which it was entitled to reach on the facts as found. There was no misdirection of law by the Employment Tribunal. In essence this was a perversity appeal that failed to surmount the high threshold required in such appeals.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This Judgment is in an appeal by the Claimant from a Decision of the Employment Tribunal at East London hearing centre dated 2 April 2013. The hearing was heard before Employment Judge Jones and lay members Mr Ross and Mr Tomey. The Employment Tribunal dismissed the Claimant's complaint of indirect discrimination on the grounds of her religious belief.

2. The appeal was referred to a Preliminary Hearing by HHJ Richardson in June 2013. On 3 December 2013 HHJ Clark, together with lay members, conducted a Preliminary Hearing and granted permission to amend the Notice of Appeal and referred certain matters to the Employment Tribunal under the **Burns-Barke** procedure. On 10 June 2014 (order dated 18 June 2014) HHJ Clark together with lay members referred grounds 1, 1a, 2, 3, 4 and 5 of the amended Notice of Appeal to a Full Hearing. The Employment Tribunal's response to the **Burns-Barke** questions is dated 28 January 2014. I shall have to refer to these in some detail later in the Judgment.

3. I take the factual background largely from the Decision of the Employment Tribunal.

4. There are different practices among Muslim women as to how to comply with the requirement of their religion that they should dress modestly.

5. The Claimant is an observant Sunni Muslim whose religious belief to comply with the obligation to dress modestly, is to cover her body. She wears a jilbab and hijab. The hijab

covers the head, although not the face. I am not concerned in this case with the hijab. The jilbab is a garment designed to cover most parts of the body, save the face. Jilbabs no doubt come in many designs and sizes, but the kind of jilbab favoured by the Claimant is a flowing full-length garment that can reach at least to her ankles when standing; some women wear a somewhat shorter jilbab. The jilbab favoured by the Claimant, covers her body save her hands and face; the question as to whether or not her feet were covered was controversial. It is important to stress that the jilbab worn by the Claimant is a flowing garment.

6. The Respondent trades as Barley Lane Montessori Day Nursery. It provides day care for children from the age of approximately two months. It is managed by a Mrs Jalah (formerly known as Ms Chauhan). It also operates a nursery at another venue. At the time with which I am concerned, that is October 2011, the Respondent employed some 16 members of staff, including four Muslim women who wore hijabs. They were accommodated by the Respondent facilitating prayer times and time off during Ramadan.

7. At least one Muslim member of staff, known to us only as "Samia", is said to have worn a full-length jilbab. A photograph was provided to the Employment Tribunal which is not altogether clear but apparently showed her wearing a full-length jilbab, and the Employment Tribunal in its **Burns-Barke** response (see page 49) stated:

> **"It is likely that Samia was wearing an ankle length jilbab in the photo …"**

8. The Respondent offers a modern apprenticeship through a Government Agency, the Skills Funding Agency, and also works with an agency known as Key Training. The Claimant approached the Respondent with a view to seeking such an apprenticeship through Key Training; which arranged for the Claimant to be interviewed by the Respondent, and to attend the nursery for a trial.

9. On 18 October 2011, the Claimant attended a half-day trial at the nursery. She was supervised by the assistant manager, Ms Garcia Diaz, and was observed by Mrs Jalah, who was at the Respondent's other premises, by use of a webcam. The Claimant wore a jilbab and evidently performed well. The Employment Tribunal made no findings as to the length of the jilbab. After the trial, the Claimant was invited to an interview with Mrs Jalah on 27 October 2011 which again went well and she was offered the "job" (which I assume to be the modern apprenticeship post). The Claimant again wore a jilbab to this interview. The interview was attended by Mrs Jalah and Ms Garcia Diaz. The Claimant denied that Ms Garcia Diaz was present, and her evidence in this regard was not accepted by the Employment Tribunal.

10. The Claimant, Ms Garcia Diaz and Mrs Jalah discussed the policies and procedures of the Respondent, including uniform. The Claimant was told she needed to wear non-slip footwear and at this point in time Mrs Jalah looked at the Claimant's feet in order to advise her on her footwear. The Employment Tribunal found that she noticed the Claimant's jilbab was covering her shoes and touching the floor. As the Claimant was sitting, the garment had come forward and was longer than it would have been had she been standing.

11. However, Mrs Jalah recalled that it had been a long garment reaching over her shoes and way past her ankles, and that she had difficulty seeing the Claimant's shoes. She considered that particular garment could be a Health & Safety risk at the nursery and asked the Claimant whether she might wear a shorter jilbab to work. There was further discussion about the uniform and the Employment Tribunal (paragraph 35) found that:

> **"… Mrs Jalah was concerned that any garment worn in the workplace did not constitute a trip hazard for the worker wearing the garment, her colleagues or the children with whom they worked. …"**

The Employment Tribunal concluded that Mrs Jalah's concerns were "real concerns held by the Respondent".

