Case No:2702689/06

EMPLOYMENT TRIBUNALS

AT: READING

BETWEEN:

Claimant	and	Respondent
Miss N Eweida		British Airways plc
Represented by:		Represented by:
Mr P Diamond, Counsel		Ms I Simler, QC

On: November 12 (in chambers) 13,14,15,16,19,22 and 23 (in chambers)
December 19 (in chambers) 2007

Employment Judge Lewis

Members: Ms P A Breslin
Mrs E Grugeon

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant's complaints of unlawful discrimination on grounds of religion, whether of direct discrimination, indirect discrimination or discrimination by harassment, fail and are dismissed.

2. The claimant's complaint that the respondent made an unlawful deduction from the remuneration due to her fails and is dismissed.

REASONS

Introduction

1. The structure of this Judgment is that we deal with general matters, then background issues, and with the issues thematically rather than in strict chronology. We have confined our Judgment to the matters which assisted us. Where we make no finding or comment on a matter which was argued before us, it is because we did not rely on that matter in reaching our conclusions.

2. By a claim form presented on 15 December 2006 the claimant complained of discrimination on grounds of religion. The proceedings were the subject of a case management discussion on 1 May 2007 and a pre-hearing review on 28 June. The issues were crystallised in Amended Particulars and a schedule of loss of 22 May 2007 (R1, 25-37) and Amended Grounds of Resistance of 12 June (R1, 38-49). The representatives agreed a list of issues (R1, 50-55).

3. We summarise the matter as follows.

   3.1 The claimant, who is a devout practising Christian, has worked part-time as a member of check in staff for the respondent since 1999. As her job is customer facing, she is required to wear uniform. As the respondent operates a 24 hour operation throughout the year, she is required to work in a shift pattern. The claimant complained of a number of incidents between 2003 and 2006 which she said showed anti-Christian bias on the part of the respondent.

   3.2 Until 2004 the claimant's uniform included a high necked blouse, and she wore a silver cross on a necklace underneath the blouse when she wished to. Starting in 2004, the respondent introduced a newly designed uniform, which we call the McDonald uniform, which included provision for an open neck, but which prohibited the wearing of any visible item of adornment around the neck. Between 20 May and 20 September 2006 the claimant came to work on at least three occasions with the cross visible under her uniform. When on 20 September she refused to conceal the cross, she was sent home.

   3.3. The claimant remained at home, unpaid, from 20 September until the following February. She initiated and pursued the respondent's grievance procedures. A storm of media attention, much of it

hostile to the respondent, led the respondent to re-consider its uniform policy and to introduce an amended policy on 1 February 2007. The amended policy permitted staff to display a faith or charity symbol with the uniform. The claimant returned to work on 3 February 2007 and is still employed by the respondent.

3.4. Within this framework, the claimant complained under the Employment Equality (Religion or Belief) Regulations 2003 ('the Regulations') of discrimination, indirect discrimination and of discrimination by harassment.

Procedure at the hearing

4. We wish to record a number of aspects of the hearing:

4.1. The first day of hearing was taken up with reading core documents and opening submissions in the absence of the parties.

4.2. The tribunal heard a total of 15 witnesses. There were written statements from all except Mr. Cunningham. The statements of all witnesses were read aloud in full except (with agreement of counsel) those of Mr Otterway, Ms Hawkes, Mr Marshall and Ms Girling, whose statements were read as evidence in chief in their absence. All witnesses were available for cross examination.

4.3. The tribunal had an agreed bundle, R1, in excess of 1,200 pages. Two additional documents made available were EG901, the respondent's disciplinary procedure (R2); and the respondent's August 2007 Uniform Wearer Standards booklet, R3.

4.4. The tribunal received written opening and closing submissions and agreed that counsel should each make an oral opening as well as full closing submissions. Each counsel submitted a substantial bundle of authorities.

4.5. At the start of hearing, and on the initiative of the Tribunal, Mr Diamond was invited to apply to amend the proceedings so as to introduce a claim of unlawful deductions. It was clear from the claimant's grievance of 25 October (R1, 737) that she had submitted a grievance to this effect, and clear from paragraph 10.1 of her claim form (R1, 7) that she complained of not having been paid during what she considered a period of suspension. Ms Simler very properly conceded that as she had understood the claim to include a complaint that the failure to pay the claimant during her

period of absence was an act of discrimination, the respondent understood that non-payment would be an issue and had prepared evidence in reply. Although no formal application to amend had been made by Mr Diamond, until invited to do so, it seemed to us that what was proposed was no more than a re-labelling of the factual matrix which was before the tribunal for consideration, and that the interests of justice required the amendment to be permitted.

4.6. We record that on the morning of 15 November and for a period of about 15 minutes the tribunal exercised its power under rule 16(1)(b) to sit in private. A member of the press was excluded. This arose from Mr Diamond putting to Mr Allen in cross examination specific questions about a named individual employee, which Mr Allen could only answer from knowledge of the individual's grievance and disciplinary proceedings. There had been no prior notice of this line of questioning. It seemed to us right that this evidence should not be given in public.

4.7. On the afternoon of the same day, the tribunal agreed to Ms Simler's application to call Mr Andrew Cunningham as a witness, without a statement being available from him. He was called to refute an allegation made for the first time in Mr Diamond's cross examination of Mr Marriott. We deal with this below. We record that although this was an unusual course to take, we were in no doubt that the exceptional gravity of the allegation rendered the interests of justice entirely on the side of the witness being called.

4.8. We permitted Ms Simler to recall Mr Stonebanks, in order to deal with the allegation (mentioned below) in relation to Ms Galvin.

4.9. Although it was made clear at the June pre-hearing review that this hearing would deal with remedy as well as liability issues, the claimant had not submitted any evidence on remedy, nor had she complied with the order for disclosure on remedy made then. These were potentially serious failings.

4.10. The witnesses from whom we heard were the following, of whom all save the first two were witnesses for the respondent.

- The claimant, Miss Nadia Eweida;

- Mr John Browne, Senior Sales Agent, retired in May 2004;
- Mr Steve Allen, Senior Manager, Passenger Services;
- Ms Pauline Naish, Duty Manager;
- Mr David Stonebanks, Duty Manager;
- Mr Paul Marriott, Service Support Analyst, called in his capacity as member of the leadership team of British Airways Christian Fellowship;
- Mr Andrew Cunningham, Manager Economic Regulation, called in the same capacity as Mr Marriott;
- Mr Steve Otterway, Senior Manager Heathrow Services;
- Ms Ruth Hawkes, Customer Services Manager;
- Mr David Marshall, Customer Service Duty Manager;
- Ms Alison Dalton, Diversity Manager;
- Ms Caroline Girling, Customer Service Manager;
- Mr David Crawford, Uniforms Procurement Manager;
- Ms Sara Dunham, then Senior Manager for Brand and Customer Proposition;
- Mr Mark Gardiner, General Manager, World Cargo.

Framework

5. We mention specific matters which set the framework for this judgement.

5.1. Although jurisdictional issues were mentioned, slightly in passing, by Ms Simler (and not at all by Mr Diamond) both parties wished the tribunal to hear evidence about the entire sequence of events since early 2003, as setting the general background to the matters before us for adjudication. These included matters of corporate policy (such as in-flight entertainment); or matters where the claimant wished to argue that by showing support to a non Christian faith, the respondent was denigrating the Christian faith. They included matters which occurred before the coming into force of the Regulations, as well as events which were never the subject of a grievance, were out of time, and of which

there was no evidence upon which we were invited to extend time.

5.2. We have heard evidence about such matters because we accept in principle that they could form part of a relevant background.

5.3. In doing so we remind ourselves that we can adjudicate only on the specific issues raised by the claimant in her two statutory grievances, the letters of 13 June and 25 October 2006 (R1, 604, 737), namely that she was not allowed to display the cross at work, and that she was not paid for the period between 20 September 2006 and 3 February 2007.

5.4. We reminded the parties, and we repeat, that we are an Employment Tribunal, not a tribunal of faith. Witnesses referred on a number of occasions to matters of Christian scripture or to the Qur'an. We were not invited to consider any religious text, and we would not have agreed to do so. It is not our role to adjudicate on matters of religious doctrine or personal faith.

5.5. If it was the intention of either party to invite the tribunal to express a value judgement on a religious belief or practice, we have declined to do so. Our role is only to decide how a factual matrix is to be considered in the framework of the Regulations.

5.6. With those constraints in mind, we heard evidence from witnesses on both sides about matters of sincere religious conviction. We listened to the witnesses with the utmost respect for their professions of personal faith.

5.7. Reference was made to the practices of at least five major faiths: Christianity, Hinduism, Islam, Judaism and Sikhism. No expert evidence was given about any religious matter. No personal evidence was given by an adherent of any faith other than Christianity. Evidence about the non Christian faiths focussed on the parties' understanding of the requirements of each such faith.

