Case No: A2/2009/2733

Neutral Citation Number: [2010] EWCA Civ 880
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
EMPLOYMENT APPEAL JUDGE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 29th April 2010

Before:

LORD JUSTICE LAWS

- -

Between:

MCFARLANE

Appellant

- and -

RELATE AVON LIMITED

Respondent

- -

(DAR Transcript of
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Mr P Diamond appeared Pro Bono on behalf of the **Appellant**.
The **Respondent** did not appear and was not represented.

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Judgment

Lord Justice Laws:

1. This is a renewed application for permission to appeal against the decision of the Employment Appeal Tribunal ("the EAT") presided over by Underhill J given on 30 November 2009. By that decision the EAT dismissed the applicant's appeal against the determination of the Employment Tribunal rejecting his claims of unfair dismissal and religious discrimination brought against his employer, Relate Avon Limited ("the employers"). Permission to appeal to this court was refused on consideration of the papers by Elias LJ on 20 January 2010.

2. The application came before me on 15 April 2010. I took the unusual step of reserving my judgment on a permission application because of the reach of the arguments, advanced by Mr Diamond for the applicant, relating to religious rights. The application is supported by a witness statement from Lord Carey of Clifton, a former Archbishop of Canterbury, to which I will refer further.

3. The employers are part of the Relate Federation ("Relate"). As is well known, Relate provides relationship counselling services. It is a member of the British Association for Sexual and Relationship Therapy ("BASRT"). BASRT has a code of ethics which requires the therapist to "avoid discrimination on grounds of sexual orientation" (paragraph 19). The employers themselves have an equal opportunities policy which requires them to ensure:

> "that no person receives less favourable treatment on the basis of characteristics such as sexual orientation."

4. The applicant entered into a contract of employment with the employers as a paid counsellor in August 2003. Upon doing so he signed up expressly to the employer's equal opportunities policy. The applicant is a Christian who, in the words of the EAT (paragraph 4):

> "believes that it follows from Biblical teaching that same sex sexual activity is sinful and that he should do nothing which endorses such activity."

5. In the course of his employment he experienced no difficulties of conscience in counselling same sex couples where no sexual issues arose. At length, however, he sought to be exempted from any obligation to work with same sex couples in cases where issues of psycho-sexual therapy ("PST") were involved. That was refused on 12 December 2007 by the employer's general manager. Further communications and discussions ensued. There was a disciplinary investigation in the course of which, at an investigatory meeting on 7 January 2008, the applicant said he would undertake PST with same sex couples if asked and would raise any problems he had with his supervisor. However, while there may have been some equivocation on his part, at length it became clear to the employers that he had no intention of counselling same sex couples on sexual matters.

6. On 18 March 2008 he was dismissed for these reasons:

> "That on 7 January 2008 you stated to Relate that you would comply with its Equal Opportunities policy and Professional Ethics policy in relation to work with same-sex couples and same-sex sexual activities, when you had no and have no intention of complying with Relate's policies on those issues."

The dismissal letter went on to state that the applicant's actions:

> "…constituted gross misconduct and in the circumstances you cannot be trusted to perform your role in compliance with Relate's Equal Opportunities policy and Professional Ethics policy."

7. The applicant launched an internal appeal against his dismissal, but that was unsuccessful. He issued proceedings in the Employment Tribunal advancing claims of discrimination on the ground of religion or belief, harassment, unfair dismissal and wrongful dismissal. All the claims were dismissed save that of wrongful dismissal, which, as the EAT recorded at paragraph 13 of their determination, proceeded on a concession by the employers which they were not allowed to withdraw. It has no significance for the purpose of this application. There was no appeal against the dismissal of the harassment claim so that the EAT was only concerned with the claims of discrimination and unfair dismissal.

8. The discrimination claim was founded on the requirements of the Employment Equality (Religion or Belief) Regulations 2003 ("the 2003 Regulations"), paragraph 31 of which provides:

> "3(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; or
>
> (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.

Paragraph 3(3) provides:

> (3) 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."