12. The Employment Tribunal at paragraph 36 went on to find:

> **"Mrs Jalah was acutely aware of her health and safety responsibilities as the managing director. She continually monitors staff for length of finger nails, inappropriate jewellery and clothes which could be hazardous. Staff are required to tie their hair back while preparing food for the children. This is a work environment where health and safety was a live issue for management and staff alike."**

13. The Claimant's evidence was that she was asked whether or not she could wear a jilbab that was knee-high, but this evidence was rejected by the Employment Tribunal (see paragraph 37). The Employment Tribunal (see paragraph 38) was satisfied the discussion took place between the Claimant, Mrs Jalah and Ms Garcia Diaz in which the possibility of wearing a shorter jilbab, than the Claimant was wearing at the time, would be acceptable with the Claimant changing into a longer jilbab after work, as apparently was the case with other Muslim women working at the nursery, or whether she might wear trousers underneath the jilbab. The Claimant said that she would discuss this with her family. The discussion did not reach a conclusion. The Employment Tribunal noted (paragraph 38) that at no time did the Claimant indicate to the Respondent that she was offended by this suggestion or proposal, or that she felt insulted, shocked or unable to respond to it. There is then this important finding:

> **"… At no point was she told that she could not wear a jilbab while working at the nursery."**

The discussion ended on a positive note and the Claimant agreed to wear a uniform T-shirt or sweatshirt over her jilbab.

14. The Employment Tribunal was satisfied that the rationale behind Mrs Jalah's questions was in relation to the Respondent's Health & Safety responsibility of which they were well

aware. The Respondent's Employee Safety Handbook provided the Respondent had a responsibility and duty towards its employees to ensure they were made aware of the significant risks associated with their work activities and how they may affect others. Mrs Jalah, as the managing director, had overall responsibility for the implementation of the Respondent's policies.

15. The interview evidently went well and the Respondent expected the Claimant to revert to them to let them know what she had decided to do, and they were expecting her to start work. However, the Claimant did not contact the Respondent again. She went back to the agency and said she had been insulted, that the policies were against her morals and beliefs, so she refused to accept the job. However, she never told the Respondent herself.

16. Subsequently she threatened proceedings, and indeed commenced proceedings. She asserted that she had been discriminated against because of the dress code said to be imposed by the Respondent in relation to her ethnic/cultural background. The Claimant, in her ET1, had maintained that she had been told by Mrs Jalah that she could not work at the nursery if she were dressed as she was at the interview.

The Decision of the Employment Tribunal

17. I have already briefly summarised the facts as found by the Employment Tribunal.

The Direction of the Employment Tribunal as to the Law

18. The Employment Tribunal identified the issues it had to determine; the first issue was did the Respondent apply a PCP (Provision, Custom or Practice) of refusing to allow the wearing of a full-length dress. Further issues were whether the PCP applied equally to persons

not of the same religion or belief as the Claimant, whether the PCP put persons of the Claimant's religious belief at a particular disadvantage (whether the PCP put the Claimant at a disadvantage) and whether the PCP was a proportionate means of achieving a legitimate aim. The Employment Tribunal reminded itself of the provisions of section 19 of the **Equality Act 2010**, to which I shall come shortly. The Employment Tribunal then noted that the PCP submitted by the Claimant was:

> **"… the refusal by the Respondent to allow staff to wear full length clothing in the form of a jilbab. …" (paragraph 7)**

19. It was said that the PCP was applied at the interview on 27 October 2011 when the Claimant was advised that she could not wear her jilbab as it was too long and on 28 October when the Respondent again refused to allow her to wear a jilbab at work. The Employment Tribunal directed itself to the Equalities and Human Rights Commission's **Equality Act 2010 Statutory Code of Practice in Employment**. The Claimant claimed to be entitled to the protection of the Act (this is not controversial). It was agreed between the parties that the Claimant wore the jilbab as part of her adherence to a religion. The Claimant maintained she was not allowed to wear a full-length dress, in so doing the PCP was applied to her and this disadvantaged her and other Muslim women on its application so that she was unable to accept employment with the Respondent. The Claimant submitted that that was a *prima facie* case of discrimination and that the burden should shift to the Respondent to prove that the PCP was a proportionate means of achieving a legitimate aim.

20. The Claimant referred to the decision of the European Court of Justice in **Bilka-Kaufhaus GmbH v Weber von Hartz** [1987] ICR 110, in which it was held that to justify an objective which had a discriminatory effect, the employer must show the means for achieving that objective corresponded to a real need on the part of the undertaking, were appropriate with

a view to achieving the objective in question, and were necessary to that end. Reference was made to other authorities, including **Chief Constable of West Yorkshire Police v Homer** [2009] ICR 223 as authority for the proposition that evidence was necessary to establish justification, but in an appropriate case reasoned and rational judgment might establish justification. What was impossible was justification based simply on subjective impression or stereotyped assumptions.