5.8. The case was conducted on the common ground that the item worn by the claimant between May and September 2006, and which was at the heart of this case, was a plain silver cross (not a crucifix) of no greater size in the vertical than one to two inches. It was common ground that the claimant wished to wear the cross visibly as a matter of

personal expression of faith, and not in response to a scriptural command.

5.9. Both in opening and in closing, Mr Diamond referred to a general range of issues affecting the relationship between religion and society. We comment briefly upon three examples in particular.

5.9.1. Mr Diamond asserted that the United Kingdom is formally an Anglican Christian state because the Head of State is also Head of the established Church of England. Any constitutional issues which arise from this assertion are for others to determine. If it is suggested that in consequence Christians have a privileged status under the Regulations when compared with adherents of other faiths, we disagree. We proceed on the basis that the Regulations embody the principles of equality of status and respect for all faiths.

5.9.2. Mr Diamond and the claimant both referred to traditional British cultural norms. In closing, Mr Diamond appeared to contrast these with the norms of faiths such as Islam and Hinduism, which arrived in the United Kingdom long after the establishment of Christianity. We do not dispute, but are not at all assisted by, the proposition that the claimant presented at all times in accordance with social norms. We repeat our comment in the previous sub paragraph as to the relationship between different faiths.

5.9.3. Mr Diamond referred to the increasing secularity of society; if his intention was simply to caution us to treat these Regulations with the same respect as all other elements of anti-discrimination law, then we agree that that is indeed the correct approach.

6. We turn now to findings of fact. We consider it most useful to set out background findings on a number of aspects of this matter, before turning to specific events.

The claimant

7. We preface our findings with our general observations of the claimant. We do not do so in any gratuitous sense, but in order to set the scene for our findings. The claimant gave evidence from 11.00 a.m. on 13 November until 1.05 p.m. on 14 November. She was then present throughout the hearing, participating actively in the presentation of her case. Many of the documents which we read were written by, to, or about her. We find:-

   7.1. The claimant, who was born in 1951, is of Anglo-Egyptian heritage, and lived in Egypt until the age of 18. She speaks fluent English, and we were confident that there were no linguistic issues in any misunderstandings which she experienced. She joined the employment of the respondent in 1999. We accept that she is loyal, conscientious, and enjoys her work.

   7.2. The claimant was at all material times contracted to work on a shift basis, working on a 24 hour / 365 day operation (R1, 501). She has always worked part time, albeit on different shifts. She has always worked in a customer facing role, and always in uniform.

   7.3. A profound and sincere commitment to her Christian faith is, and always has been, central to the claimant's way of life.

   7.4. A recurrent theme in this case was the potential conflict between the claimant's religious commitment, and, in the most general words, the needs or opinions of others (whether individuals or the respondent). When such conflicts occurred, we found the claimant generally to lack empathy for the perspective of others. Although sharply critical of the respondent's managers, she displayed little understanding of the complexity of aspects of management, and almost no understanding of the extent to which management must fairly balance different interests and rights in order to function successfully. Her own overwhelming commitment to faith led her at times to be both naive and uncompromising in her dealings with those who did not share her faith. At times she misinterpreted the respondent's and colleagues' use of plain language. We will illustrate these observations in our findings of fact.

Aspects of British Airways

8. We heard a substantial volume of evidence about the respondent's operations. We were assisted by the following material findings:

8.1. The company is the United Kingdom national carrier airline, working across the world;

8.2. It is an operation of huge complexity, working 24 hours a day, every day of the year;

8.3. It operates in a competitive commercial environment, and with a high media profile;

8.4. It employs about 50,000 people, of whom about two thirds are required to wear uniform while carrying out their duty;

8.5. The respondent attaches significant importance to the establishment and maintenance of a visible brand, (which includes the uniform) recognisable through high standards of presentation, and identical throughout the world;

8.6. It has many detailed rules and policies applying to all aspects of its employment, reflecting the scale and complexity of its operations. In consultation with recognised trade unions, and other special interest groups, internally and externally, it keeps its policies under review, and makes use of techniques such as the intranet for consultation and exchange of information;

8.7. As an organisation operating worldwide, with headquarters on the Western edge of London, the respondent has an expectation that its workforce will reflect the diversity of modern Britain. It has a commitment to policies and practices which represent the values of equality, diversity and inclusion;

8.8. One aspect of these practices is that the respondent has given generously in time and facilities to employees who have established faith groups. These include the Christian Fellowship.

The British Airways uniform

9.

9.1. We accept that the respondent considers maintenance of the uniform to be central to its corporate mission. We accept in full the evidence of Ms Dunham in saying:

> "Uniform plays a vital part in defining the experience customers have... [It] serves an important practical, business and commercial purpose ... It enables us to maintain a uniform, professional and consistent front line image which is seen by all our customers, wherever in the world they encounter BA ... staff. The uniform represents and strengthens the BA brand by giving customers a sense of professionalism, high quality service, reassurance and safety ... [T]he very smart formal image projected by uniformed pilots provides reassurance and confidence to airline passengers ... [O]ur check in staff and cabin crew are effectively the face of the airline."

9.2. Compliance with uniform standards and rules is a requirement of the respondent's contract of employment (R1, 504). Mr Diamond cross examined a number of management witnesses to the effect that the respondent was in reality lackadaisical about uniform standards. We could see no evidential basis for those questions, and we find that the opposite was the case.

9.3. Individual staff, including the claimant, overwhelmingly share a sense of pride in the uniform concept and the standards which it represents.

9.4. The respondent has for many years maintained a Uniform Committee. It is chaired by Mr Crawford, and has eleven other members, drawn from different areas of the respondent's operation. Ms Dunham and Ms Hawkes were members. In Mr Crawford's words, the Committee's broad remit is "to provide a consistent, managed approach to decision taking and communication in respect of uniform issues".

9.5. Before 2004, the uniform which the claimant was required to wear included a high necked blouse. She was free to wear a cross on a chain under the blouse. In her word, she did so 'intermittently.' No issue was before us relating to that uniform. The remainder of this Judgment deals solely with the McDonald uniform worn after 2004, and before the amendment of 1 February 2007.

9.6. In 2004 the respondent began to roll out use of the newly designed McDonald uniform. This was supported by a wearer guide (R1,

203-237) which in meticulous detail gave detailed rules about every aspect of the uniform, and any related item of individual appearance. We accept that the booklet containing the wearer guide was distributed to new appointees on induction, and that it was promulgated and made available to all staff on the intranet. It was not disputed that the claimant was familiar with its contents. One significant distinction from the pre McDonald uniform was that it permitted an open neck blouse, to be worn with a BA cravat and toggle. If the cravat were tucked into the blouse, any item worn round the neck would be rendered invisible; if the cravat were worn externally with toggle, then a necklace would be visible (R1, 211).

9.7. The booklet dealt (R1, 214-219) with "Female Accessories" a term embracing among others hosiery, footwear, umbrellas and luggage. It was immensely detailed.

9.8. The passage to which we were referred most was the following:

> "Any accessory or clothing item that the employee is required to have for mandatory religious reasons should at all times be covered up by the uniform. If however this is impossible to do given the nature of the item and the way it is to be worn, then approval is required through local management as to the suitability of the design to ensure compliance with the uniform standards, unless such approval is already contained in the uniform guidelines ... *NB No other items are acceptable to be worn with the uniform. You will be required to remove any item of jewellery that does not conform to the above regulations"* (R1, 219, italics in original). The male accessory section contained the same wording (R1, 231) as well as the following: "When the wearing of a turban has been agreed it must be plain white or plain dark navy blue". (R1, 232).

9.8.1. There was no other express reference in the booklet to religious symbols. It was therefore understood by the respondent and its employees that an item such as a Christian cross or a star of David would be treated, for the purposes of the policy, in the same way as the general category of "jewellery". As appears below, we consider this usage significant only in the context of the claim of indirect discrimination.

9.8.2. The claimant read the policy as categorising the Christian cross as an item of jewellery. Mr Diamond submitted that that categorisation was evidence of a

corporate policy which belittled Christianity. While we accept that the claimant was genuinely offended by a categorisation which she felt trivialised the central image of her faith, we find that the passage in question was no more than an administrative classification, and that there was no evidence to support Mr Diamond's submission.

9.9. The uniform policies were, we find, policed on a daily basis by operational management, allowing for the range of human variation of standards and human error. We find that Duty Managers (such as Mr Stonebanks, Mr Marshall, and Ms Naish) were required to check the appearance of uniformed staff arriving for duty, and that they did so in relation to all such staff at the start of each shift. The same procedure was also used to check access and security issues. This procedure applied to the claimant throughout her employment.

9.10. We accept the evidence of the managers that it occurred frequently that a member of staff might on arrival be found to be in breach of the uniform policy. We were given routine examples; an employee might have forgotten to remove an item of jewellery which he or she had worn the previous day on a day off; or might have come to work wearing brown shoes rather than black. We accept that on such occasions, the Duty Manager invariably instructed the employee to make good the matter on the spot (e.g. by removal of an earring). If this could not be done on the spot (we were quoted the example of an employee who arrived at work wearing the wrong blouse) the employee was sent home to change, and the time spent by the employee doing so was deducted from pay.

