EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr R Sethi		Elements Personnel Services Ltd

Heard at: London Central **On**: 12-13 November 2019

Before: Employment Judge Stout
Mr L Tyler
Mr D Eggmore (Day 1) / Ms S Plummer (Day 2)

Representations
For the claimant: Mr M Singh (counsel, direct access)
For the respondent: No appearance or representation

JUDGMENT

(1) The unanimous judgment of the Tribunal is that the Respondent indirectly discriminated against the Claimant contrary to ss 19 and 39(1)(c) of the Equality Act 2010.

(2) The Tribunal orders the Respondent pursuant to s 124(2)(b) of the Equality Act 2010 to make a payment of compensation to the Claimant in the sum of £7,102.17 (comprising £1,208 loss of earnings plus interest of £96.36 and £5,000 injury to feelings plus interest of £797.81).

(3) The Respondent is to pay that sum (£7,102.17) to the Claimant within 14 days of the date on which this judgment is sent to the parties.

REASONS

Introduction

1. The Claimant is a Sikh whose home is New Zealand but who has travelled widely seeking employment mainly in the hospitality industry. The Respondent is a specialist agency providing temporary staff for the hospitality industry, predominantly for 5 star hotels working within front of house food and beverage roles. The Claimant sought employment with them in November 2017 but was not ultimately taken on because (he says) the Respondent's "no beards" policy precluded him from working for the Respondent.

2. By a claim form received on 17 January 2018 (following a period of ACAS Early Conciliation from 27 November to 27 December 2017) the Claimant claims that the Respondent's policy constituted indirect discrimination (contrary to s 19 of the Equality Act 2010 (EqA 2010).

The Evidence and Hearing

3. The Respondent did not attend the hearing. The notice of hearing had been sent to the Respondent's then representative on 20 September 2019. The Respondent had previously (on 15 October 2019) been issued with a strike-out warning by EJ Wade for not actively pursuing the proceedings. The Respondent's then representative responded to that by email of 16 October 2019 confirming that the proceedings were being actively pursued.

4. On 8 November 2019 the Respondent's representative emailed the Tribunal and the Claimant informing the Tribunal that they were no longer acting for the Respondent and providing an email address (for someone apparently called "Fred") and postal address for future correspondence with the Respondent (but no telephone number).

5. At the start of the hearing, the Tribunal made enquiries of the Claimant. He showed the Tribunal three emails he had sent yesterday (11 November 2019) to the Respondent at the email address provided in which he mentioned the dates of the hearing as 12 and 13 November 2019 and provided the Respondent with copies of his counsel's bundle of authorities and Skeleton Argument. The Claimant said he had had no response from the Respondent. The Tribunal had received no other correspondence from the Respondent. The Judge checked on Companies House in relation to the Respondent, which appears still to be an extant company.

6. The Claimant had travelled from New Zealand (where he now lives) especially for the hearing. The case had previously been listed to be heard in London South in February 2019, but was postponed and transferred to London Central as arrangements for video evidence (for the Claimant) could not be made at London South.

7. In the circumstances, bearing in mind the age of this case, the previous postponement, and the fact that the Claimant had travelled about as far as it is possible to travel for a hearing at no doubt significant expense, the Tribunal determined that it was appropriate to proceed with the hearing in the Respondent's absence.

8. The Tribunal arranged for copies of the bundle previously submitted by the Respondent for the hearing in February 2019, and the (unsigned) witness statement of Ms Kymberley Davies (the Respondent's Recruitment Manager) to be copied. The Tribunal read these documents, together with the witness statement of the Claimant, and his counsel's skeleton argument.

9. The Tribunal heard oral evidence from the Claimant. During that oral evidence, the Tribunal took care to ensure that it put to the Claimant all points in the Respondent's evidence, and all points that it considered might have been taken by the Respondent had the Respondent been present. The Tribunal did the same to the Claimant's counsel in the course of his submissions.

Change of Tribunal panel member

10. After the Tribunal had reached its decision on liability on Day 1, Mr Eggmore was unable to continue with the hearing for medical reasons. The Tribunal announced its decision on liability at the start of Day 2 in Mr Eggmore's absence and indicated that reasons would be given in writing (in light of a request made by the Claimant). Pursuant to reg 9(3) of the 2013 Employment Tribunal procedure regulations, the Tribunal substituted Ms Plummer as a panel member for the remedy part of the hearing.

11. The Respondent was notified of these circumstances by email from the Tribunal at 12.37am on Day 2, and invited to agree to the hearing going ahead with just one panel member if it should turn out that no second panel member was available, but did not respond to that email before the remedy hearing commenced at 2pm, or at all before the end of the hearing. Ms Plummer was, however, available and could be substituted without the Respondent's consent under reg 9(3).