21. The Claimant also referred to **R (on the application of Begum) v Headteacher and Governors of Denbigh High School Session** [2005-6] UKHL 15. In that case the House of Lords had held that a school could lawfully insist that a pupil could not wear a jilbab described as a "long coat-like garment that effectively concealed the shape of the female body" because its uniform policy made adequate provision for sensibilities of Muslim pupils by providing for a uniform shalwar kameeze that concealed less of the body. The Administrative Court at first instance did observe that the jilbab the Claimant wished to wear did not constitute a Health & Safety risk, nor had the wearing of jilbabs and long dresses at other schools. This point was not subject to appeal in the Court of Appeal or Supreme Court.

22. In our opinion the case does not lay down any general principle that wearing a full-length jilbab does not pose such a risk. Every case must turn on its own facts and it was for the Employment Tribunal to determine whether or not the jilbab favoured by the Claimant did constitute such a risk and whether, if the Claimant was prevented from wearing her jilbab, the Respondent was capable of seeking to achieve the legitimate aim of protecting health and safety.

23. We need say no more about this case.

24. The Claimant did not accept that her jilbab was a Health & Safety risk and relied on her previous experience when working in a jilbab and participating in outdoor activities, such as running and jumping. If, however, the Employment Tribunal was to find that the refusal to allow her to wear a full-length jilbab was capable of achieving the legitimate aim of protecting health and safety, then it could not be justified as being proportionate because the risk would only be minimal.

25. The Respondent's case was that the Claimant was never told she could not wear an ankle length jilbab. She was only asked if she might wear a shorter version of the one she wore to the interview. The jilbab she wore on the day of the interview was a trip hazard and the Respondent was accordingly justified in asking her to wear a shorter version.

The Findings of the Employment Tribunal

26. It seems to us that there is an ambiguity running throughout the evidence. What is meant by "ankle length" - to the top of the ankle or completely covering the ankle, i.e. virtually to the floor? The Employment Tribunal accepted that the Claimant, as a Muslim, was entitled to protection extending to her decision to wear a hijab and jilbab as an expression of her faith and adherence to her religion. The Employment Tribunal finding (see paragraph 48) was that the Respondent's practice was that , because of Health & Safety concerns, all members of staff were required to dress in ways that did not endanger their health and safety or that of their colleagues or the children in their care, whether actually or potentially.

> **"In our judgment the Claimant was never told that she could not wear a full length dress to work. She was asked whether she could wear one shorter than the one she wore to the interview. That one appeared to Mrs Jalah to be longer than ankle length and to cover her shoes." (paragraph 49)**

The Employment Tribunal recorded that Mrs Jalah was concerned that this could possibly represent a trip hazard.

> **"… However, no decision was made about her wearing a jilbab to work at the Respondent." (paragraph 50)**

27. The Employment Tribunal concluded that 25% of the Respondent's workforce were Muslim women and although the Employment Tribunal was not told that they all wore jilbabs, it was the judgment of the Employment Tribunal that they could do so if they wanted.

> **"It is therefore our judgment that the Respondent's practice did not put Muslim women at a disadvantage as they were able to wear [a] jilbab - whether full length dress or shorter - to work. As long as it did not represent a trip hazard i.e. be longer and cover shoes, it could be worn. It did not put the Claimant at a disadvantage as she could still wear a full length jilbab to work." (paragraph 53)**

28. The Employment Tribunal concluded that there did not need to be any specific incidents or reports naming a garment longer than one's shoes as being a specific possible trip hazard for Mrs Jalah to make that decision. The Employment Tribunal was satisfied that she had sufficient experience as the manager of the business to be able to decide what constituted a potential trip hazard. The Employment Tribunal was also satisfied those concerns were applied across the board, to all members of staff, and that it did not particularly disadvantage Muslim women. Muslim women who wanted to wear a shorter jilbab could do so. Muslim women who wanted to wear a full-length jilbab "could do so as long as it was not likely to cause a trip hazard". A garment to the ankle would not have created a trip hazard whereas the one which the Claimant wore to the interview appeared to Mrs Jalah to be longer than that. There is no doubt that Mrs Jalah considered that the jilbab worn by the Claimant at the interview constituted a tripping hazard whether "ankle length" or not as the Employment Tribunal evidently accepted her evidence. The Employment Tribunal found that the Claimant did not challenge that the jilbab she wore went past her ankles (and thus was a potential tripping hazard) when said to her at the interview and freely discussed with the managers varying

lengths of dress she could wear to work. If she had objected, the issue of the length of the dress she was wearing could have been resolved on the spot. The Employment Tribunal was unable to decide that aspect as it was not agreed that the jilbab she wore to the hearing was the one she wore to the interview, or even if it was, how it looked to Mrs Jalah as she looked down at the Claimant's feet as she was sitting.