9.11. We accept the evidence of all managers who had had responsibility for this procedure that no employee before the claimant had ever persisted in a refusal to carry out an instruction given in accordance with the uniform policy .

9.12. The effect of the policy on religious items was the following:-

9.12.1. An employee could wear any item which he or she wished under the uniform, provided it was not visible. This would include any concealed religious item. Concealed religious items might include

a cross, a star, or a Sikh Kirpan (ceremonial dagger).

9.12.2. An employee who wished to wear a religious item visibly outside the uniform was permitted to do so if the item were 'mandatory;' and could not be concealed under the uniform; and was approved by management. Obvious examples were any form of headgear, such as the hijab, turban, or skull cap.

9.12.3. The word 'mandatory' in the policy was an unhappy usage and led to considerable but unnecessary discussion before us. We accept that when faced with an employee's request to wear a religious item, the respondent did not undertake its own theological analysis of what was mandatory, but relied primarily on accepting the employee's assurances as to his or her religious practice, and/or, if appropriate, on consulting its own relevant faith group or an external religious authority. This approach cannot be faulted in principle.

9.13. The respondent maintained the policy under review and amended it so as to take account of the dynamic requirements of its workforce. We were told, and we accept, that any application to modify the policy was considered on its merits, and might give rise to a range of considerations: a striking instance was that when first asked to authorise the wearing of the hijab by flight crew, the respondent undertook assessment of any risk posed by the need to put on a smoke hood in an emergency.

9.14. We accept that if invited to consider an amendment to the policy on religious grounds, the respondent generally saw the matter through the perspective of diversity, and sought to accommodate staff diversity where appropriate.

9.15. We find that other than the claimant every individual who requested accommodation of the policy observed

existing policy until a change was authorised. The claimant was the only employee who ever raised an issue under the McDonald policy and insisted on a departure from the McDonald policy while the matter was still under consideration.

Other faith items

10. We set out briefly our findings on how the respondent has dealt with other faith items. The claimant had in her claim form complained that, "I have not been permitted to wear my Christian cross; whilst other faiths (Sikhs, Hindu, Muslims) are permitted to manifest their faith in a very obvious fashion. Secular individuals can show private affiliations" (R1, 5). We note that the first and last assertions in this statement were wrong. Subsequently, Mr Diamond set out a list of eight religious items as comparators (R1, 52), not all of which the claimant adopted in her evidence. We here describe with how the respondent dealt with these items.

10.1. The claimant referred to three items from Sikhism: the turban, the bracelet, and the Kirpan. The turban was regarded as a mandatory religious. It was headgear which could not be concealed. It had always been permitted by the respondent. The McDonald policy stipulated that it could only be white or dark blue (R1, 232). The Kirpan was concealed at all times.

10.2. The bracelet was a mandatory item which could be concealed under shirt sleeves, and was concealed. When Sikh staff working in hot climates requested permission to wear short-sleeved shirts, which would inevitably reveal the bracelet, the matter was considered in accordance with the respondent's process for dealing with uniform issues. The outcome was that Sikh men were permitted to wear short sleeved shirts with the bracelet, so that the bracelet was visible, provided the bracelet was not conspicuous.

10.3. From Islam the claimant referred to headscarves or hijab. We repeat our above comments as to headgear. A form of headscarf was always permitted to be worn by ground staff, whether with or without the uniform. We heard of no issues arising in consequence. When in about 2006 a member of flight crew applied to wear hijab, the application was subjected to risk assessment, and then granted, subject to rules as to the style and appearance of the item (R3, 24).

10.4. The claimant referred also to the Hindu wrist string and to henna dots painted on the hands of wedding guests: evidence as to use of the former was scant, and was presented on the basis that a wrist string could in any event be concealed. We had no evidence that the latter practice was related to any specific faith and in any event it was not the subject of managerial approval or acquiescence.

10.5. We understand the claimant not to rely on any comparison with a bearded man of any faith. We comment only that the McDonald policy and the amended policy permitted men to wear tidy facial hair, (R1, 232 and R3, 65).

Rostering arrangements

11. We set out our findings in relation to rostering, to the extent that they form part of the agreed background. There was no material dispute on any of these matters:-

11.1. For management purposes, the respondent regards Heathrow Terminals 1 and 3 as a single operation.

11.2. Within those terminals, the respondent employs about 1,100 uniformed staff.

11.3. Every employee, including the claimant, has a contract of employment which specifies one of a number of patterns of hours per week, such as full time, part time, or job share. Staff have the opportunity to apply to change their individual arrangement.

11.4. A computer-driven operation prepares, up to a year in advance, a statement of the operational need for staff on a shift by shift basis throughout the year.

11.5. Individuals are then allocated to fill the pattern which has been produced.

11.6. Once that process has been completed, individuals have almost complete flexibility to swap their shift, provided they swap like for like, i.e. a person rostered to work an 8 hour shift on a day must swap with a colleague who will also work an 8 hour shift on that day and so on. The system is so flexible, and so manageable, that Mr Stonebanks told us that he was able at one point to clear his work allocation for a period of several weeks, so as to take a long break abroad.

11.7. Staff in addition may book annual leave against allocated shifts, (except at Christmas) in which case there are appropriate cover arrangements.

11.8. Staff in addition have the right to book what the respondent terms an Additional Rest Day, (ARD) which is a company term for emergency leave required by a short term unforeseen emergency.

11.9. Staff also have, where appropriate, statutory rights in relation to dependency leave, flexible working and the like.

11.10. Many staff are reluctant to work weekends, and these arrangements are often used to enable staff to swap weekends.

11.11. These arrangements have not changed significantly in the eight years of the claimant's employment with the respondent.

Events before 20 May 2006

12. It is in the totality of the above that we deal with events up to and including 19 May 2006. We do so subject to the cautions on jurisdiction set out at paragraph 5.1 above. We proceed on the basis of the limited analysis presented on behalf of the claimant as to how each such complaint might fall within the framework of the Regulations. There were no submissions from either side as to the standard of proof which we should apply to allegations which cannot be the subject of a finding of liability or an award of remedy. In the absence of any such submissions, we consider each of these allegations, where appropriate, in accordance with the approach set out in Regulation 29, and having regard to the line of authority on the burden of proof and discrimination cases, notably **Igen Ltd v Wong 2005 IRLR 258** and **Madarassy v Nomura International 2007 IRLR 246.**

13.

13.1. The first such matter related to the Qur'anic in-flight entertainment channel. The claimant's statement asserted:

"Soon after commencement of employment at British Airways, I noticed the perceived *irreverence* given to the Christian faith. Many flights to the Middle East and beyond had a *Qur'anic* In-Flight channel. There was a concerted attempt to secure a similar Christian channel for some twenty years, but this reasonable request was always resisted on spurious grounds". (Italics in original).

13.2. We accept the evidence of Mr Allen, which was that a Qur'anic channel was introduced by the respondent in the 1990s and withdrawn in the spring of 2001. It was introduced in response to requests from passengers, and in the knowledge that competitor airlines flying to Muslim countries provided it. It was withdrawn in March 2001 for commercial reasons. Mr Allen stated, and we accept, that there was no comparable demand or competition to provide a Christian channel.

13.3. The Qur'anic channel was withdrawn over two years before the commencement of the Regulations. We would have struggled to consider this issue as falling within the ambit of Regulation 6(2). We consider that the availability of a Qur'anic channel, and the absence of a channel for other faiths, were purely commercial decisions. We attach no weight to them whatsoever, either as evidence of hostility towards Christianity, bias in favour of Islam, or a matter of which the claimant might legitimately complain to an Employment Tribunal.

14.

14.1. In light of the events of September 2001, the respondent made available a booklet on cultural awareness (R1, 1031-7). The booklet was for the benefit of staff who might be unfamiliar with the characteristics of Arab culture and whose work brought them into contact with Arab customers. It set out some basic information about Islam, as the predominant religion of the Arab world, with the comment that "Whereas most of the Arab World is Muslim, not all Muslims are Arabs and not all Arabs are Muslims" (R1, 1032).

14.2. Commenting on the September 11 events, it mentioned that in consequence of those events, "[M]any westerners have a distorted and stereotypical view of 'Muslims' and the Islamic religion. Islam is a rich and dynamic religion – it is fact, the second largest religion in the world – but in the west, its true meaning and beliefs have been overshadowed by menacing headlines, and images of gun-toting militants".

14.3. Immediately after those words was the heading, "Islamic society's misconceptions of the west" and then, "Likewise, certain social problems in Western society, such as prostitution, alcoholism, high crime and sexual promiscuity, have coloured the way in which Muslims perceive the west. This should be kept in mind".