The issues

12. The issues to be determined had been agreed at a preliminary hearing on 18 July 2018, at which the Claimant appeared in person and the Respondent was represented, as follows:

    a. Did the Respondent's Dress Code Policy amount to a provision, criterion or practice (PCP) that put the Claimant at a particular disadvantage due to his religion;
    b. Was the Dress Code Policy applied equally to all agency workers?
    c. Was the Dress Code Policy a proportionate means of achieving a legitimate aim? (The legitimate aims that the Respondent relies upon

are (1) clients' genuine requirements for front of house staff based on hygiene concerns; and (2) appropriate back of house jobs were available.)

13. What was identified in the list of issues as being the Respondent's legitimate aims do not fully capture the justification arguments advanced in the Respondent's response to the proceedings (especially paragraph 14), or in Ms Davies' witness statement (especially paragraph 7). In those documents, the Respondent appears to be advancing legitimate aims based on client requirements, which requirements the Respondent suggests are imposed for food hygiene purposes and/or appearance purposes.

14. Mr Singh for the Claimant suggested that we are bound by the list of issues. However, that is not the case. As Mummery LJ expressed it in *Parekh v London Borough of Brent* [2012] EWCA 1630 at paragraph 31, the list of issues is: *"a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal … if the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list … [However], as the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence"*.

15. In our judgment, given the Respondent's absence from this hearing, it is especially important that we do not stick slavishly to the list of issues when there is no clear indication from the record of the preliminary hearing that the Respondent intended to abandon arguments it had pleaded in its response (and, indeed, the contents of Ms Davies witness statement clearly suggest that the Respondent did not intend to abandon such arguments). We further note that what was identified at the preliminary hearing as the second 'legitimate aim' of the Respondent (that alternative roles were available) in fact makes no sense because that is not a 'legitimate aim', but a possible aspect of why it was proportionate to have the PCP.

16. We have therefore approached the case on the basis that the Respondent's argument on justification is as follows:

    a. The 'no beards' PCP is justified in pursuit of the legitimate aim of maintaining food hygiene; and/or
    b. The 'no beards' PCP is justified in pursuit of the legitimate aim of maintaining high standards of appearance; and/or
    c. The 'no beards' PCP is justified in pursuit of the legitimate aim of the Respondent complying with its clients' requirements.

The facts

17. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

18. The Claimant is a Sikh. He is a Sehajdhary, which means that he is an unbaptised Sikh, but he is a practising Sikh. He prays and meditates. He attends the temple (Gurdwara) weekly when at home. He participates in the practice of food sharing (Lungar). He adheres strictly to Kesh, which is the requirement that the hair of the body not be cut. He believes, in common with other Sikhs, that it is what you are born with and you do not cut it. Likewise, you only cut the dead part of your nails. Mr Singh referred us in this regard to *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), [2008] All ER (D) 376 (Jul) where the judgment records that the following expert evidence was given regarding Kesh:

> 24. … Guru Gobind Singh (the tenth Guru) is believed to have instructed his first initiates to adopt the "5 K's" in 1699. The 5 Ks are the outward signs required of a Sikh and these are Kesh (uncut hair), Kangha (comb), Kirpan (sword), Kachh (cotton breeches) and Kara (steel or iron bangle).
>
> 25. The 5 Ks are important as they are intended to distinguish Sikhs from both their Muslim and Hindu contemporaries. In their origin they are closely associated with armed combat and the Sikhs' history of struggle. When Sikhs learn about these martyrs of Sikh identity, they are told about the readiness of some Sikhs to lose their lives rather than to sacrifice their kesh, and this courage-to the point of martyrdom – is emphasised. Thus, the five Ks are regarded as demonstrating both loyalty to the Gurus' teaching and the bravery to be counted at times when even their lives are endangered by this visibility.

19. We bear in mind that this is not evidence that has been given to this Tribunal directly, but we have taken it into account by way of background to assist our understanding of the Claimant's beliefs. The Claimant in these proceedings said that it is because of Kesh that he has never cut his beard. Before us today, his beard appeared to be quite short, but he told us that this is because it is tied up, something which Sikhs can do. He wears a turban.

20. The Respondent is, as we have said, a specialist agency providing temporary staff for the hospitality industry, predominantly for 5 star hotels working within front of house food and beverage roles.

21. After making initial enquiries about employment with the Respondent on 13 November 2017, on 15 November 2017 the Claimant attended an induction/training session with the Respondent. At this induction/training the Respondent's policies on various matters were explained and pictures were shown of the dress/appearance standards required of those working for the

respondent. In common with other attendees at the event, the Claimant was asked to, and did, sign various documents at the end of the event.

22. This included the Respondent's standard Contract for Agency Workers. On its face, this document states that it is a contract for service but not of employment. It is, however, we find a 'contract of employment' within the meaning of s 83(2)(a) of the EqA 2010 because it is a 'contract personally to do work'.