29. At paragraph 55, the Employment Tribunal said:

> **"The Claimant has failed to make a prima facie case that the Respondent applied a criterion to her which would have been detrimental to Muslim women. Muslim women were employed at the Respondent. There were four Muslim women employed there and from the photograph of Samia it is our judgment that Muslim women are able to wear a jilbab and be employed by the Respondent."**

30. The findings to which we have just referred, on the face of them, seem fatal to the success of this appeal, unless they can be disregarded as being perverse.

31. At paragraph 56, the Employment Tribunal held:

> **"The only criterion applied by the Respondent in this context was that no garment worn by any member of staff should present a trip hazard to users, colleagues or the worker herself. In our judgment such a criterion would not necessarily put Muslim women at a disadvantage because even if a full length jilbab to the ankles is worn it would not be a trip hazard. The Respondent raised a query of the Claimant in the circumstances where she was assessed as wearing a garment that went past her ankles and to the floor. Since the sections of the Qu'aran and the Hadith quoted in the [Employment Tribunal Hearing] referred to a requirement that the garment stipulated for Muslim women to wear should cover their bodies from neck to ankle, a requirement that the garment does not go to the floor thereby creating a possible trip hazard is not a requirement or criterion that places Muslim women at a disadvantage."**

32. The Employment Tribunal asked itself whether the criterion or requirement to which we have just referred placed this particular Claimant at a disadvantage:

> **"… In our judgment it did not. The Claimant was not told that she could not wear a jilbab. She was never prohibited from wearing one. Enquiries were made as to whether she could wear a shorter garment. There was a discussion between her and the manager of the different lengths the garment could be worn and which would be the one which suited both parties best. The discussion had not concluded at the time that the Claimant left the nursery. She was expected to revert to the Respondent once she had a discussion with her family on the issue. Merely raising an enquiry cannot and did not put the Claimant under a detriment. The Claimant chose to look elsewhere for a training placement and succeeded in getting one but it was not because she was prohibited from working by the Respondent. It was her choice to**

> **decide not to progress her application with the Respondent. In our judgment what was said to the Claimant by the Respondent was an attempt to explore the issue of what would be an acceptable length of the garment to satisfy both parties given that the Respondent had assessed the garment she had on at the time as presenting a possible trip hazard and the Claimant's right to wear the garment to the length (i.e. her ankles) that she considered was required by her religion. Such enquiries did not place her at a disadvantage." (paragraph 57)**

Accordingly the claim failed. There was no discrimination on the grounds of religion or belief.

33. We also need to draw attention to the response to the **Burns-Barke** request from the Employment Tribunal of 28 January 2014. The question posed by the Employment Appeal Tribunal was as follows:

> **"Did you consider, on the assumption that the Claimant had established the PCP relied on namely a refusal by the Respondent to allow the [Claimant] to wear an ankle length jilbab and that the imposition of the PCP by the Respondent was [prima facie] indirectly discriminatory on the grounds of her religion whether the Respondent could justify their policy within the meaning of section 19 (2)d of the Equality Act 2010 and if so what was your conclusion on justification and what were your reasons for reaching that conclusion?"**

34. In its response to the **Burns-Barke** request, the Employment Tribunal reiterated that it had decided that the PCP relied upon was a requirement that members of staff dress in ways that did not endanger their health and safety, or that of the colleagues or the children in their care:

> **"It was not our judgment that the Claimant had established that there was a PCP that she would not be allowed to wear an ankle length jilbab.**
>
> **The Respondent proved and we found that their concern was for the health and safety of staff and children at the nursery and that the practice included checking the clothing, nails, hair and shoes of all members of staff.**
>
> **There was no PCP that the Claimant could not wear an ankle length jilbab. …"**

35. The Employment Tribunal referred to earlier findings:

i) The Claimant had worn a jilbab to the interview and been allowed to work on a trial basis while wearing the garment.

ii) She was offered the job at the end and the issue of her clothing came up in the discussion about the uniform and how she would wear it once she began her

employment. The discussion was in relation to the particular garment the Claimant was wearing on that day, and not generally in relation to jilbabs. Although Mrs Jalah asked the Claimant whether she could wear a shorter jilbab, the discussion covered a variety of lengths and the Claimant was to seek the opinion of her family and return to the Respondent.

"…She was not told that she could not wear an ankle length jilbab."

iii) The Employment Tribunal considered it likely that Samia was wearing an ankle length jilbab in the photograph, which has already been referred to.