> 7. Direct (paragraph 3(1)(a) of the 2003 Regulations) and indirect (paragraph 3(1)(b)) discrimination were both argued on the applicant's behalf. As regards the former, the Employment Tribunal had adopted this approach:
> "[W]e concluded, firstly, that it was necessary for an actual or hypothetical comparator to be identified and, secondly, that an appropriate comparator would be another counsellor who, for reasons unrelated to Christianity, was believed by the respondent to be unwilling to provide PST counselling to same sex couples and therefore unwilling to abide by the respondent's Equal Opportunities and Ethical Practice Policies. The question, therefore, is whether the respondent would have treated [such] a comparator differently, and in our view it would not."

9. In the EAT the applicant submitted that this approach was inapt because it diminished or extinguished the need to protect the manifestation of religious belief as well as the fact that the belief is held. The EAT rejected this argument (paragraph 18) and, after the citation of a number of authorities, dismissed the direct discrimination ground of appeal. On indirect discrimination the EAT accepted (paragraph 23) that the employers had to show that the application to the applicant of a "provision, criterion or practice" within the meaning of paragraph 3(1)(b) of the 2003 regulations – here, their insistence on compliance with their policy -- was a proportionate means of achieving a legitimate aim. The Employment Tribunal's conclusion at paragraph 42 of its determination that "the provision of a full range of counselling services to all sections of the community, regardless of their sexual orientation" was a legitimate aim which the employers were entitled to pursue was not disputed before the EAT (see paragraph 24). The applicant submitted, however, that Relate's absolute rule was disproportionate and there was no good reason why he should not be allowed to counsel heterosexual couples only.

10. The EAT took account of its own earlier decision in London Borough of Islington v Ladele [2009] ICR 387, where the facts were not dissimilar. In that case a registrar objected on religious grounds to "gay marriage" and was disciplined by her local authority employer for refusing to conduct civil partnership ceremonies. At paragraph 27 in the present case the EAT cited President Elias at paragraph 111 of Ladele:

> "In our judgment, if one applies the statutory test, the council was entitled to adopt the position it did. Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate - and in truth it was bound to be - then in our registrars to perform the full range of services. They were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation. That stance was inconsistent with the non-discriminatory objectives which the council thought it important to espouse both to their staff and the wider community. It would necessarily undermine the council's clear commitment to that objective if it were to connive in allowing the claimant to manifest her belief by refusing to do civil partnership duties."

11. The EAT held (paragraph 28) that this reasoning applied directly to the present case and dismissed the indirect discrimination ground of appeal. They also dismissed the unfair dismissal claim. This turned on factual points which play no part in the present application, and I need say no more about it.

12. Ladele was appealed to this court. Judgment was given on 15 December 2009, [2009] EWCA Civil 1357 [2010] IRLR 211, which was of course after the EAT's decision in the present case. The employee's appeal was dismissed. An application for leave to appeal to the Supreme Court has been refused. In this court Lord Neuberger MR, Dyson LJ and Smith LJ roundly rejected the suggestion that the council had been motivated by the nature of the appellant's religious beliefs rather than by the fact of her refusal to officiate at civil partnerships. For this and other reasons Miss Ladele's claim of direct discrimination was rejected. So was her claim of indirect discrimination. The Master of the Rolls, with whom Dyson LJ and Smith LJ agreed, stated at paragraph 52:

> "[I]t appears to me that the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the

> course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished."

13. The Master of the Rolls went on to hold (paragraph 55) that Article 9 of the European Convention on Human Rights ECHR, which guarantees freedom of thought, conscience and religion, together with the Strasbourg jurisprudence on Article 9, supported the view that Miss Ladele's desire to have her religious views respected should not be allowed

> "…to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community."

14. It is this reasoning in Ladele, addressing indirect discrimination, that is the specific target of Mr Diamond's vigorous assaults. Ladele is of course binding upon me, but Mr Diamond says that it was decided *per incuriam*, because the judgments failed properly to consider other decisions of this court, notably R (Williamson) v SSHD [2003] QB 1300 and Copsey v WWB Minerals Ltd [2005] IRLR 811. More broadly he would have me accept that the court in Ladele ignored the very principle of legality itself, and its judgment is "unconstitutional and contrary to the rule of law" (skeleton argument 15 April 2010, paragraph 5). In his oral argument on 15 April Mr Diamond submitted that this case is seminal

> "not just for the law but for the direction of the United Kingdom, and whether we are going to be a secular state or a neutral state holding the ring between competing values ."