14.4. The claimant considered the booklet disrespectful to Christianity, first in failing to make any reference to the Arab Christian minority; and secondly by setting out the passage quoted at 14.3 above.

She relied on these as evidence of anti Christian bias on the part of the respondent.

14.5. We find these observations misconceived. The claimant has first misunderstood the nature and purpose of the document: it is no more than an introduction to aspects of Arab life for non-Arab staff serving Arab passengers. The respondent made a legitimate judgement about the selection and presentation of the contents.

14.6. The claimant's objections to the depiction of the West fail to analyse the context, namely that those observations plainly appear in a section about misconceptions which two cultures may have about each other. Like the Qur'anic channel, this issue illustrates the claimant's misinterpretation of events around her, and her inability to assess the reasoning of management.

15.

15.1. It was common ground that on 18 January 2003 the claimant asked for leave of absence for the following day so that she could attend an event at which an eminent Arab preacher was to speak. The event was important to her, and she gave an honest explanation of the reason for her request. The request was refused, and the claimant did not attend work. She was issued with a written warning. Her appeal was rejected by Mr Otterway (R1, 518A).

15.2. The claimant submitted that she had been refused leave "because of animus to the Christian faith. I believe another faith group would have been considered". She also argued that the response of the respondent "was motivated by contempt of the Christian faith."

15.3. We attach no weight in favour of the claimant to this matter. In our judgement:-

15.3.1. There was no evidence that an adherent of any other faith, asking for leave at less than 24 hours notice to attend a religious event, would have been treated any differently;

15.3.2. There was no evidence that an employee, asking for leave at less than 24 hours notice to attend a secular event of personal importance, would have been treated differently;

15.3.3. The decision of management that the event in question could not be brought within the ARD policy, as it was not an unforeseen emergency, did not appear to us to be unreasonable, or tainted by any element of discrimination;

15.3.4. We could see no discrimination in the respondent's designation of the claimant's decision not to attend work as an exercise of choice in the knowledge that she was taking leave which had been refused.

15.3.5. In light of the above, we could see no element of discrimination in the implementation of the disciplinary process or its outcome.

15.4. It follows that we do not consider that this incident is one to which weight attaches as part of the claimant's main claim.

16.

16.1. We now turn to the first of the matters before us to have taken place after commencement of the Regulations. On 25 May 2004, Mr Stonebanks, who was and remains the claimant's line manager, spoke to the claimant and subsequently confirmed the conversation in writing (R1,546).

16.2. We accept the evidence of Mr Stonebanks, which was that before speaking to the claimant on 25 May, he had received a number of informal reports about her from other staff. The common theme of these was that while no one wished to present a formal complaint, colleagues objected to the claimant either giving them religious materials unsolicited, or speaking to colleagues in a judgmental or censorious manner which reflected her beliefs; one striking example was a report from a gay man that the claimant had told him that it was "not too late to be redeemed".

16.3. The claimant denied that any such events had taken place which could have given rise to Mr Stonebanks speaking to her. It followed, in her submission, that the conversation was itself both fraudulent, and evidence of hostility towards Christianity and a tendency to discriminate.

16.4. We accept Mr Stonebanks' evidence in full. Our reasons are the following:

16.4.1. We could conceive of no reason why Mr Stonebanks should have called a meeting with the claimant, and then confirmed its contents in writing, without having had any evidential basis for doing so. He would have opened himself to a range of criticisms and adverse responses had he done so.

16.4.2. We agree with Mr Stonebanks that the purpose of the meeting was to alert the claimant to the necessity to

observe boundaries in the work place. We did not consider that where issues of faith were engaged the claimant understood the concept of boundaries. She therefore failed to appreciate or analyse the basis of the discussion.

16.5. We do not consider that the burden shifts in relation to this allegation; had we found that it did, we would have accepted the respondent's explanation.

17.

17.1. The claimant complained that adherents of other faiths were favoured in allocation of break times. We find that in the course of each working shift, every employee is entitled to a number of break periods. The times at which break periods may be taken are allocated by a manager. We accept the evidence of Ms Naish, Ms Girling and Mr Marriott. Subject only to operational need, each had found managers generally accommodating in allowing them to take permitted breaks at times which would enable them to attend a Christian service at an airport church or chapel. We consider the evidence of these three witnesses conclusive on the respondent's readiness to balance religious observance (specifically Christian observance) with operational need, and on the acceptance, by active and professing Christians, of the justice of that approach.

17.2. The claimant had pleaded one specific episode where she claimed that in 2005 a manager, Ms Gavin, had refused her request for prayer time but had volunteered it to a Muslim colleague (R1, 24C). The respondent's case preparation indicated that an employee of that name had retired in 2002.

17.3. It did not emerge until this hearing that the claimant had pleaded the name of the manager wrongly. The correct individual, Ms Galvin, was contacted during the course of the hearing. She was unavailable to attend the Tribunal. Mr Stonebanks, who had spoken to her, was recalled and gave evidence of her distress and denial of the allegation. Given the length of time since the event complained of, and as the claimant correctly identified the individual manager only in the course of the hearing, we do not consider that this allegation is now capable of fair trial, and we decline to make any finding on it.

17.4. We do not find that the burden shifts in relation to any allegation of discrimination in allocation of break times.

18.

18.1. The claimant complained of being unable to enjoy a roster which would guarantee that she would have all Sundays free all day. The respondent agreed that that was the case, relying on the claimant's contractual obligations and on the nature of its continuous operation.

18.2. We have described above how the shift system generally works. It was common ground from the records that the claimant worked no Sunday mornings in 2005 or 2006, and worked 20 non morning Sunday shifts in 2005 and two in 2006. The respondent submitted that this showed that the claimant was able to operate the system with flexibility to accommodate her religious requirements. The claimant submitted that if free to do so she wished to attend three church services on a Sunday, not just a morning service; that she had to make considerable efforts to free Sunday mornings; and that the respondent's computer programme was sufficiently robust to guarantee freedom from Sabbath working for her, or indeed for any adherent of any faith.

18.3. The respondent's witnesses were unclear as to the technical feasibility of the computer keeping Sabbath days free for any individual. They were however very clear about the managerial undesirability of allowing that principle, and that to do so would open the doors to any employee with any personal need or wish for not working on any given day.

18.4. We find as follows:-

18.4.1. The shift system reflects both the contractual obligations of employees and the complex operational requirements of the respondent;

18.4.2. It operates with the high degree of flexibility which we have already described;

18.4.3. Such flexibility had enabled the claimant to achieve the pattern of Sunday working referred to above, despite the wish of many colleagues (see paragraph 11.10 above) not to work at weekends;

18.4.4. We accept that the claimant had to make efforts to secure Sunday mornings free. There was no evidence or reason to believe that an adherent of any other faith wishing to free any other day for religious observance would not have had to make the same endeavours;

18.4.5. It was suggested by Mr Diamond that the respondent is duty bound to exclude the claimant from all Sunday

shifts. We reject that suggestion. It would constitute a form of preferential treatment on grounds of religion. We do not consider that the Regulations require or justify this. We deal below with the managerial issues which might follow.

18.4.6. It was suggested by Mr Diamond that the Regulations require the respondent to award the claimant a priority or privilege over other colleagues in allocation of shifts, so as to accommodate her religious observance. We can see no foundation for that argument in the Regulations;

18.4.7. Evidence of the management of a Jewish colleague was given to us in sketchy outline. It was clear that the circumstances were different, in that at the time of this hearing there was an agreed breathing space for both sides to consider their positions. The fundamental proposition which we find however is the same; the individual has not been authorised a permanent work exemption from all Sabbath working, and it is unlikely that he will be;

18.4.8. The extensive cross examination by Mr Diamond as to the technical feasibility of a computer programme which would exempt observant employees from working on their Sabbath seemed to us quite off the point. We could see no obligation on the respondent to create such a system, and we could see no means by which it could be operated in a manner which would deliver fairness and consistency as between adherents of different faiths and as between religious employees and adherents of no faith. The argument contained the obvious flaw that an offer by the respondent of exemption from Sunday working might lead employees to claim to be religious so as to avoid Sunday working. This in turn would force the respondent into precisely the invidious position which it has sought rightly to avoid, namely that of assessing the spiritual sincerity of its staff.

18.4.9. In answering Mr Diamond's questions on this matter, a number of management witnesses made the point that other employees might have valid, non-religious reasons for wanting never to work on a particular day, such as a sporting interest or a cultural or social activity, and that they in turn might ask for exemption from working on that day. Mr Diamond put it that these answers indicated that 'British Airways regards Christianity as a hobby.' There

was no basis for such questioning: the witnesses were not seeking to belittle Christianity, but to make the point that each individual in a huge workforce has a personal sense of what is important to him or her. The claimant clearly had neither understanding nor empathy for this.

18.4.10. In our judgement, there was no material on this issue which caused the burden of proof to shift. If it had, we would have accepted in full the respondent's explanation of the treatment complained of.

19.