23. It also included the Respondent's Code of Conduct (p 31). So far as relevant this provides:

> **Code of Conduct**
>
> The impression we create by our personal appearance and what we wear is a powerful visual language which communicates more about us in one glance than can be said in a thousand words. The following are our professional appearance standards and must be adhered to without exception.
>
> **Hair**
>
> Hair styles and colours must not be extreme or unusual and must present a professional business image.
> Male: Hair must be neatly trimmed so that sideburns are no lower than mid-ear and hair falls no lower than the top of the collar. No beards or goatees are allowed.
> Female: No elaborate styling and hair must be worn only in a bun style.

24. We note that the policy on its face is not concerned with hygiene. The first paragraph we have quoted makes clear that it is about appearance and impression created by personal appearance.

25. The Claimant told us that there were other people at the event with short beards. They were (he said) mainly "Aussies and Kiwis" and his understanding was that they did not have beards for religious reasons and would shave their beards before working for the Respondent, although he did not know anything about what happened to these others after the event.

26. At the end of the session everyone present was 'hired'. However, that meant only that they were placed on the Respondent's 'books', not that they were offered immediate employment. The Respondent does not guarantee any particular hours of work. If it takes someone onto its 'books' it opens a 'portal' for them so that they can put themselves forward for particular jobs. A 'portal' was opened for the Claimant at that session.

27. However, at the end of the session the Claimant explained to Ms Davies that he would not be able to shave his beard for religious reasons.

28. After the session at 16.07 Ms Davies emailed the Claimant to say that she would confirm with managers in the morning about his beard and get back in

touch with him. In her witness statement Ms Davies states that she spoke to Louisa MacLoughlan and Nenad Petrovic and that Nenad in turn contacted Grosvenor House, the Connaught and Claridges in order to double check given the claimant had cited "business reasons" (which we take to be a typographical error for "religious reasons"). However, there is no contemporaneous documentary evidence to support the assertion that these enquiries were made (although there is documentary evidence of other enquiries being made about other employees at other points in time). Mr Petrovic has not provided a witness statement and Ms Davies has not been cross-examined. In those circumstances, we do not accept that such enquiries were made at this point.

29. The next day (16 November), Ms Davies spoke to the Claimant on the phone and then sent a follow-up email saying that she would *"love to have enough shifts without food handling to make it worth your while to join us"*. She suggested an alternative agency who might be able to help the Claimant.

30. The Claimant responded the same day saying that he would love to do shifts without food handling.

31. Ms Davies replied saying that she thought the Claimant had misunderstood: *"It would not be worth your while to work with elements as there wouldn't be enough shifts to give you. As mentioned on the phone, as we are working with 5* Hotels the hotel managers unfortunately won't allow having facial hair due to health and safety/hygiene reasons. If we worked with Hotels at a lower star ratings facial hair wouldn't be as big of an issue. I know it's part of your religion, and we have tried to accommodate to allow you to get started with us but unfortunately no facial hair is a part of the 5* standards as even if you thought minimal hours were fine and were working in another area you may be pulled to the food area etc and that just wouldn't work".* She concluded: *"But please do let us know if there is anything that we can do to help."*

32. In its ET3 response (para 9), the Respondent stated that it had *"advised the claimant that they were happy to retain him for any future work but this would be limited"*. This does not accord with the emails that we have seen, the last of which we find clearly imports that the Respondent would not keep the Claimant on the books. Our reading of this email accords with the evidence in Ms Davies witness statement (para 12) where she says that *"it would not be worth his while continuing on the books with us as it would be extremely limited and he wouldn't get the hours he would wanted"*. We find that the Respondent did not offer alternatives to the Claimant, other than suggesting an alternative agency altogether in the emails we have quoted. In the circumstances this was, we find, a case of the Respondent 'not offering [the Claimant] employment' within s 39(1)(c) of the EqA 2010.

33. The Respondent put in evidence in the bundle of material from clients said to provide the justification for its policy as follows:

    a. Page 53 – Jumeirah email dated 15 September 2016 stating, so far as relevant, "Men - Must be clean shaven";

b. Page 57 – Attachment to Jumeirah email, document headed Male Uniformed Grooming Standards – stating, so far as relevant, "Hair must be Trimmed regularly in a short and neat style … Sideburns must be well trimmed and cut straight at the tip and should not exceed half of the ear … In food preparation areas hair must be covered with a chef's cap or hairnet … Our preference is for all colleagues to be clean shaven. Beards are not permitted unless you were employed with a beard, in which case you may keep it. Current beards must be trimmed and well groomed. Colleagues who grow stubble during the working day are requested to shave at break time, to remain clean shaven during working hours. … For Men without a beard, always shave before commencing duty, ideally on a daily basis";

c. Page 59 – email dated 21 Sep 18 from Jumeirah – in response to enquiry from the Respondent about deploying someone with a moustache – answer 'no';

d. Page 65 – Dorchester policy for Male Service Staff – "Face: Clean shaven, No moustaches and beards or facial hair allowed. No facial piercing.