The Employment Tribunal also stated:

> **"We found from the evidence that Mrs Jalah never said to the Claimant that she could not wear an ankle length jilbab. The contents of the conversation … is that Mrs Jalah said that the Claimant could not wear an ankle length garment <u>that would restrict her movements</u> and therefore restrict her interaction with the children in the nursery. …" (our underlining)**

The Employment Tribunal then stated:

> **"… The Claimant never stated to Mrs Jalah that the only length she could wear was ankle length. …**

The Employment Tribunal repeat:

> **"Our judgment was that at no time was the Claimant told that she could not wear an ankle length jilbab."**

36. The Employment Tribunal also record that it found Mrs Jalah was qualified to and did make assessments on appropriate clothing, footwear and dress of her staff in order to safeguard the health and safety of her staff and the children in her care; and to discharge her statutory liability in that regard. The Employment Tribunal also accepted that Mrs Jalah was not told by the Claimant that she was required to wear the particular jilbab she was wearing to the interview in order to be in keeping with her religion. The Employment Tribunal then say this:

> **"… Although as part of her appeal the Claimant now states that the garment worn to the interview did not go past her ankles she failed to take the opportunity to challenge Mrs Jalah about this during the interview. …"**

37. The Claimant was not put at a disadvantage in comparison to other Muslim women also employed by the Respondent because they had the same Health & Safety assessment made of their clothing, and wore a variety of types of clothing that were also in keeping with their religion.

> **"… All the Muslim women working for the Respondent were able to comply with the requirement that their clothing did not present a trip hazard to staff and children. …"**

38. If the Employment Tribunal was wrong, and the effect of the application of the Respondent's PCP was that the Claimant was disadvantaged, in that she was unable to take up the position of trainee nursery assistant:

> **"… it is our judgment that this was a proportionate means of achieving a legitimate aim."**

39. There was a real need to safeguard the health and safety of staff and children and the PCP corresponded to a real need on the part of the Respondent:

> **"The practice was appropriate with a view to achieving the objective considered. There was no blanket refusal to allow [the Claimant] to wear the ankle length jilbab. …"**

40. Finally the Employment Tribunal said that:

> **"Since the Claimant was never told that she could not wear an ankle length jilbab it would be our judgment that the requirement placed on her by the Respondent, that whatever garment she wore should not present a trip hazard; was unrelated to any discrimination and proportionate."**

Notice of Appeal and Submissions in Support

41. *Ground 1*: It is said the Employment Tribunal made a perverse finding of fact regarding the perceived (and/or actual) length of the Claimant's jilbab which she wore to her interview.

42. *Ground 1A*: The Employment Tribunal failed to provide adequate reasons for its factual finding regarding the perceived (and/or actual) length of the Claimant's jilbab which she wore to her interview with the Respondent.

43. *Ground 2*: The Employment Tribunal failed to make a critical finding of fact as to the length of the Claimant's jilbab (whether perceived or actual) whilst the Claimant was standing up and/or moving around.

44. *Ground 3*: The Employment Tribunal in its findings of fact failed properly to identify the PCP which was applied by the Respondent and/or the indirectly discriminatory nature/effect of the same.

45. *Ground 4*: The Employment Tribunal misapplied the law when dealing with the question of detriment/disadvantage and/or failed to take into account relevant evidence.

46. *Ground 5*: The Employment Tribunal failed properly to consider the question of justification and/or give adequate reasons for its conclusion on that issue.

47. The Claimant sought to submit that the evidence did not justify the finding as to the perceived length of her jilbab because that finding was perverse having regard to the evidence before the Employment Tribunal. It is said that the Claimant's evidence that the jilbab covered her body from neck to ankles was unchallenged. Reference was made to documentation suggesting that the Respondent had accepted that the jilbab worn on the day of the interview was ankle length, although we note that on the findings of the Employment Tribunal it may have seemed longer. In those circumstances, the Employment Tribunal could not find that an

ankle length jilbab was a tripping hazard. It is said that the conclusion of the Employment Tribunal was based on their uncritical acceptance of Mrs Jalah's oral evidence. The Employment Tribunal is criticised for its uncritical acceptance of Mrs Jalah's oral evidence without any proper regard "for the wealth of other evidence which directly contradicted this account".

48. Mr Smith points to the note of Key Training Provider recording a conversation with Mrs Jalah who confirmed that she could not wear an ankle length jilbab but omits the reference "which would restrict her movement". He refers to Mrs Jalah's file note which refers to the jilbab which was to her ankle and which she said was too long.

49. In her witness statement, at paragraph 8, Mrs Jalah says that she "looked at the Claimant's jilbab from my desk and noted that its length went to her ankles", and asked if she could wear a shorter jilbab. She later said that viewed objectively:

> **"… I took the view that the ankle length Jilbab which was worn by the Claimant at the interview posed a genuine trip hazard due to the possible restriction of the movement within the garment as a result of its length. …" (paragraph 11)**

50. Mr Smith submitted that the discussions between the Claimant and Mrs Jalah as to what would be an acceptable length were incompatible with the finding that Mrs Jalah perceived the jilbab to be longer than ankle length.