19.1. Similar issues arose from the evidence which we heard about Christmas Day working. The respondent's system for maintaining Christmas Day cover is the following:-

19.1.1. The respondent must maintain its operation throughout the Christmas period;

19.1.2. Christmas is the period when staff least wish to be at work;

19.1.3. No member of staff may book annual leave during the Christmas period, but swapping arrangements and ARD arrangements are available;

19.1.4. To find Christmas Day shift workers the respondent first identifies the numbers needed; next it asks for volunteers; and thirdly, and with Trade Union co-operation, it allocates the remaining shifts by ballot. Having done so, it keeps the situation under review.

19.1.5. Working at the Christmas period is an emotive issue for all the respondent's staff, irrespective of religion. We accept that staff have offered colleagues sums of money to swap shifts, or have approached managers in tears with wholly legitimate personal requests not to work on Christmas Day.

19.2. It was common ground that since joining the employment of the respondent in 1999 the claimant has never in fact worked on Christmas Day. It was common ground that she instructed solicitors to engage the respondent in correspondence when she was rostered to work on Christmas Day 2003 and 2005. In

the event she was not required for operational reasons on the former day, and was on certificated sick leave on the latter.

19.3. The claimant in evidence and Mr Diamond in submission and cross examination argued that although Christmas is a family or secular holiday for many, it is for the claimant the prime Christian holy day. That was not disputed. They submitted that her wish to celebrate a religious festival on that day should take priority over the non religious wishes of colleagues. The claimant was asked how the respondent should manage her religious-based request not to work on Christmas Day, when set hypothetically alongside a colleague's request not to work on that day so as to be with small children. The claimant's response was that it would not be fair to ballot between the two, and that her wishes should take priority.

19.4. We find the following:-

19.4.1. The respondent manages Christmas working in a manner which is collectively agreed, and which appropriately balances business need with the competing individual needs and wishes of employees;

19.4.2. It is impossible to fault a system which allocates an undesirable burden by fairly conducted ballot;

19.4.3. No evidence of anti Christian animus is to be found in the respondent's management of Christmas shifts;

19.4.4. The respondent is under no obligation to accord special privileges to Christian employees who wish to observe Christmas as a religious festival;

19.4.5. The claimant's insistence on privilege for Christmas Day is perhaps the most striking example in the case of her insensitivity towards colleagues, her lack of empathy for those without a religious focus in their lives, and her incomprehension of the conflicting demands which professional management seeks to address and resolve on a near-daily basis.

19.4.6. In our judgement, there was no material on this issue which caused the burden of proof to shift. If it had, we would have accepted in full the respondent's explanation of the treatment complained of.

20. We turn to the Christian Fellowship matter, which we can best describe by setting out how this evidence emerged, and its relevance:-

20.1. Mr Marriott gave evidence for the respondent on the afternoon of 15 November. He is a member of the leadership team about British Airways Christian Fellowship. He gave extensive evidence of the various ways in which British Airways supports the work of the Fellowship, making available facilities, time, work spaces, intranet use, and supporting Christian charitable activities throughout the world. He explained that the Fellowship did not support the claimant's allegations and referred to a letter to the press (regrettably not published) which set out its views (R1, 780). Mr Marriott was a witness of palpable integrity. We accept his evidence in full.

20.2. Mr Diamond put to Mr Marriott that his evidence was tainted because the Christian Fellowship had been placed in fear that the respondent would cease to support charity work for children in Africa if this case proceeded, and had made this fact known to the claimant in a meeting. Mr Marriott acknowledged that there had been a meeting, but stated that he had not been present, so could not give evidence of what was said.

20.3. The Chairman intervened to ask Mr Diamond to confirm in terms that the claimant's case was that the respondent had threatened that if this case went ahead, it would withdraw support from a children's charity or charities in Africa in retaliation; Mr Diamond confirmed that that was indeed the claimant's case. It was as extreme an allegation as we could envisage, and as it emerged for the first time in cross examination of Mr Marriott, the claimant had not been available to be cross examined on it.

20.4. At the conclusion of Mr Marriott's evidence, Ms Simler QC applied to call Mr Cunningham, who was present as an observer. There was no statement from him, as it had not been anticipated that this matter would be the subject of evidence. It was common ground that he had attended a meeting with the claimant on behalf of the Christian Fellowship and could speak about the matter set out above. Although Mr Diamond objected, it seemed to us overwhelmingly in the interests of justice that an allegation of this gravity should be answered.

20.5. Mr Cunningham told us, and we find, that he attended a meeting with the claimant in about August 2007, at which he and others told the claimant that they considered that the respondent supports both Christians and Christian projects,

and that the Fellowship would not support these proceedings. The claimant replied by volunteering the accusation that Mr Cunningham and colleagues were not supporting her in this case because they feared that projects in Africa might suffer in consequence. The Chairman's note reads: "I recall her accusing us of being scared that there would be starving children in Ethiopia".

20.6. We find that no person on behalf of the respondent said or did anything to advance the suggestion that there might be linkage between this litigation and charity work in Africa. This allegation originated entirely with the claimant.

20.7. In closing, Ms Simler described this episode as "illuminating". We agree: the question is what precisely it illuminates. We find that it demonstrates to a degree the extent to which the claimant misinterpreted events, as well as her readiness to make a serious accusation without thought of the implications.

21.

21.1. On 19 May 2006 the claimant attended compulsory training. The training was on Harassment and Bullying. The examples given of training materials (R1, 370-410) included instances of racial or religious abuse and stereotyping.

21.2. It was common ground that the Harassment and Bullying training contained no specifically Christian content, while it did make reference to other faiths (eg R1, 377). We accept the evidence of Ms Dalton that it was not intended to include Christianity, and that Christianity is covered in the respondent's managerial training on Diversity and Inclusion (R1, 260-345 and 346-369). That is not training that the claimant was entitled to receive, as it is only made available to managers.

21.3. The claimant was offended that the 19 May training did not contain a Christian element. She perceived that she, and the Christian faith, had been slighted. That perception in turn began the sequence of events which concluded in this tribunal. It is possible that if the claimant had asked a manager on 19 May, why the respondent provided no training (as she saw it) with Christian content, she would have been referred to the relevant portion of the Diversity and Inclusion training. It is just possible that that reassurance might have averted the subsequent events.

However, she did not do so, and she left the 19 May training under the misapprehension that the respondent provides training with an element on non Christian faiths, but not on Christianity. We confirm that in our judgement, there was no material on this issue which caused the burden of proof to shift. If it had, we would have accepted in full the respondent's explanation of the treatment complained of.

21.4. The claimant invited the tribunal to find that the sequence of events from 20 May 2006 onwards occurred in a setting in which the respondent had over a number of years amply displayed hostility towards Christianity, both inherently and by contrast with its favourable treatment of other faiths. In our judgement, there was no such setting. The respondent was not hostile to Christianity, and the respondent did not give unfair or undue favouritism to any other faith. The findings which follow must be read in the context that the claimant went to work on 20 May under a misapprehension about the previous day's training, and on a false premise about her employer generally.

Events of 20 May 2006

22.

22.1. In response to the training event the previous day, the claimant attended work on 20 May wearing a silver cross on a silver necklace openly and where it could be seen. Ms Simler submitted that this was a 'calculated' decision to 'start a fight'. We do not think that that is appropriate language. Based on her misunderstanding of the training the previous day, the claimant made a decision to wear the cross openly, and thereby challenge the rule for concealment of the cross, in the knowledge that an issue would arise with management. She knew the uniform policy and had adhered to it for many years up to that date; she knew that she was about to contravene it. She also knew, as she candidly confirmed to us, that her decision to display the cross was a personal not a scriptural one.

22.2. On arrival at work, the claimant was seen by Ms Naish. Ms Naish asked the claimant to do one of two things; either to remove the cross and chain, or to wear them under her uniform cravat. Ms Naish regarded this as a routine instruction to comply with the uniform policy, of which she might give several in the course of each shift. Ms Naish alerted the claimant to the possibility that she might be sent

home without pay if she persisted in her insistence in wearing the cross openly. Ms Naish is a practising Roman Catholic, and there was no anti religious element in her actions.

22.3. The claimant refused, and Ms Naish asked her to speak to the Customer Service Manager, Mr Berneau. Mr Berneau was, in the claimant's words, very polite. After some discussion with Mr Berneau the claimant agreed to comply with the instruction, and wore the cross concealed under her cravat. That was the end of the incident that day.

22.4. Ms Naish made a file note (R1, 602) and Mr Stonebanks e-mailed other managers to alert them to the possibility of this issue recurring (R1, 603).

22.5. The claimant gave evidence that between that date and 7 August she wore the cross openly on each occasion when she attended work, and, in effect, got away with it through the acquiescence of managers. She gave this evidence to suggest that the purported uniform policy of the respondent was less strict than might appear. She did not name any such manager, and no manager gave evidence in support of this suggestion.