More concretely, certainly more modestly, he submitted that the EAT and the court in Ladele failed altogether to conduct the balancing exercise between the claims in the council's policy and the claims of Miss Ladele to respect for her religious views, which the principle of proportionality required.

15. Ladele is by no means inconsistent with this court's decision in Williamson. Williamson concerned the conscientious belief of Christian parents of children at certain independent schools as to the use, in some circumstances, of corporal punishment and the effect of section 548(1) of the Education Act 1996, which provided that corporal punishment could not be justified on

stated grounds. The claimants asserted that the subsection tended to violate their rights under ECHR Article 9 and Article 2 of the First Protocol, which I need not set out. The court accepted that the claimant's beliefs fell within the scope of Article 9(1) but held that their rights under that Article were not infringed by section 548; nothing in the reasoning conflicts with Ladele. The same is true of Copsey. That was a case in which a Christian worker objected to the introduction of a new shift system at his place of work which would involve Sunday working. At length he was dismissed. It was held on the facts that the dismissal was not unfair.

16. Thus it is, in my judgment, impossible to contend that Ladele was decided *per incuriam*. But the appellant seeks to put his case on a much greater canvas than can be reflected in these distinctions. I have already (paragraph 14) referred to some of Mr Diamond's broader submissions. The case is supported, as I have said, by a witness statement from Lord Carey of Clifton. I think it right to address what he has to say, having regard to his seniority in the Church and the extent to which others may agree with his views, and because of the misunderstanding of the law which his statement reveals. The statement contains these passages:

> "3. I make this Witness Statement in support of the appeal of Gary McFarlane for his case to be heard before the Lord Chief Justice... and a specially constituted Court of Appeal of five Lords Justices who have a proven sensibility to religious issues...
>
> 9... I wish to dispute that the manifestation of the Christian faith in relation to same sex unions is *'discriminatory'* and contrary to the legitimate objectives of a public body. Further, I wish to dispute that such religious views are equivalent to a person who is, genuinely, a homophobe and disreputable. I will deal with these two issues.
>
> 10. The description of religious faith in relation to sexual ethics as *'discriminatory'* is crude; and illuminates a lack of sensitivity to religious belief. The Christian message of 'love' does not demean or disparage any individual (regardless of sexual orientation); the desire of the Christian is to limit self destructive conduct by those of any sexual orientation and ensure the eternal future of an individual with the Lord.
>
> 11. The field of sexual ethics and Christian (and other religious) teaching on this subject is a field of complex theology for debate by the Church and other religious institutions. The vast majority of the more than 2 billion Christians would support the views held by Ms Ladele. The descriptive word

> ‘discriminatory’ is unbefitting and it is regrettable that senior members of the Judiciary feel able to make such disparaging comments.
>
> 12. The comparison of a Christian, in effect, with a ‘bigot’ (ie a person with an irrational dislike to homosexuals) begs further questions. It is further evidence of a disparaging attitude to the Christian faith and its values. In my view, the highest development of human spirituality is acceptance of Christ as saviour and adherence to Christian values. This cannot be seen by the Courts of this land as comparable to the base and ignorant behaviour. My heart is in anguish at the spiritual state of this country.
>
> 13. It is, of course, but a short step from the dismissal of a sincere Christian from employment to a ‘religious bar’ to any employment by Christians. If Christian views on sexual ethics can be described as *‘discriminatory’*, such views cannot be *‘worthy of respect in a democratic society’*. An employer could dismiss a Christian, refuse to employ a Christian and actively undermine Christian beliefs. I believe that further Judicial decisions are likely to end up at this point and this why I believe it is necessary to intervene now...”

17. Then going to paragraph 17, after referring to decisions of the Court of Appeal concerning the wearing of crosses:

> 17. [After referring to decisions of the Court of Appeal concerning the wearing of crosses] This type of ‘reasoning’ is dangerous to the social order and represents clear animus to Christian beliefs. The fact that senior clerics of the Church of England and other faiths feel compelled to intervene directly in judicial decisions and cases is illuminative of a future civil unrest.
> 18. I am concerned that judges are unaware of these basic issues on the Christian faith; further it is difficult to see how it is appropriate for other religions to be considered by the Judiciary where the practices are further removed from our traditions.
> 19. It is for this reason that I support the application by Mr McFarlane for his appeal to be heard under the direction of the Lord Chief Justice and a freshly constituted five member Court of Appeal.