51. We do not see any difficulty because, as we have explained, Mrs Jalah was seated at her desk observing the Claimant who was sitting causing the jilbab to come down over her ankles and, regardless of whether described as ankle length or not, was reasonably regarded as being a tripping hazard. We have already observed that the term "ankle length" is somewhat ambiguous.

52. The argument that the finding that Mrs Jalah perceived the jilbab to be longer than ankle length was perverse is simply an impermissible attempt to reargue the facts which are the province of the Employment Tribunal, which has the responsibility of resolving factual disputes and inconsistencies and which had factual material to justify its findings. The Claimant has given no explanation as to why Mrs Jalah might have objected (if she did) to the jilbab she wore if she did not see it as a tripping hazard.

53. In relation to ground 2, it is said that a finding as to the length of the jilbab actually worn by the Claimant at the interview was necessary as it was relevant to the PCP and the Employment Tribunal had failed to make such a finding. The terms of the PCP as identified by the Employment Tribunal were said to be insufficient; the PCP that no garment worn by a member of staff should be a trip hazard was too vague. The Employment Tribunal concentrated on issues of policy rather than the issue what clothes are actually prohibited, and should have found a different PCP. It was submitted on behalf of the Claimant, that the PCP should have been something like the following:

> **"Members of staff shall not be permitted to wear garments that are (deemed to be) longer in length than the wearer's shoes, either whilst the worker is standing up / moving around, or whilst the worker is sitting down."**

54. The Employment Tribunal should have concluded that the PCP implied by the Respondent was *prima facie* indirectly discriminatory against Muslim women, because the wearing of a full-length (i.e. ankle length) jilbab is an important part of the dress code for many Muslim women. If the Respondent was not prepared to permit the wearing of garments that touched the floor (whether when the wearer was upright and/or sitting down), such a policy was *prima facie* indirectly discriminatory against Muslim women, because a jilbab which covered the wearer's body from neck to ankle (whilst the wearer was upright) but which touches the floor whilst the wearer is sitting down, would fall foul of the Respondent's uniform policy. The

application of that policy would put Muslim women at a particular disadvantage when compared with non-Muslim women, on the basis that they would be prevented from wearing to work a garment which forms an important part of their Muslim faith. The Employment Tribunal should have gone on to consider whether the uniform policy, as applied to the Claimant, was a proportionate means of achieving a legitimate aim.

55. In relation to ground 4, it is said that the Employment Tribunal misapplied the law as to detriment or disadvantage by preventing them from wearing full-length jilbabs. The fact that the Claimant chose not to take the post did not mean that she suffered no disadvantage. Reference was made to the Equality and Human Rights Commission's statutory Code of Practice on the **Equality Act 2010** (paragraph 4.9) and the well known passage from the speech of Lord Hope in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285. The fact that the Claimant felt unable to pursue her application with the Respondent or was deterred or discouraged from doing so, as a consequence of the Respondent's application of the uniform policy, placed her at a disadvantage.

56. In relation to ground 5, it is said that the Employment Tribunal failed to adequately consider the issue of justification and gave insufficient reasons for justification. There was no proper assessment of the risk as to its nature or severity, or as to the effects of the disadvantage caused. The Employment Tribunal should have applied its own objective test and not relied on Mrs Jalah's subjective views and considered whether the objectives could be achieved by less discriminatory means.

The Respondent's Submissions

57. As a general proposition, it was submitted on behalf of the Respondent that this was in essence a perversity appeal and the Employment Tribunal was entitled to come to the conclusions it did on the totality of the evidence, including oral evidence as to the length of the jilbab worn by the Claimant to the interview. The Respondent drew attention to the findings of the Employment Tribunal that no requirement had been placed on the Claimant not to wear a similar jilbab to that which she wore at the interview, or that she must only wear an ankle length jilbab. The only requirement was that her jilbab should not constitute a tripping hazard.

58. In relation to ground 1 (alleged perverse findings), the Employment Tribunal accepted the evidence of Mrs Jalah as opposed to that of the Claimant. It is said that the Claimant's case at the Employment Tribunal as to the PCP is unclear. The Claimant did not challenge the evidence as to the jilbab extending over her shoes. The Claimant chose not to cross-examine or give evidence as to the length of the jilbab she wore. Further, it was submitted that "ankle length" can mean reaching to the ankle bone, or reaching just below the ankle bone. The Respondent asked forensically why the Claimant did not produce the jilbab she wore at the interview or wear a similar jilbab to the Employment Tribunal. The Employment Tribunal had to do the best it could on the evidence it had available as to the length of the jilbab.

59. In relation to ground 1A, the Respondent reiterated that on several occasions the Employment Tribunal say that the Claimant was not told she could not wear an ankle length jilbab; the thrust of the discussion related to wearing a garment that constituted a tripping hazard. Mrs Chapman drew attention to the **Burns-Barke** response, which I have referred to, at page 49 of our bundle.