22.6. We find that while the claimant may well have worn the cross under her cravat during this period, or failed to conceal it completely, there was never any occasion when this met with the agreement of a manager, and she had no reason to believe that her conduct was accepted or acceptable.

22.7. We should record for completeness that on 13 June the claimant wrote a letter (R1, 604) which is a statutory grievance. It raised in outline the issues of whether the cross was correctly designated as an item of jewellery under the respondent's policies; complained of discrimination by contrast with the wearers of hijab; and referred to her rights under Article 9 of the European Convention on Human Rights and under the Regulations.

Events of 7 August 2006

23.

23.1. The claimant attended for early shift on 7 August 2006, and the events with which we were concerned took place before 6.00 a.m.

23.2. The claimant attended at work with the cross visible. Mr Marshall challenged her and called upon Ms Hawkes to assist. The claimant was again instructed to follow the options of removing the cross or wearing it under her cravat. She refused.

23.3. Ms Hawkes informed the claimant that if she declined this instruction, she would be sent home unpaid. There was a dispute as to whether or not the claimant could properly be recorded as 'no show' by Ms Hawkes in circumstances where she had arrived at work and been sent home.

23.4. It was eventually agreed that an appropriate compromise was that the claimant would wear a lanyard round her neck (similar to that used for a security pass) and that the cross would be attached to it inside her blouse. Ms Hawkes obtained a lanyard, and Mr Marshall left the room while Ms Hawkes assisted the claimant in fastening the necklace to it and tucking it under her blouse. The cross was thereby concealed, in compliance with the uniform policy.

23.5. Although the claimant agreed in evidence that both Mr Marshall and Ms Hawkes were 'polite, sensitive and respectful' she also said that Ms Hawkes had harassed her by invading her privacy and forcing her to remove her necklace and replace it with the lanyard.

23.6. We prefer Ms Hawkes' evidence, which was that the procedure of changing the items caused the claimant to fumble with the clasp of her necklace, and that with the claimant's consent, she helped her with the clasp.

23.7. We reject the allegation that Ms Hawkes invaded the claimant's personal space contrary to the claimant's wishes. We noted the inconsistency with which the claimant described this episode, and we were confident that Ms Hawkes was too aware of the sensitivities of this issue to have acted in such a foolhardy way.

Events of 20 September 2006

24.

24.1. The claimant continued at work between 7 August and 19 September. On 20 September she attended work and was again challenged by Mr Stonebanks as to the visible cross. She was again instructed to remove or conceal it and she

declined to do so. She was told that if she maintained her refusal she would be sent home without pay.

24.2. Mr Stonebanks referred the matter to Ms Girling, and the claimant spoke by telephone to Mr Allen. The claimant had the benefit of trade union assistance at a meeting with Ms Girling. The claimant was sent home and Ms Girling confirmed the outcome by letter the same day (R1, 628).

24.3. It follows from the sequence of events after 20 May that, contrary to the repeated submissions and arguments on behalf of the claimant,

24.3.1. The claimant was never at any stage disciplined as a result of wearing the cross. We use the word "disciplined" in its proper sense, namely subjected to management action in accordance with the provisions of the respondent's disciplinary procedure; and

24.3.2. The claimant was never subjected to management action for wearing a cross, and she was at all times free to attend work wearing a cross. The issue was whether she could wear it outside the uniform or inside, having worn it inside for the great majority of her many years of service.

Events after 20 September

25. In the period after 20 September, a number of strands in this matter ran in parallel. It may be helpful simply to summarise. The claimant remained an employee of the respondent, not working for it, and not paid. The grievance which the claimant had presented on 13 June (R1, 604) followed its course. The grievance was not upheld. The claimant's appeals were rejected. A related strand was the second grievance which the claimant presented on 25 October (R1, 737) which was that she remained at home unpaid. We identify as the second strand the press and public debate which was initiated on 14 October 2006 (R1, 797, 799), and which came to involve comment from political and religious leaders. This fed into the third strand, which was the decision of the respondent's Chief Executive to initiate a review of the McDonald uniform policy, leading in turn to an amended policy, whereby staff might openly display approved symbols of faith and charity with the uniform. This led then to the fourth strand, namely the claimant's return to duties on 3 February 2007, after having been away from work without pay since 20 September 2006. There was a significant body of evidence about this period, and it is

with all due respect to both counsel that we summarise that evidence very briefly: the facts were scarcely disputed; they consisted to a large extent of repetition of the arguments before us; and they were of limited assistance in determining the claims of religious discrimination relating to events before 20 September.

The grievance procedures

26. We found the following:-

26.1. The claimant had the benefit of a contractual grievance procedure (R1, 421) which she triggered on 13 June and 25 October 2006 (R1, 604 and 737).

26.2. Management identified readily that the claimant's first grievance gave rise to a particular difficulty, which was that it was a challenge to a corporate policy and not just a complaint about individual employment. Furthermore, the policy in question was one which potentially affected every member of uniformed staff, and where any breach or change could have an impact on many staff.

26.3. The first grievance meeting was with Mr G Comber on 22 September (R1, 640). The claimant had trade union support. The notes indicate that there was reiteration rather than dialogue. The claimant spoke at length about the theological importance of the cross, and complained of discrimination in favour of other faiths. Mr Comber asked her to return to work, complying with the existing policy, pending further discussion. By letter of 6 October, he rejected the grievance (R1, 672). A summary of the respondent's position may be found at R1, 674, and we quote it to illustrate the essence of the dispute, as it was then, and as it continued before us:

"In your letters you have referred to Article 9 ... and the Regulations. I understand that neither of these provisions entitle employees to demonstrate their faith or belief through the display of an item such a [sic] cross and in any event British Airways simply requires such items to be concealed where possible to ensure uniformity of appearance. This I believe is a proportionate way to balance your wish to wear a cross and British Airways' requirement for uniformity of appearance in customer facing roles where

uniforms are compulsory ... [T]here is no restriction placed upon wearing a cross visibly in non-uniform areas of the business and therefore British Airways' focus is on uniform standards, rather than preventing the display of religious symbols."

26.4. The claimant appealed and Mr Gardiner heard the appeal on 17 October (R1,707). Mr Gardiner invited the claimant to a further meeting on 21 November, at which he informed her that the appeal had been rejected (R1,764). His decision was confirmed by letter the same day (R1, 774). His letter sets out the issues with which this judgement has been concerned; the importance of uniform, flexibility where a religious item cannot be concealed, and respect for diversity and the Christian faith.

26.5. The claimant appealed and the final stage was heard by Mr Keith Heywood, General Manager Ground Operations, and rejected on 15 March 2007, by which time the claimant had already returned to work (R1, 976).

26.6. In cross examination, and without any evidence to support the assertion, Mr Diamond put to Mr Gardiner that the managers responsible for the grievance procedure had been improperly pressured to distort the outcome against the claimant. We accept Mr Gardiner's rejection of the allegation.

26.7. The claimant's second grievances were dealt with between April 2007 and November 2007, long after commencement of these proceedings. We decline to extend our jurisdiction to comment on them.

26.8. We find that the procedures were properly followed, and where delays arose, they arose not out of the factual complexity of the issues, but partly due to the unavailability of individuals, and partly because the claimant's insistence in introducing wide policy considerations forced the grievance investigators to seek a range of management views on broader issues. The press coverage which was, in the main, supportive of the claimant cannot have assisted any manager tasked with objective adjudication on an individual employment issue.

26.9. The claimant had no right to have her grievance upheld. She was entitled to a fair and open minded consideration of her grievance in accordance with the procedure; to receive a reasoned written decision which gave the honest opinion of the decision-maker; and to appeal. We find that that was what she received. We consider that the requirements of the statutory grievance procedure were met. We accept that the procedures were conducted more slowly than should have been the case, and we accept the respondent's explanations for delay. To the extent that it was alleged that the respondent's conduct of the grievance procedure was itself an act of religious discrimination, we find (even assuming that the grievance appeals themselves constitute a grievance of discrimination in the process) that the burden of proof does not shift.

Employment status

27. There was much discussion before us about why the claimant had remained unpaid between 20 September and 3 February, and whether this was properly designated as suspension or otherwise. This was a much simpler issue than might have appeared, and we found as follows:-

27.1. In every case, other than that of the claimant, where an employee was sent home due to non compliance with the uniform policy, the time spent going home, changing and returning was docked from pay. As the claimant was the first employee who had persisted in non compliance, the respondent had no experience of managing an employee who was docked more than an hour or two of pay, or, at most, a shift.

27.2. In managing each such situation, the respondent took the view that as the contract of employment required compliance with the uniform standards in full (R1, 504), failure to adhere fully to uniform standards constituted only part performance of the contract; that the respondent would not accept part performance; and that therefore there was no obligation to make any payment. That consistent policy had applied in every other case.

27.3. The respondent's disciplinary procedure provides that there may be precautionary suspension with pay where "following an alleged offence it would be

undesirable for an employee to remain at work" (EG901 3.4.1). If the case involves an alleged criminal offence, precautionary suspension continues until conclusion of proceedings (EG901, 6.2).