e. Page 68 – email from Claridges dated 21 April 2018 – "Few boys I can see (only from pics) with long hair and facial hair. Please ensure none of that here at Claridge's (no pony tails, no facial hair)".

f. There are also client complaints as follows:

   i. Page 61 – email from Connaught dated 21 November 2017 complaining about someone being "not shaved" (among other things) and saying "I do not believe we are still having these issues after all these years. Please do not apologise. Just get it correct";
   ii. Page 62 – email from Connaught dated 1 December 2017 complaining about "grooming is terrible yesterday 2 boys not shaved girls incorrect tight etc? I cannot keep saying this?";
   iii. Page 63 – email from Connaught dated 28 April 2018 – had to send someone home as they had dyed hair not meeting grooming standards.

34. In Ms Davies' witness statement (para 7) she said that client requirements are *"entirely outside of our control – if we send such workers, they are sent home by the client and we will be instructed to either get them to shave (or otherwise change their appearance) or they will not be provided with any further shifts from the client"*. We accept in general terms that Ms Davies' assertion in this regard is borne out by the evidence in the bundle. However, the Respondent has not produced any evidence of their clients being asked about whether they would accept a Sikh working for them who could not shave for religious reasons. The possibility of clients making an exception to their policy for Sikhs for religious reasons had not, on the evidence before us, been explored by the Respondent.

35. In oral evidence, the Claimant told us that since being turned down by the Respondent, the Claimant has had a variety of jobs in the hospitality industry, including some time working at the 5* Savoy hotel through the agency 'At your service'. The Claimant told us that most of his shifts were in the cloakroom, or setting up for events, but that two or three shifts were front of house serving food and four or five shifts were serving drinks behind the bar.

36. The Claimant also told us that he had subsequently experienced a number of incidents where he had been refused work in the hospitality industry, or work in particular areas, because of his beard and/or turban and, on one occasion, because he 'looked like Osama bin Laden'. He said that he had not sought to bring legal proceedings about any of these other incidents because they all involved verbal exchanges. In this case, he had documentary evidence and so he brought this claim. In his statement he described how these experiences had affected him deeply and that he had brought these proceedings because he felt strongly that *"there should be equal rights for everyone"* and *"it has affected me and is affecting many others who probably can't raise their voices for whatever reason"*.

Conclusions

The law

37. By s 19(1) EqA 2010 a respondent discriminates against a claimant if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of the claimant's. By s 19(2) a PCP is discriminatory if: (a) the respondent applies, or would apply, it to persons with whom the claimant does not share the characteristic, (b) it puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with person with whom the claimant does not share it, and (c) it puts, or would put, the claimant at that disadvantage. It is a defence (under s 19(2)(d)) for the respondent to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

38. The burden of proof is on the claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. In an indirect discrimination case, this means that the claimant must prove the application of the PCP, the particular disadvantage in comparison to others and that the claimant was put at that disadvantage. The burden then passes to the respondent under s 136(3) to show that the treatment was justified.

39. Further guidance on the matters which the claimant has to prove was given by the Supreme Court in *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343. The Supreme Court held that the EqA 2010 s 19 did not require a claimant alleging indirect discrimination to prove the reason why a PCP put the affected group at a disadvantage. The causal link that must be established is between the PCP and the disadvantage. The proportion of those with the

protected characteristic who can comply with the PCP must be significantly smaller than the proportion of those without the protected characteristic. It does not matter, in this respect, that the PCP does not disadvantage all those who share the protected characteristic.

40. As to the question of justification, a respondent must normally produce cogent evidence of justification: see *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] IRLR 471. What needs to be justified is the rule itself (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704). The Tribunal must focus on the proportionality of having a rule at all, rather than the question of reasonableness of applying the rule to the particular claimant (*The City of Oxford Bus Services Limited t/a Oxford Bus Company v Mr L Harvey* UKEAT/0171/18/JOJ).

41. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 the Supreme Court (see Lord Reed at para 74, with whom the other members of the Court agreed on this issue: see Lord Sumption, para 20) reviewed the domestic and European case law and reformulated the justification test as follows: (1) whether the objective of the PCP (the alleged legitimate aim) is sufficiently important to justify the limitation of a protected right, (2) whether the PCP is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether the impact of the right's infringement is disproportionate to the likely benefit of the PCP. (We have adjusted the language used by the Supreme Court to fit with that used in the EqA 2010.)

42. In other cases, the question of whether a particular aim is legitimate has been expressed as being whether it 'corresponds to a real need' of the employer: see *Bilka-Kaufhau GmbH v Weber von Hartz* (case 170/84) [1984] IRLR 317. While a tribunal must take account of the reasonable needs of a respondent's business, it is for the tribunal to assess for itself both whether or not an aim is legitimate, and whether it is proportionate. It is not a 'range of reasonable responses' test: *Hardy and Hansons plc v Lax* [2005] IRLR 726, followed in *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334 at paragraphs 10-12.

