

Employers must justify requiring Christians to work on a Sunday (and why that wasn't the headline in the Telegraph)

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Next Tuesday the European Court of Human Rights rules on the cases of [Eweida, Chaplin, Ladele and McFarlane](#). The case is likely to be quite complicated and I plan to read it very carefully and give it some serious thought before I write anything about it. After that of course I shall go on about it at tedious length.

Those tempted to comment on the outcome before they have read the decision in full should take note of the case of [Mba v London Borough of Merton](#). The judgement was read out to the parties before Christmas but only made its way to the EAT website on 10th January. By that time however, a seriously misleading account of the decision had made its way into the press. Let's look at what happened.

Mba is a pretty run-of-the-mill indirect discrimination case. It doesn't change the law or even pretend to. It simply upholds the finding of an Employment Tribunal that there was no discrimination when an employer insisted that a devoutly Christian employee comply with her contractual obligation to work on Sundays.

In Paragraph 2 of the Decision the EAT says this:

It is no longer open to an employer to require staff to work on Sunday and thereby cause disadvantage to those who are Christian unless the employer can show that the requirement is objectively justified

So there has never been any doubt that insisting that employees work on a Sunday is potentially an act of indirect discrimination. Whether it is or not depends on whether the employer can show that the requirement is a 'proportionate means of achieving a legitimate aim'. This is straightforward and uncontroversial.

In the Mba case the Tribunal held that the employer had met that test. The claimant worked at a registered children's home which – unsurprisingly – did not close at weekends. Care had to be provided seven days a week and all employees had to take their share of working on Sundays. For two years the employer tried to work around the problem caused by Ms Mba's refusal to do so but eventually they decided that the only viable course was for her to work to her contract. She resigned and claimed constructive dismissal and discrimination.

The Tribunal considered carefully the alternatives that Ms Mba had put forward, and agreed with the employer that they were not practicable, or involved too much additional cost. I've read the ET decision and they give careful reasons why each 'solution' put forward by Ms Mba was not viable. On appeal the EAT accepted that the Tribunal had properly examined the issues and reached a conclusion that was open to it.

That's really all there is, nothing to see here folks.

The EAT tried to stress that this was a case which turned on its own particular facts. The President of the Employment Appeal Tribunal said this:

We should make it clear at the outset of this Judgment to anyone who expects the conclusion to amount either to a ringing endorsement of an individual's right not to be required to work on a Sunday on the one hand, or an employer's freedom to require it on the other, that they will both be disappointed. No such broad general issue arises. The questions raised must be determined in the specific circumstances of this particular case alone.

Is it clear to everyone? This case absolutely does not say that Christians have no legal protection when it comes to being required to work on Sunday. They have the same right as any other religious group not to be discriminated against.

The case was reported by the Daily Telegraph before the judgment was published with the headline: '[Christians have no right to refuse to work on Sundays, rules judge](#)'. The story which follows is pretty much worthless as a description of the ruling.

For example, take this quote from the article:

A new ruling by a High Court judge – the first on the issue in nearly a decade – says that Christians have no right to decline working on Sunday as it is not a "core component" of their beliefs.

The judgment – which upholds an earlier decision – means that individual Christians do not have any protection from being fired for not working on Sundays.

This is simply wrong – and unambiguously so. Most of the rest of the article unquestioningly puts the case for Ms Mba. It is clearly based not on what the EAT said, but on what the Daily Telegraph was told at some stage by Ms Mba or her representatives.

One key assertion made in the article is that the EAT took it upon itself to judge the importance of Sundays to Christians:

Mr Justice Langstaff...upheld the lower tribunal's ruling which said it was relevant that other Christians did not ask for Sundays off.

The fact that some Christians were prepared to work on Sundays meant it was not protected, the court said.

No it didn't.

The Telegraph also quotes Andrea Williams, Director of [Christian Concern](#) as saying:

The court seems to be requiring a significant number of adherents of the Christian faith to observe a particular practice before the court is willing to accept and protect the practice.

Again, no. The EAT is not doing anything of the kind and anyone who actually knows about the case must surely realise that. The case was not rejected on the basis that refusing to work on Sunday is not a 'core' component of the Christian faith. In fact, the EAT distanced itself from the use of that term by the Employment Tribunal. What it said on this issue was simply that the fact that many Christians are willing to work on Sundays was relevant in considering whether or not the defence of justification was made out. Since the defence is based on proportionality, the needs of the employer need to be weighed against the discriminatory effect of the practice. It is harder to justify a practice that strikes so to the core of a religious belief that it effectively excludes all adherents but the ET held that this was not that sort of case. The EAT held that there was no error of law here.

If this was a central part of the decision I'd be tempted to argue with it. After all it is not Christians generally who should be considered in this exercise, but those who share the particular religious beliefs of Ms Mba. However, it is clear that this was just an additional observation by the Tribunal. The reason Ms Mba lost was not any analysis of how many other Christians would refuse to work on a Sunday but the impact that her refusal would have on the employer and her colleagues.

In the [Guardian](#), [Joshua Rozenberg](#) has picked up on the fact that the Telegraph article is inaccurate and was written before the judgement was available. Noting that the judgment was originally read out by Mr Justice Langstaff in the EAT he says that the Daily Telegraph reporter in question:

... has excellent shorthand and the absence of any quotes from the judgment in his scoop demonstrates that he had not been in court. Instead, he would have relied on notes of the ruling made by one of the lawyers present.

Those notes proved to be accurate but they could never have been as complete as a copy of the judgment itself.

But the problem with the Telegraph's article is not that it paints an incomplete picture – it paints a blatantly distorted and inaccurate one. I think that to assume that this is the result of a misreading of some lawyers' notes is to take a charitable view at best.

It is sad that even the HR press was not immune to repeating the Telegraph's line without waiting for the actual judgment to come out. I'm particularly disappointed in [HR Magazine](#) which ran with 'High Court Rules that Christians can't refuse to work on Sundays' and said:

'a High Court judge has ruled that Christians have no right to decline working on a Sunday as it is not a core component of the Christian faith'

Not only did they misunderstand the ruling, they even illustrated the story with a picture of a gavel resting on a big book with 'LAW' written on the side – that's just unforgivable. Gavels are for auctioneers people.

And what to make of [HR Zone](#) who said: 'News: Christians cannot refuse to work on Sundays, rules judge'? That story opens with the paragraph:

Individual Christians do not have any protection in law against being fired if they refuse to work on Sundays, a High Court judge has ruled.

Wrong. Very very wrong.

The fact is that there are certain religious discrimination stories that are being manipulated as part of what amounts to a political campaign. My objection is that this includes misrepresenting the outcome of cases to fit a particular 'persecution' narrative – often with the (entirely false) suggestion that the law treats other religions more favourably. As a result, employers and employees are less well informed about discrimination law than they should be. The Telegraph and its ilk are beyond redemption, but surely those who write specifically for HR professionals can try to hold back a bit and do some reading before they regurgitate the line being peddled by a biased and unreliable press?

Lets see what happens on Tuesday.

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