27.4. We accept that suspension with pay is imposed where the circumstances require the removal of the individual from the workplace. We accept the evidence of Mr Gardiner, supporting that of other managers, that there was no such necessity in the respondent's perception of this case. The claimant had done nothing which inherently required her removal from work, and the respondent was content for her to remain at work, complying with the old policy, pending consideration of a change of policy. We accept that this was precisely what had been done by others who on grounds of a religion other than Christianity had asked for a reconsideration of the uniform policy.

27.5. In recognition that the claimant was intransigent on this issue, Mr Gardiner on 23 October (R1,735) offered her the option of administrative work pending resolution of the grievance procedures. As this was non-uniformed work, the claimant would be free to wear the cross at work if she wished. The claimant regarded this as not equivalent to the uniformed work which she enjoyed, and rejected the proposal. We had some sympathy with her reasons for doing so.

27.6. The consequence was that the claimant was not suspended in accordance with the respondent's procedure for suspension. She was at home as a result of refusing to attend work in full compliance with the uniform policy, and of declining a temporary non-uniformed role. She was not paid because the respondent refused to accept what it considered to be part performance of her contract of employment.

27.7. To the extent that it was submitted that the failure to pay the claimant was an act of discrimination, we find that there was no distinction in treatment such as to require the burden of proof to shift. Employees of any faith who went home to change an item of clothing or attire were not paid while doing so. Other, non-Christian staff who complied with the existing uniform policy while their requests for accommodation were

under consideration attended work in full contractual compliance and were paid.

Process of change

28. We deal with this in outline only, as the documentation was self evident:-

28.1. The Uniform Committee meeting on 5 September received a report about the claimant's wish to display the cross. The meeting recorded that it was "unanimous in agreeing that BA have the right to uphold uniform standards". It also asked for clarification of the wearer guide (R1, 1079).

28.2. Following the incident on 20 September, Ms Dalton, who had been contacted by Mr Comber for diversity advice about the first grievance, wrote a memo which discussed the case from a diversity perspective (R1, 657). It was a perceptive summary of the problems caused by the McDonald policy. Ms Dalton clearly suggested that there should be a wider accommodation in favour of religious symbols.

28.3. The press story about the claimant broke in mid October. The focus of much of the reporting was that British Airways was an anti Christian company which had banned the Christian cross at work. Neither of these comments was accurate.

28.4. The press coverage led to what management described as a crisis, with criticism of the company made, we were told, by, among others, the Pope, the Archbishop of Canterbury, and the then Prime Minister.

28.5. Mr Diamond invited us to find that the respondent had discriminated against the claimant in giving inaccurate statements about her to the press. There was no evidence that this had taken place, and it would be far beyond our competence to assess the reliability of press coverage of this case, or to apportion blame for any inaccuracy. We can however deal with the claimant's allegation that Mr Walsh, the respondent's Chief Executive, had shown hostility towards Christianity by likening the cross to 'New Age crystals.' The source of this allegation (R1, 880) was an internet news posting. The most cursory reading showed that the reference to crystals was nothing to do with the Chief Executive, and was simply an argumentative device to illustrate some of the legal difficulties which might arise from defining religious items.

28.6. On 24 November Mr Walsh announced a review of the uniform policy stating: "The review will examine ways in which our uniform policy will be adapted to allow symbols of faith to be worn openly, while remaining consistent with the British Airways brand and compliant with employment legislation". (R1, 1087). The purpose of the review was not to decide whether to allow faith symbols. On the contrary, the use of the word "will" clearly indicated that the policy would be changed as a result of the review, and that the new policy would permit positive manifestations of faith.

28.7. We were referred in outline to the nature of the review then undertaken by Ms Dalton and Ms Dunham. It was clear that they and Mr Crawford worked at speed, and under considerable pressure, to achieve the desired outcome.

28.8. The process which was followed included widespread consultation with staff and Trade Unions, and with representatives of all faiths, and included consideration of aesthetic issues, as well as extending a change in policy to charities. It was a substantial and thoughtful piece of work, for which all of those involved deserve nothing but commendation.

28.9. On 19 January 2007 the respondent adopted a new policy, to be implemented on 01 February. It amended the McDonald uniform by allowing the display of faith and charity symbols (R1, 1073), subject to a detailed application procedure. It provided for immediate approval of the cross and star of David as authorised symbols, subject to rules about the appearance of the individual item. In announcing the new policy, Mr Walsh commented to all managers, "Unintentionally, we have found ourselves at the centre of one of the hottest social issues in current public debate". (R1, 1203). The full amended policy was found in R3.

28.10. We were informed in evidence that between implementation of the new policy in February 2007 and this hearing, there have been very limited applications to wear a charity symbol, and only two applications to wear a symbol of another faith. We infer from this that the amended policy meets the objectives identified by the Chief Executive (paragraph 28.6 above).

28.11. The claimant returned to work on 3 February 2007, with permission to wear a cross in accordance with the new policy. Her actions had brought about the change in

company policy which she wanted. She has remained at work ever since.

Unlawful deductions

29.

29.1. It will be recalled that the tribunal invited Mr Diamond to apply to amend the claim and then acceded to the application. It was common ground that the claimant had not been paid between 20 September 2006 and 31 January 2007. The respondent submitted that it was entitled to rely on clause 5 of the contract of employment, (R1, 502) which provides, "The Company is entitled to deduct from your salary other monies payable and reimbursable to you by the Company all and any sums which you may owe to the Company ..." (We assume that the word "or" should be inserted before "other monies").

29.2. The respondent asserted that the duty to wear the uniform is contractual, and that as the claimant had failed to perform the contract in full, the respondent was not bound to accept part performance and was authorised to refuse to pay.

29.3. This claim arises under part 2 of The Employment Relations Act 1996 and relates to a claim for wages, defined at section 27(1) as "any sums payable to the worker in connection with his employment". In our judgement, the claim can only succeed if it is a claim for remuneration properly and unconditionally due. We are therefore with Ms Simler in finding that the respondent was not bound to accept performance of the contract which did not include full compliance with the then uniform policy, and that on that basis, the claim cannot be properly advanced under the unlawful deductions provisions and fails.

29.4. We do not reject this claim in reliance on clause 5 of the contract, which we consider applies, as drafted, only to the claw back of sums overpaid to an employee by the respondent, and not to the present circumstances.

Human Rights Act

30. We deal briefly with the Human Rights Act 1998.

30.1. Mr Diamond, in closing, referred to authority from jurisdictions including the United States and Canada, as well as the European Court of Human Rights, to illustrate how the

relationship between religious manifestation and the state had been considered elsewhere. It seemed to us that our inquiry had to proceed within much more limited confines.

30.2. We agree with Ms Simler that the Tribunal has no power to consider any separate or free standing claim under the Convention, but that we must interpret the Regulations, so far as possible, compatibly with the rights granted by Article 9.

30.3 While we agree with Ms Simler that the right of belief guaranteed by Article 9(1) is an absolute right, our conclusions on direct discrimination, below, do not seem to us to require any consideration of Article 9(1).

30.4 In considering indirect discrimination, and the potential application of Article 9(2), we note the comments of the EAT at paragraph 61 of **McClintock v DCA 2008 IRLR 29,** which, as Ms Simler suggested, indicated sufficient compatibility between the terms of the Regulations and the Convention as to require no further interpretative assistance for us from the Convention or the European cases.

Direct discrimination

31.

31.1. We now turn to the allegation of direct discrimination, dealing only with matters arising on and after 20 May 2006, and which have been the subject of a grievance, occurring within the statutory time limits, and been pleaded. That includes only a fraction of the matters put before us.

31.2. The Regulations follow the familiar pattern of discrimination law rights. Regulation 3 provides as follows:- "(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if - (a) on grounds of religion or belief A treats B less favourably than he treats or would treat other persons."

31.3. Regulation 3(3) provides: "A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other".

31.4. Within those definitions, this claim is properly brought under Regulation 6(2)(d) which provides that "It is unlawful for an employer, in relation to a person whom he employs at an

establishment in Great Britain, to discriminate against that person -- ... by ... subjecting him to any other detriment".

31.5. As Ms Simler rightly pointed out in submission, the three separate elements of a successful claim of direct discrimination in these circumstances are that we must be satisfied that there has been less favourable treatment; that it has been on religious grounds; and that the claimant has suffered detriment. While Ms Simler's submissions are correct, we find it more useful to consider together the issues of treatment and comparison.

31.6. In support of her complaint of direct discrimination the claimant repeatedly compared her treatment with that of the wearer of items which she regarded as manifestations of other faiths. It was obvious from her repetition of this point that what she saw as visible disparity in treatment was a prime emotive driver of this case. What was less obvious was the true basis for the comparison.