43. In a case where the claimant contends they cannot comply with a PCP because of a matter connected with their religion or belief, section 3 of the HRA 1998 requires that the EqA 2010 is interpreted compatibly with the European Convention on Human Rights. In *Eweida v UK* (2013) 57 EHRR 8 the ECrtHR considered what is necessary for a professed manifestation of a religious belief to engage article 9 of the Convention. At para 82 the Court held:

> 82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection

> of art.9(1). In order to count as a "manifestation" within the meaning of art.9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.

44. The Court went on to give guidance as to the relevance in this context of the fact that a claimant could seek alternative employment where his or her religious belief could be freely manifested:

> 83. It is true, as the Government points out and as Lord Bingham observed in the *R. (Begum) v Denbigh High School Governors* case, that there is case law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under art.9(1) and the limitation does not therefore require to be justified under art.9(2) . … More relevantly, in cases involving restrictions placed by employers on an employee's ability to observe religious practice, the Commission held in several decisions that the possibility of resigning from the job and changing employment meant that there was no interference with the employee's religious freedom. However, the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under art.8 ; the right to freedom of expression under art.10 ; or the negative right not to join a trade union, under art.11 . Given the importance in a democratic society of freedom of religion, the Court considers that, 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.

45. In *Eweida*, the ECrtHR found that British Airways' policy on not wearing religious symbols (a crucifix necklace) at work was unlawful. The ECrtHR accepted that the employer's wish to project a certain corporate image was a legitimate aim. However, the ECrtHR held (para 94) that the domestic courts had accorded it too much weight because *"the crucifix was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic*

jewellery demonstrates that the earlier prohibition was not of crucial importance".

46. In the linked case of *Chaplin*, however, the ECrtHR accepted that the domestic court's conclusion that a policy of not permitting the wearing of jewellery (again a crucifix) on a hospital ward was justified by clinical safety requirements was within the margin of appreciation open to the domestic authorities.

47. We have also been referred by Mr Singh to a number of cases involving Sikhs. These include *Singh v Rowntree MacKintosh* [1979] ICR 554 where the Scottish EAT held that a tribunal had not erred in law in finding that a no beard policy enforced in the interests of hygiene was justified. In that case, there was expert evidence as to the hygiene implications. The possibility of dealing with the hygiene threat by wearing a beard net does not appear to have been canvassed. Possibly, beard nets were not generally available in 1979. The EAT did, however, emphasise that a 'no beards' policy based on convenience would not have been justified. *Panesar v Nestle Co Limited* [1980] IRLR 64 (EAT) and [1980] IRLR 64 (CA) was a very similar case upheld on essentially the same basis. In *R (Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin), [2008] 3 FCR 203 the High Court concluded that a school's 'no jewellery' policy was unlawful in not making exception for Sikh pupils who wished to wear a Kara bangle as a manifestation of their religious belief. The High Court placed particular reliance in that case on the fact that the Kara bangle was relatively discreet in contrast to items of uniform that had been held in other cases to have been lawfully prohibited (niqab in *R (X) v Headteacher and Governors of Y School* [2007] EWHC 298 (Admin) and jihab in *R (Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100).

Conclusions

48. We find that the Respondent's Dress Code Policy, specifically the "no beards" requirement, is a PCP within the statutory definition.

49. The policy has been applied equally to all agency workers, as there is no dispute that all those present at the training session were required to sign up to it and the Respondent's position is that this is a policy that applies to everybody.

50. It places Sikhs generally, and it placed the Claimant himself, at a particular disadvantage because it is a fundamental tenet of the Sikh faith, to which the Claimant adheres, for a male to have an uncut beard and therefore we accept that a significantly greater proportion of Sikhs will not be able to comply with the PCP than will persons who do not have that characteristic. For the avoidance of doubt, we find that the Claimant's manifestation of his religious belief through Kesh plainly meets the threshold of engaging his rights under Article 9 of the ECHR.

51. In the circumstances of this case, we do not consider it is necessary as a matter of law for the Claimant to adduce evidence of the numbers or proportions of Sikhs seeking employment with the Respondent to establish 'group disadvantage' or 'disparate impact'. However, lest we are wrong on that, we add that we have not received evidence about the characteristics of persons who seek employment with the Respondent generally, or the make-up of its workforce, but the Claimant gave evidence that all those on the training session with him on 15 November 2017 were not Sikh and thus there is evidence before us that, at least on that occasion, the Claimant as a Sikh was in a clear minority in not being able to comply with the PCP because of his religion.