60. In relation to ground 2, it was submitted that the Decision of the Employment Tribunal should not be subjected to inappropriate scrutiny. It had made findings of fact which were justified by the evidence.

61. In relation to ground 3, the PCP had been identified by the Employment Tribunal; as a finding of fact and justified by the evidence that the Employment Tribunal accepted. Mrs Chapman drew specific attention to paragraph 53 of the Judgment, to which we have already referred; in which the Employment Tribunal found quite clearly that the Respondent's PCP did not put Muslim women at a disadvantage. Ms Reece, on behalf of the Respondent, pointed out that the Claimant had put her case in several different ways.

i) At paragraph 5.2.5 she claims to have been told that she could not work at the Respondent's premises "if she dressed as she did at the interview".

ii) In the skeleton argument submitted to the Employment Tribunal, the PCP (paragraph 13) was a "refusal by the Respondent to allow staff to wear full length clothing" (or paragraph 11). A PCP of refusing to allow full-length clothing, which in the Claimant's case was "an outer garment (jilbab) which covers her body from neck to ankle" (paragraph 18).

62. The case at the Employment Tribunal (see paragraph 7), the PCP was said to be the refusal by the Respondent to allow staff to wear full-length clothing in the form of a jilbab.

63. It was repeated that the Employment Tribunal did not accept the Claimant's evidence that she had been told that she was required to wear a knee-length jilbab. The Employment Tribunal was entitled to conclude that the PCP did not have a discriminatory effect and noted that the length of clothing was likely to be a matter for further discussion, and apparently an

amicable discussion about this had taken place at the interview when the Claimant was to go back to consult her family. The PCP was found to be objectively justified and proportional. The justification was not challenged (health and safety of staff and children). The Claimant says proportionality was not properly examined. Nonetheless, in its **Burns-Barke** response (page 50 of our bundle) the Employment Tribunal, in a passage I have already referred to, considered that the PCP (contrary to its view) disadvantaged the Claimant, it was nonetheless a proportionate means of serving a legitimate aim, namely health and safety of staff and children, and was appropriate with the view of achieving the objective. There being no blanket refusal to allow the Claimant to wear an ankle length jilbab. The requirement placed on the Claimant that any garment she wore should not present a trip hazard was unrelated to any discrimination and proportionate (page 51).

64. We now turn to the law. I start with section 19 of the **Equality Act 2010**:

> ***"Indirect discrimination***
>
> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -**
>
> > **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> >
> > **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> >
> > **(c) it puts, or would put, B at that disadvantage, and**
> >
> > **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**
>
> **(3) The relevant protected characteristics are -**
>
> > **…**
> >
> > **religion or belief;**
> >
> > **…"**

65. The Employment Tribunal correctly set out the principle in **Bilka-Kaufhaus GmbH v Weber von Hartz** [1987] ICR 110 in which the European Court of Justice held that to justify

an objective which had a discriminatory effect, an employer was required to show that the means chosen for achieving that objective (a) correspond to a real need on the part of the objective, (b) were appropriate with a view to achieving the objective in question, and (c) were necessary to that end.

66. The meaning of "detriment" was explained in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 and should be given a broad meaning; see the speech of Lord Hope at paragraph 34. The broad interpretation should be given, otherwise taking account of all circumstances, and whether the treatment was of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment. An unjustified sense of grievance cannot amount to "detriment".

Conclusions

67. There is no issue that the wearing of a jilbab is a manifestation of the Claimant's religious belief. So a PCP that might prevent the wearing of a jilbab that complied with the wearer's religious beliefs is capable of engaging the protection of section 19 of the **Equality Act 2010**, unless the Respondent can show that it is a proportionate means of achieving a legitimate aim.

68. This case, in my opinion, clearly turns on the facts. The PCP relied on by the Claimant that the Respondent objected to a particular jilbab worn by her at interview, and the issue as to the length of the jilbab to which she claimed the Respondent objected on Health & Safety grounds, and the alleged instruction not to wear an ankle length jilbab were expressly rejected by the Employment Tribunal. I cannot help but feel that there are a number of misunderstandings that have lead to some confusion, regarding the nature of the jilbab and the

perception of its length. The Employment Tribunal found that when the Claimant was sitting, it could easily cover the whole of her feet and give the impression that it was longer than it in fact was; see the Decision of the Employment Tribunal at paragraphs 34 and 49.

69. There is the further ambiguity in relation to what is meant by "ankle length". It could mean extending to the top of the ankle; however it could mean covering the entire ankle bone. There are important factual findings justified by the evidence that the Claimant was never told she could not wear the jilbab she was wearing at the interview, only that she should not wear clothes that might constitute a tripping hazard. I have referred already to, and will not repeat, the findings of the Employment Tribunal (at paragraphs 38, 39, 53 and 54 of the Judgment) as well as the passages to which I referred in the **Burns-Barke** response. The Claimant was permitted to wear a jilbab, even full-length, providing it did not constitute a tripping hazard. Whatever length the jilbab worn to the interview was, it was reasonably contended to be a tripping hazard.