31.7. The respondent's policy required any item of adornment which could be concealed to be concealed. Any item which was both worn as a result of a mandatory religious requirement and could not be concealed under the uniform would, if approved, be permitted. The requirement for like with like comparison, explained by the EAT in **Azmi v Kirklees MBC 2007 IRLR**, notably at paragraph 55, rendered those stipulations fatal to the case of direct discrimination. We find that the respondent would have treated identically to the claimant any of the following:-

31.7.1. An adherent of any non-Christian faith, or of no faith, displaying a cross for cosmetic not religious reasons;

31.7.2. An adherent of a faith other than Christianity wearing a symbol of that faith visibly on a silver chain round the neck;

31.7.3. An employee wearing a visible silver necklace without any form of Christian or other religious adornment.

31.8. By contrast, an adherent of any faith, or none, who wore a religious or cosmetic item round her neck, but concealed it under the cravat, would have been treated in the identical

manner to that in which the claimant was treated when she wore a concealed cross, namely that management took no notice of an item which could not be seen.

31.9. The seven potential comparator items mentioned by the claimant (paragraph 10 above) did not seem to us to advance her case on a like with like basis. It is evident that the claimant's situation is inherently not comparable with the wearer of headgear of any type, or with a beard. There was no evidence that the Kirpan was ever permitted visibly so that is not a comparative situation. We do not accept the claimant's evidence that Hindu wrist strings or henna marriage dots had been permitted by management.

31.10. There was only one item of which we heard which could be concealed, but which was permitted to be worn visibly, which was the Sikh bangle. We have set out our findings at 10.1 and 10.2 above. However, the comparison between the bangle and the cross breaks down immediately on consideration. For adherents of the Sikh faith, the bangle is mandatory, and it was agreed in this case that the cross is not mandatory for Christians. When the bangle could be concealed under the uniform, it was required to be concealed. However, the bangle ceases to be concealable under the uniform if the wearer wears a short sleeved shirt. At that point, the bangle falls into the same category as headgear, ie it is a mandatory religious item which cannot be concealed under the uniform, and it may therefore be displayed. The anomaly of the bangle is that, although mandatory, it is sometimes concealable under the uniform and sometimes not, depending on the choice of uniform shirt. In either event, the circumstances are not comparable with those of the claimant.

31.11 The complaint of direct discrimination fails because we find that the claimant did not on grounds of religion or belief suffer less favourable treatment than a comparator in identical circumstances.

Harassment

32.

32.1. Regulation 5 provides that harassment occurs where "on grounds of religion or belief, A engages in unwanted conduct

which has the purpose or effect of (a) violating B's dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B". We were not referred to regulation 5(2).

32.2. Those words are to be read in light of the Judgment of the EAT at paragraph 32 of **McClintock,** where, on very different facts, the EAT cautioned against finding automatically that direct discrimination might constitute harassment.

32.3. The claim for harassment must fail because:-

32.3.1. There was no evidence that the respondent engaged in "unwanted conduct" save that of seeking to enforce the contractual McDonald uniform policy to which the claimant had given her agreement;

32.3.2. There was no evidence that any part of the respondent's treatment of the claimant was on grounds of religion or belief;

32.3.3. Although neither side addressed us on the point, we would, if directed to Regulation 5(2), have had very considerable difficulty in finding that the matters which gave rise to this claim should reasonably be considered as having the effect complained of by the claimant. The claimant's insensitivity towards colleagues, and lack of comprehension of management, would have been significant factors against her.

Indirect discrimination

33.

33.1. Regulation 3 provides as follows: "(1) For the purposes of these regulations, a person ("A") discriminates against another person ("B") if ... (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but --(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with

other persons, (ii) which puts B at that disadvantage, and (iii) which A cannot show to be a proportionate means of achieving a legitimate aim".

33.2. It was agreed that the respondent applied to the claimant a provision criterion or practice, defined by Ms Simler (and we agree) as the provision "that personal jewellery or items (including any item worn for religious reasons) should be concealed by the uniform unless otherwise expressly permitted by BA". It was also conceded that that provision applied equally to persons not of the Christian religion.

33.3. We turn next to the question of whether the provision, as defined, puts Christians at a particular disadvantage compared with other persons. Ms Simler reminded us of the judgement of Baroness Hale in **Rutherford v Secretary of State for Trade and Industry 2006 IRLR 551**, describing the rule or requirement in that case as creating a barrier for a group of people who want something, and who are selected for disadvantage compared with others.

33.4. The tribunal heard evidence from a number of practising Christians in addition to the claimant. None, including the claimant, gave evidence that they considered visible display of the cross to be a requirement of the Christian faith; on the contrary, leaders of the Christian Fellowship had stated that, "It is the way of the cross, not the wearing of it, that should determine our behaviour". (R1, 780). The claimant's evidence was that she had never breached the uniform policy before 20 May 2006, and that the decision to wear the cross visibly was a personal choice, not a requirement of scripture or of the Christian religion. There was no expert evidence on Christian practice or belief (although that possibility had been canvassed at the PHR in June).

33.5. There was no evidence in this case that might support any suggestion that the provision created a barrier for Christians, and ample evidence to the contrary. Mr Marriott stated that this was the only case which he had encountered of a Christian complaining of the uniform policy. Certainly there was no evidence of Christians failing to apply for employment, being denied employment if they applied for it, or failing to progress within the employment of the respondent.

33.6. Taking these matters together, we do not consider that the provision put Christians at a particular disadvantage, and that being so, there is no disadvantage to which the claimant as an individual was put. The complaint of indirect discrimination therefore fails.

33.7. While that is the end of the claim of indirect discrimination, we do consider it right, for the sake of completeness, to deal with other matters on which we heard evidence and submission.

33.8. Had we had to consider the question of justification, we would have found that the aim pursued by the McDonald uniform policy, namely that of brand uniformity and consistency, was undoubtedly a legitimate aim: the evidence of Ms Dunham, Mr Crawford, and others who spoke of corporate pride was significant.

33.9. We would not have proceeded to find that the McDonald provision was a proportionate means of attaining the legitimate aim. We bear in mind that we approach this matter with the benefit of hindsight, and indeed after the respondent has changed the policy without seemingly suffering any ill effect. We consider that a proportionate means is one which is achieved as a result of a balancing exercise between all the interests involved, recognising the importance of the business need, analysing the business case and the rationale put forward by the respondent in accordance with the guidance in **Hardys & Hanson plc v Lax 2005 IRLR 726,** and forming our own view of whether justification has been proved. We would in that context consider it important to assess whether the respondent has demonstrated that any discriminatory impact has been assessed and reduced to the barest minimum.

33.10. We would reject the argument to some extent in reliance on the reasons so wisely put forward by Ms Dalton (R1, 657), and, as we understood it, not challenged in principle by Mr Crawford. This document was the first principled analysis of whether the McDonald policy on 'jewellery' was really necessary, and the first management suggestion that the cross might be classified separately from jewellery. It was the first suggestion that the respondent could be flexible, and indeed might benefit from flexibility. We note that there was

no evidence that the discriminatory impact of the policy had been analysed formally at any time before November 2006.

33.11. We would not consider the requirement proportionate because it fails to distinguish an item which represents the core of an individual's being, such as a religious symbol, from an item worn purely frivolously or as a piece of cosmetic jewellery. We do not consider that the blanket ban on everything classified as 'jewellery' struck the correct balance between corporate consistency, individual need and accommodation of diversity.

34. We need give no judgement on remedy, but having heard evidence and submission, we consider it helpful to comment on the following points of principle:-

34.1. It was common ground that it was open to the tribunal to find that the claimant had suffered loss of earnings between September 2006 and February 2007, and that these may be recoverable as a head of damage arising out of unlawful discrimination. It was also common ground that in the same period the claimant had enjoyed an income of well over twice her loss of earnings, some of it through gifts and donations, some as earnings from other sources. In our judgement, as a matter of principle, the respondent was entitled to require the claimant to offset earned income during the absence period (but not gifts or donations) against her claim for loss of earnings.

34.2. Ms Simler conceded that any such set off would apply only against an award for loss of earnings, and not against an award for injury to feelings. We agree.

34.3. Mr Diamond submitted that any injury to feelings award should be in the top **Vento** band. There was no evidence to support this submission, and we would not have accepted it. We make no other comment on injury to feelings, as we do not consider it possible to do so in the light of this judgement.

34.4. There was no material before us to justify the claimant's application for aggravated damages, which was in fact no more than a restatement of the complaint of harassment which we have rejected.

34.5. The claimant made a far-reaching application for recommendations (R1, 24M). This seemed to us to go well beyond the legitimate remit of the tribunal set out in Regulation 30, and given in particular the adoption of the amended uniform, we would have declined to make any recommendation.

35. It follows that the claimant's complaints fail and are dismissed in their entirety.

.....

Employment Judge

Judgment sent to the parties on 07-01-2008

Any application for review of this judgment must be made within 14 days of this date. Any appeal against this judgment must be instituted within 42 days of this date.

..... for Secretary of the Tribunals