52. In the light of the issues as we have identified them to be, we have considered first whether the PCP is justified by a legitimate aim related to the maintenance of appropriate hygiene standards. We find that in principle maintenance of appropriate hygiene is a legitimate aim. However, the Respondent's policy is not rationally connected to that aim. The policy is explicitly addressed to personal appearance rather than hygiene. It is clear on the evidence that in some 5* and other 4* (and lower) establishments a 'no beard' policy is not enforced. If it were a hygiene issue, we would expect the evidence to indicate that it is more or less universally adopted. Even if there were a genuine hygiene reason, one would expect that to be adequately addressed by wearing a net. It is not suggested by the Respondent (or any of the evidence from clients) that this is a solution. It is plain that the 'no beards' requirement, both as articulated by the Respondent and as it appears from the client documentation, is an appearance issue not a hygiene issue (save where a worker is to be directly involved in food preparation, which was not work which the Claimant sought).

53. We have then considered whether the PCP is justified by appearance requirements. We again accept that it is in principle a legitimate aim that staff working in the hospitality industry, in particular in 5* hotels, should have high standards of personal appearance. That is borne out by the detailed appearance codes of the Respondent in this case, and those of the clients, covering a multitude of matters to do with personal appearance, in addition to beards. We accept that there is a rational connection between that aim and a policy on facial hair in general terms. There is, however, a significant element of subjectivity as to what constitutes a smart appearance, in particular insofar as concerns facial hair. In another age, beards and/or moustaches might have been considered almost compulsory. We have heard no evidence as to why 5* hotels consider that beards are not smart, but we are prepared to accept nonetheless that is a legitimate opinion and that therefore there is the necessary rational connection between a 'no beards' policy and the legitimate aim of maintaining high standards of appearance.

54. However, the key question here in our judgment is whether a less strict approach to facial hair could nonetheless have achieved that aim, given the degree of intrusion that it presents for a Sikh like the Claimant who cannot, for religious reasons, shave his face. The impact of the policy in this case is that the Claimant could not take up employment with the Respondent. We accept that there may be other opportunities within the hospitality industry open to

Sikhs, such as within 4* hotels as the Respondent suggested. However, the 'no beards' policy in some form appears on the evidence before us to be widely adopted in the industry in particular in 5* hotels, so it appears in practice that the Claimant was unlikely to have alternative equivalent employment open to him in quality establishments and that the work he did find at the Savoy was perhaps exceptional.

55. In any event, having regard to the guidance in *Eweida*, the availability of other employment is only one factor to take into account and we do not consider that it is an answer to the Claimant's claim in this case because we consider the PCP in any event to be disproportionate because the legitimate aim can be met by less intrusive means. We consider that the legitimate aim of maintaining high standards of appearance can be met by requiring a Sikh such as the Claimant to maintain their beard in a tidy fashion, in much the same way as the policy currently requires those with sideburns to keep them tidy and within certain bounds. Given the importance to Sikhs such as the Claimant of not cutting their facial hair, a 'no beards' policy is likely to amount in practice to a 'no Sikhs policy'. (Indeed, it is possible that, following the Supreme Court judgment in *Hall v Bull* [2013] UKSC 73, [2013] 1 WLR 3741 that a case such as this should be analysed as a case of direct discrimination, but that is not how the case has been put to us, and it may well be that there is not such a close link between having a beard and being a Sikh as there was at the time of *Hall v Bull* between marriage/civil partnership and sexual orientation.) In any event, we find the application of a 'no beards' policy in this case to be disproportionate. The very significant impact on the Claimant (and Sikhs generally) of not being able to take up employment with the Respondent is not justified by the legitimate aim of maintaining high standards of appearance.

56. It follows that were this a case in which the Respondent was itself a hotel or other organisation directly employing hospitality staff that the application of a 'no beards' policy to the Claimant would not be justified by reference to either hygiene or appearance reasons. However, that is not quite this case. In this case, the Respondent is an employment agency. Its business is supplying workers to hotels and other third parties. It depends on clients for its livelihood. The primary case we understand it to advance in these proceedings is that the 'no beards' policy is a requirement of its clients. We have therefore considered whether or not a legitimate aim of servicing its clients' requirements (even if those are unlawfully discriminatory) justifies it having a 'no beards' policy and applying it to the claimant.

57. We accept in general terms that it is a legitimate aim for the Respondent to seek to comply with client requirements. The evidence from the Respondent's clients in the bundle shows that clients are in general terms very strict about dress and appearance codes and complain and/or refuse to accept workers when the respondent supplies workers who do not meet those requirements. We do not consider that the fact that we have, on the evidence before us in these proceedings, concluded that a hotel or other organisation could not justify having those requirements by reference to the legitimate aims of hygiene or personal appearance necessarily means that the Respondent's aim of complying with the clients' requirements is not legitimate. While an aim that

is itself discriminatory cannot be legitimate (see eg *Orphanos v Queen Mary College* [1985] AC 761), we do not consider that a policy of complying with client requirements of this type is 'inextricably linked' to the prohibited ground of discrimination so as invalidate the Respondent's otherwise legitimate aim of complying with client requirements. This is because, first, it is just possible that a particular client *may* in their particular circumstances be able to establish a justification defence, and, second, because we find that the Respondent can in practice break the potentially discriminatory 'link' by ensuring that, notwithstanding the clients' policies, it puts workers forward to clients on a non-discriminatory basis and makes reasonable efforts to seek exceptions to the 'no beards' policies from clients for individuals like the Claimant who cannot shave for religious reasons. We therefore accept that the Respondent's policy of complying with client requirements constitutes a legitimate aim notwithstanding that we in this case have found those requirements constitute unlawful discrimination.