70. In relation to ground 1, the Claimant's case that she was required to wear a knee-length jilbab was expressly rejected by the Employment Tribunal.

71. I consider it was likely there was some confusion because the Claimant was clearly wearing a flowing garment and, dependent on how she was sitting (or even how she was standing), the jilbab might cover more or less of her leg. This appears to have been the view of the Employment Tribunal.

72. So far as the perversity argument is concerned, it must be borne in mind that we in the Employment Appeal Tribunal have not seen all the evidence that was before the Employment

Tribunal. It is obvious from the terms of the Judgment that Mrs Jalah's oral evidence may have differed from that in her witness statement and in other documents. However, that is not an infrequent occurrence and the Employment Tribunal is charged with deciding what evidence to accept and what evidence to reject. We would find it impossible to say, on the basis of what Mrs Jalah clearly said in her oral evidence, as to her perception of the length of the jilbab worn by the Claimant on 27 October 2011, that the finding of the Employment Tribunal was perverse. The Employment Tribunal has preferred the evidence of the Respondent to that of the Claimant, and the Claimant has failed to surmount the high threshold of proving an overwhelming case that the finding is perverse; see **Yeboah v Crofton** [2002] IRLR 634 CA.

73. There is a flaw running throughout the Notice of Appeal that the Employment Tribunal's findings as to what the Claimant was told, or not told, could be reversed by the Employment Appeal Tribunal. The Employment Tribunal gave reasons for its findings and had evidence to justify them, that the PCP operated by the Respondent was not discriminatory. A number of grounds of appeal founder on the findings of the Employment Tribunal that the Claimant was never instructed not to wear any particular jilbab, including that she wore at interview, only that she should not wear a garment that was a tripping hazard. We do not accept that it was necessary for the Employment Tribunal to determine the precise length of the jilbab that was worn by the Claimant to the interview (grounds 1A and 2).

74. In relation to ground 3, the Employment Tribunal was entitled to have regard to Mrs Jalah's experience as to the justification for the PCP that prevented the wearing of clothes by members of staff that constitute a tripping hazard. The PCP could not be said to be either wrong or unreasonable, and in our opinion is patently not so. The Employment Tribunal was perfectly entitled to have regard to the evidence of an experienced nursery teacher and manager.

75. The Claimant appears to suggest that an employer's PCP must be carefully defined, and particularised or detailed. A PCP may be informal and there is no conceptual difficulty with a PCP as formulated by the Employment Tribunal in this case.

76. Ground 4, this implication of the law in relation to detriment or disadvantage, at this point may have some relevance were the PCP to have been discriminatory; the Employment Tribunal found that it was not, and in those circumstances, the Claimant cannot have suffered a detriment, or been placed at a disadvantage, because there was no discriminatory PCP in place.

Alleged Inadequacy of Reasons

77. We did not consider that there was anything in this point. The Reasons in the Judgment together with the more or further matters as set out in the **Burns-Barke** response, are more than sufficient to adequately explain to the parties the reasons for the Employment Tribunal's decision and explain to the Claimant why she lost. We have already observed that the Employment Tribunal was entitled to rely upon the experience of Mrs Jalah, and was well able to assess her reliability.

78. We shall deal with the **Burns-Barke** point raised by the Claimant, which takes exception to the response of the Employment Tribunal on the basis it went outside its remit, which was essentially to ask whether if the Claimant established the PCP for which she contended and if this were indirectly discriminatory to female Muslims, was that PCP justified and if so what were the reasons? It is suggested by the Claimant that the Employment Tribunal was impermissibly trying to justify its earlier findings and engage in advocacy to protect its decision. Our view on the matter was that the Employment Tribunal was answering the questions put to it by the Employment Appeal Tribunal and we consider that the Employment

Tribunal attempted to do no more than assist the Employment Appeal Tribunal by amplifying its earlier Judgment. We do not consider that it was attempting to engage in advocacy, to defend earlier findings or present its decision in a better light. The factual findings marry up with its original decision.

79. In the circumstances, the grounds of appeal do not succeed. The appeal must be dismissed.

80. Before we conclude this Judgment, we would like to express and recognise the gratitude of the Employment Appeal Tribunal to all counsel such as Mr Smith who has appeared for the Claimant pro bono and come to the Employment Appeal Tribunal to assist unrepresented litigants.

81. I am extremely grateful for the assistance of the lay members Ms Bilgan and Mrs Chapman, especially in their appreciation of proper work place practice.

82. Finally I must express my regret for the delay in handing down this judgment caused by my having been indisposed.