

ARTICLE: Gender rights trump religious discrimination

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Introduction

Discrimination is always a hot topic and we have previously reported on various cases (please see our Articles at the following link: <http://www.davidsonlargelaw.com/news.php?pid=1>) In January this year, we made mention of notable cases to keep an eye on. One case in particular was that of Ms Ladele, the Christian registrar who refused to undertake civil partnership ceremonies because such same sex unions went against her Christian beliefs.

Now, a similar case has come before the Court of Appeal (CA) where Lord Carey, a previous Archbishop of Canterbury, took the unusual step of giving a witness statement in support of the claimant and his views. This gave the CA the opportunity to comment on the interaction between law and religion.

The facts

Mr McFarlane worked as a relationship counsellor for the Relate Federation. Relate's Code of Ethics requires a counsellor to avoid discrimination on the grounds of sexual orientation. When he became an employee of Relate, Mr McFarlane expressly signed up to this policy.

During his employment, Mr McFarlane sought to be exempted from counselling single-sex couples where sexual issues were involved. He was refused permission in December 2007, following which an investigation and a disciplinary meeting took place. At this meeting, Mr McFarlane said he would undertake psycho-sexual therapy (PST) if asked and raise any problems with his manager.

Despite such assurances, it became clear that he had no intention of carrying out such duties, so he was dismissed on 18 March 2008 for gross misconduct on the ground that he could not be trusted to comply with the Code of Ethics.

The Employment Tribunal and Employment Appeal Tribunal rulings

When Mr McFarlane failed in his appeal against his dismissal, he brought a claim to the Employment Tribunal alleging discrimination on the ground of religion or belief, harassment, unfair dismissal and wrongful dismissal. He was unsuccessful on every count except that of wrongful dismissal.

In considering the issue of direct discrimination, it is necessary to identify a comparator. The Tribunal held that the correct comparator was "another counsellor who, for reasons unrelated to Christianity, was believed by the respondent to be unwilling to provide PST counselling to same sex couples". The Tribunal did not believe that Relate would have treated such a hypothetical comparator any differently.

Mr McFarlane appealed against the findings about discrimination and unfair dismissal, claiming that the Tribunal's approach was "inapt" because it did not take into account the need to protect the *manifestation* of religious belief as well as the fact that the belief is held. The EAT rejected this argument. Insisting on compliance with the Code of Ethics was a

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proportionate means of achieving the legitimate aim of providing “a full range of counselling services to all sections of the community regardless... of their sexual orientation”. The EAT quoted Ms Ladele’s case, where the facts were very similar. In that case, Ms Ladele could not pick and choose which services she performed, at least where her choice involved discrimination on the grounds of sexual orientation. Applying this reasoning to Mr McFarlane’s case, the EAT held that there was no discrimination.

Lord Carey’s comments

In his witness statement, Lord Carey wanted “to dispute that the manifestation of the Christian faith in relation to same sex unions is ‘discriminatory’ [and]... that such religious views are equivalent to a person who is, genuinely, a homophobe and disreputable”. Lord Carey focussed on the Christian message of love, emphasising that Christianity did not demean or disparage any individual, but only sought to “limit self destructive conduct” which would prevent an eternal future with the Christian God.

The word “disparaging” was used repeatedly to describe the law and its judges’ approach to the Christian faith, claiming that the law compared a Christian to a bigot. He postulated that the law was a short step away from an employer being able to dismiss, refuse to employ or actively undermining a Christian because of his faith. Lord Carey urged that a specialist panel of judges be created with “a proven sensitivity and understanding of religious issues” because normal legal judges have made clear their lack of knowledge about the Christian faith”.

The Court of Appeal’s response

The CA stated that it wished to address the views expressed in Lord Carey’s statement not just because of his seniority within the Church, but also “because of the misunderstanding of the law which his statement reveals”.

It commented that “Lord Carey’s observations are misplaced”, making it clear that judges have never sought to equate Christians with bigots nor to regard them as “disreputable”.

The CA went on to discuss the issue of discrimination, pointing out that an actor’s motives for his conduct are irrelevant - it is the outcome and effect of their conduct on others which is what matters. An act or omission may have a discriminatory effect “whether [the actor’s] motivation is for good or ill”. It was not correct to assume that conduct which is legally discriminatory is also going to be condemned as disreputable.

In considering the lack of sensitivity within the law, the CA noted that there is a distinction between the law protecting a right to hold and express a belief, with the law’s protection of the content or substance of that belief. It was “deeply unprincipled” to confer legal protection upon a particular substantive moral position. Laws are created to advance “the general good on objective grounds” not to support a subjective opinion. Treading on highly philosophical ground, the CA commented that any religion “may of course be true; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it”.

The CA concluded by stating that protecting a particular religious view was preferring the subjective over the objective, and was “irrational... divisive, capricious and arbitrary”. In any event, given the number of religious beliefs within our society, it would be impossible for any one of them to take precedence and receive protection, or believers in the other religions “would be less than citizens”.

Conclusion

At the end of its judgment, the CA held that the appeal could not succeed because of the previous case of *Ladele*. *Relate's* proper and legitimate policy won the day.

For such a firm decision, it is interesting that the CA went into so much detail and debate over the perceived conflict of the law and religion. For anyone interested in the subject, the case itself can be found at: <http://www.bailii.org/ew/cases/EWCA/Civ/2010/B1.html> and at only 15 pages long, it makes for a modest but thought-provoking read.

The lesson for employers is to remember that many cases involving discrimination could involve conflicting rights of two parties. Choosing the correct course of action will be a subtle balancing act. Certainly, having policies and procedures in place is going to help in such situations, so long as they are reasonable and proportionate. Treating all employees fairly and consistently will also help when it comes to the hypothetical comparator exercise for discrimination.

If you would like further information on this case or the issues addressed within it, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.

Please note that this article is for guidance only and does not constitute legal advice.

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