58. We further accept that in general terms there is a rational connection between the Respondent's 'no beards' policy and the legitimate aim of complying with client requirements, given that it appears most of the Respondent's clients have a 'no beards' policy. However, we are not satisfied that the aim of complying with client's requirements justifies having a 'no beards' policy that admits of no exceptions for those such as the Claimant who cannot shave for religious reasons.

59. This is because, first, it is apparent from the material supplied by the Respondent that not all the Respondent's clients have a strict 'no beards' policy. Jumeirah, as we have noted, permits beards if an individual had a beard when they were employed. Although Jumeirah's policy states that beards *"must be trimmed and well groomed"*, from what we have seen of the Claimant today if he tied his beard up it would appear to be trimmed and well groomed and we see no reason therefore why Jumeirah would refuse to accept him on the basis of its own policy. It follows that the Claimant could have been offered work with at least one of the Respondent's clients.

60. Secondly, the Respondent has produced no evidence that any client was asked whether they would make an exception for a Sikh such as the Claimant, let alone provided with an explanation as to why they should do so. We do not accept that it follows from the fact that clients complain about breaches of the dress/appearance code generally that they would not make an exception for a Sikh. As we have noted, a 'no beards' policy is likely to amount in practice to a 'no Sikhs' policy. We are not prepared to assume that all or even a significant proportion of the Respondent's clients would maintain such a policy if asked to make an exception for Sikhs. The burden of proof is on the Respondent in this respect and we find that the Respondent has not shown that its clients would not have accepted the Claimant had the Respondent put him forward to a client with an appropriate explanation about the requirements of his religion. As such, we find that having a 'no beards' policy without exception is not itself rationally connected to client requirements because there is no evidence of what client requirements would be when faced with a Sikh worker. Further, we find that it was disproportionate to refuse to accept the Claimant onto the Respondent's

books at all because of this legitimate aim, because the legitimate aim of meeting client requirements can be met on a case-by-case basis by taking the Claimant onto the books and addressing client requirements on a case-by-case basis thereafter by seeking exceptions for Sikhs together with an explanation that they are unable to shave for religious reasons.

Overall conclusion on liability

61. The unanimous judgment of the Tribunal is therefore that the Respondent indirectly discriminated against the claimant contrary to ss 19 and 39(1)(c) of the EqA 2010.

REMEDY

62. The Claimant gave evidence as to remedy.

63. The evidence (p 52) is that the Respondent's published hourly rates are "£9ph + holiday pay", although higher rates are available. The Claimant was expecting £9-£10 per hour. He was available to work immediately after 17 November 2017, but there is no evidence before us as to what work would have been available from the Respondent. The Claimant says he anticipated working for 6 months with the Respondent.

64. Between 23 November 2017 and 2 January 2018 the Claimant worked for At Your Service. The rate of pay was, the Claimant said, about £7 per hour. In total with that employer, the payslips show the Claimant earned £1,777.73 (gross) with At Your Service. He gave up that employment because he was not earning enough. He went to Scotland, where he worked 20 hours per week as a volunteer in a hostel in return for lodgings. After that, he travelled, visiting Ireland, Italy, Germany and the Netherlands before returning to New Zealand in August 2018.

65. Pursuant to s 124 of the EqA 2010 the Tribunal must first consider in an indirect discrimination claim whether or not the indirect discrimination was intentional. Without having heard from the Respondent, we are not prepared to make a finding as to whether or not the discrimination was intentional. We therefore assume that it was not. As such, we can only make an award of compensation under s 124(4) if we first consider whether or not to make a declaration or a recommendation. In this case, we find that the judgment itself will stand as a declaration in effect of our findings and that a declaration would serve no additional purpose. At the hearing we indicated that we considered that a recommendation would be appropriate that in every case where a Sikh with a beard seeks employment with the Respondent, the Respondent should (providing that the individual is otherwise suitable for employment) take that

individual onto their books and should explain to each client to whom that individual is put forward for employment that their religious beliefs require them to have a beard and should ask each client to make an exception to any 'no beard' policy that they have to accommodate that religious requirement. However, we had forgotten that under s 124(3) a recommendation must be one that obviates or reduces the adverse effect on the Claimant of any matter to which the proceedings relate. Since the Claimant lives in New Zealand and does not intend to seek work with the Respondent again, we cannot make the recommendation we proposed.