> 20. Further, I appeal to the Lord Chief Justice to establish a specialist Panel of Judges designated to hear cases engaging religious rights. Such Judges should have a proven sensitivity and understanding of religious issues and I would be supportive of Judges of all faiths and denominations being allocated to such a Panel. The Judges engaged in the cases listed above should recuse themselves from further adjudication on such matters as they have made clear their lack of knowledge about the Christian faith."

18. Lord Carey's observations are misplaced. The judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds with homophobia, or to regard that position as disreputable, nor have they likened Christians to bigots. They administer the law in accordance with the judicial oath, without fear or favour, affection or ill will. It is possible that Lord Carey's mistaken suggestions arise from a misunderstanding on his part as to the meaning attributed by the law to the idea of discrimination. In cases of indirect discrimination, such as are provided for by paragraph 3(1)(b) of the 2003 Regulations (which is centre stage in the present case), the law forbids discriminatory conduct not by reference to the actor's motives but by reference to the outcome of his or her acts or omissions. Acts or omissions may obviously have discriminatory effects and outcomes, as between one group or class of persons and another, whether their motivation is for good or ill; and in various contexts the law allows indirect discrimination where, in a carefully controlled legislative setting, it can be shown to have justifiable effects. Accordingly, the proposition that if conduct is accepted as discriminatory it therefore falls to be condemned as disreputable or bigoted is a *non sequitur*; but it is the premise of Lord Carey's position.

19. These considerations, I believe, refute the applicant's argument as to the meaning of discrimination, but they do not confront deeper concerns expressed in Lord Carey's statement and in Mr Diamond's argument. These are to be found, for example, in the references to an alleged want of understanding or sensitivity on the part of the courts in relation to the beliefs espoused by Lord Carey and others: "a lack of sensitivity to religious belief" (paragraph 10 of the witness statement).

20. These concerns are formulated at such a level of generality that it is hard to know precisely what Lord Carey has in mind. Broadly, however, the argument must be that the courts ought to be more sympathetic to the substance of the Christian beliefs referred to than appears to be the case and should be readier than they are to uphold and defend them. The beliefs in question are not specified by Lord Carey. Since his statement is given in support of the applicant's case, it must be a fair assumption that they include what is expressly stated in paragraph 21 of Mr Diamond's skeleton argument of 23 December 2009:

> "To the religious adherent religion is the route to salvation."

And there follow bullet points, two of which are as follows; first:

> "The fear of hell is central to the appellant's religious belief and individuals ought to be informed of the consequences of hell."

Then another bullet point:

> "The proposition of the appellant's religious belief is that sin will have eternal consequences. Those who do not repent will go to hell when they die."

21. In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society. The first of these conditions is largely uncontentious. I should say a little more, however, about the second. The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur*, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law, the prohibition of violence and dishonesty. The Judea-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy, and the liturgy and practice of the established church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It 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; no one else is or can be so bound, unless by his own free choice he accepts its claims.

22. The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion, any belief system, cannot, by force

of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law, but the State, if its people are to be free, has the burdensome duty of thinking for itself.

23. So it is that the law must firmly safeguard the right to hold and express religious beliefs. Equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime.

24. As I have shown, Lord Carey's statement also contains a plea for a special court. I am sorry that he finds it possible to suggest a procedure that would, in my judgment, be deeply inimical to the public interest.

25. I have gone into these matters because of the wide issues raised by Mr Diamond's argument and Lord Carey's statement. I have done so although, in truth, there is a short route to the resolution of this application. The applicant's argument is closed against him by this court's decision in Ladele, from which this case cannot sensibly be distinguished. There is no more room here than there was there for any marginal balancing exercise in the name of proportionality. To give effect to the applicant's position would necessarily undermine Relate's proper and legitimate policy. This application is dismissed.

Order: Application refused