66. In the premises, we consider it appropriate to award compensation to the Claimant for the losses that he has suffered consequent upon the tortious act of the Respondent.

67. We accept that the Claimant suffered some loss of earnings as a result of the Respondent's discriminatory decision not to take him onto its books. However, it is very difficult to assess what that loss is. Doing the best we can, we find on balance of probabilities that the Claimant would have worked for the Respondent for about the same time and number of hours that he worked for At Your Service. In the absence of evidence as to what work would actually have been available at the Respondent we are not prepared to assume that he would have got more work or would have stayed for longer. The Claimant's main purpose in coming to Europe, we find, was to travel, earning money where he could to support that. In the event, he was able to continue travelling for six or seven months without earning any money. We do not, therefore, accept that he would have stayed with the Respondent, even at the better rate of pay, for six months.

68. We find therefore that his loss of earnings is to be calculated by assessing, first, the difference in pay that he would have received if he had done the same amount of work for the Respondent as he did for At Your Service. We find this to be approximately £725 over the period in question. We arrive at that figure by dividing the Claimant's gross pay less NI, i.e. £1,692 by 7 and multiplying by 3 to represent the additional £3 per hour in expected pay rates at the Respondent.)

69. There was in addition one week between 17 November 2017 when the Claimant was not taken on by the Respondent and 23 November 2017 when he started work with At Your Service. The Claimant put that loss as being two weeks' loss amounting to £1,000. It was in fact just one week. Applying the same rate as we have applied to the loss between 23 November 2017 and 2 January 2018 (i.e. (£1,777.73 + £762)/5) gives a weekly rate of £483.

70. The Claimant in his Schedule of Loss also included a claim for compensation for travel and accommodation for hearings, but Mr Singh acknowledged at the hearing that these costs could not be recovered by way of compensation for discrimination.

71. We therefore find the Claimant's financial loss to be £1,208.

72. We make that award gross because the Claimant's earnings were well below the personal allowance limit of £11,500 for the tax year in question.

73. Pursuant to the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, reg 4* (the 1996 Regulations), we award interest on that sum from the mid-point between 15 November 2017 (when the act of discrimination occurred) and 13 November 2019 (the date of our award), i.e. from 14 November 2018, giving interest of £96.36.

74. So far as injury to feelings is concerned, the Presidential Guidance indicates that, in respect of claims presented on or after 11 September 2017 (but before 6 April 2018), the Vento bands are as follows:
    a. a lower band of £800 to £8,400 (for less serious cases);
    b. middle band of £8,400 to £25,200 (for cases that do not merit an award in the upper band); and
    c. an upper band of £25,200 to £42,000 (for the most serious cases), with the most exceptional cases capable of exceeding £42,000.

75. In our judgment this is a case that merits an award in the lower band. It was a one-off incident that occurred after very little contact between the Claimant and the Respondent. We accept the Claimant's evidence that his feelings were hurt by the way the Respondent treated him. We consider that his commitment to these proceedings, including flying from New Zealand for hearings, demonstrates to some extent the degree of hurt that he felt at the way he was treated. We also accept that the way the Respondent dealt with it, in particular the reference in Ms Davies' emails to *"no facial hair [being] part of the 5* standards"*, thus implying that bearded people such as the Claimant were only suitable to work in lower quality establishments, reasonably contributed to the injury to feelings. However, we take into account that the Claimant on his own evidence suffered a number of further apparently discriminatory incidents after his involvement with the Respondent not only the Osama bin Laden remark we have mentioned in our liability judgment, but also being told by someone else that an employer only liked to employ European people. We find that these subsequent incidents made a significant contribution to the Claimant's hurt feelings as described in his witness statement. However, those subsequent incidents are not the responsibility of the Respondent and we do not reflect them in the award that we make in recognition of his injured feelings. Taking all those matters into account, we put that award at £5,000.

76. We award interest on that sum pursuant to reg 6(1)(a) of the 1996 Regulations, i.e. in the sum of £797.81.

77. The Claimant also invited us to vary the standard time for compliance with the judgment under rule 66 to 7 days in light of the Respondent's non-appearance at this hearing and concerns that the Claimant expressed about the likelihood of successfully enforcing against the Respondent. Given that the Respondent is not present at this hearing, and therefore will not have notice of this judgment until it is sent out, we do not consider it appropriate to shorten the time for compliance. Indeed, we consider that it is appropriate to order that time for compliance is extended to 14 days from the date on which this judgment is

sent to the parties as the Respondent will not have notice of it until that time and should have a reasonable opportunity to consider its contents.

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Employment Judge Stout

Date 19 November 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

20 November 2019

FOR THE TRIBUNAL OFFICE