

Case Reports

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It was not sexual orientation discrimination for a baker to refuse to provide a cake with a slogan supporting gay marriage (UK)

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Summary

22

The Supreme Court has ruled that a baker's refusal to provide a cake with a slogan supporting gay marriage was not sexual orientation discrimination, nor discrimination on grounds of political belief. The Northern Ireland bakery was owned by Christians who had religious objections to gay marriage (they thought Christian doctrine holds that marriage can only take place between a man and a woman). Gay marriage is not legal in Northern Ireland, although it is in the rest of the United Kingdom. Gay couples can enter into a 'civil partnership' in Northern Ireland, which formalises the relationship and provides it with legal recognition in a similar way to marriage.

Facts

In this case, a gay man, Mr Lee, wanted to take a cake to a private event organised by an organisation called QueerSpace. QueerSpace is an organisation for the lesbian, gay, bisexual and transgender (LGBT) community in Northern Ireland. The event was for the support of same-sex marriage and Mr Lee wanted a cake with the slogan 'support gay marriage', together with the QueerSpace logo and a picture of Bert and Ernie of the puppet show Sesame Street. Bert and Ernie are said by some people (including one of the writers of the show) to be

gay. Mr Lee went to the bakery Ashers to order the cake.

Ashers initially accepted the order from Mr Lee. However, they did not intend to provide the cake because they were a Christian business (the name 'Ashers' is derived from the bible, but this connection was not advertised anywhere). Ashers only took the order to spare Mr Lee embarrassment while in the shop and to give themselves time to consider how to explain their objection. Mr Lee was informed of the refusal to provide the cake a few days later. He received a full refund along with an apology from Ashers.

Mr Lee managed to make arrangements with another baker for a cake for the event, but made a complaint with the Equality Commission for Northern Ireland who supported him in bringing a claim against Ashers for direct and indirect discrimination on grounds of sexual orientation, religious belief or political opinion. However, by the time of the Supreme Court hearing it was common ground that this was a case of direct and not indirect discrimination.

Legal background

Under Article 3(1) of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ('SORs') discrimination occurs when:

"a person ('A') discriminates against another person ('B') if—

- a. *on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons [...]."*

Article 5(1) of the SORs reads as follows:

"It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services —

- a. *by refusing or deliberately omitting to provide him with any of them [...]."*

In Northern Ireland, protection against discrimination on grounds of religious belief or political opinion has constitutional status and is set out expressly in the Fair Employment and Treatment (Northern Ireland) Order 1998 ('FETO'). Article 3(1) defines direct discrimination as:

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- a. “discrimination on the ground of religious belief or political opinion.”

Article 3(2) reads:

“A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this Order if—

- a. on either of those grounds he treats that other less favourably than he treats or would treat other persons; [...].”

Under Article 28(1) of the FETO it is:

“[...] unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services—

- a. by refusing or deliberately omitting to provide him with any of them; [...].”

The district judge at the County Court found that there had been direct discrimination against Mr Lee, either on grounds of his own sexual orientation or on grounds that he associated with the gay community and awarded him £500 in compensation.

The decision was appealed to the Northern Ireland Court of Appeal who agreed that Mr Lee had been directly discriminated against, although it found that it was a case of associative discrimination based on the fact that he associated himself with the gay and bisexual community.

Judgment

The Supreme Court disagreed with both lower courts and found that there had not been direct discrimination against Mr Lee on either the grounds of his sexual orientation or on grounds that he associated with the gay community.

The direct discrimination claim

When making findings of fact, the district judge had not found that the bakery refused to provide the cake because of Mr Lee’s actual or perceived sexual orientation. They refused because they opposed same-sex marriage, based on genuinely held religious beliefs. The bakery would have supplied the cake to Mr Lee, a gay man, without the slogan ‘support gay marriage’, and would have refused to supply a cake with this slogan to a heterosexual person. The refusal was, therefore, not because of Mr Lee’s own sexual orientation – ‘the objection was to the message, not the messenger’ – and so could not be direct discrimination on this basis.

The Supreme Court did consider arguments that support for gay marriage was ‘indissociable’ from sexual orientation. In a previous case (*Preddy – v – Bull* [2013] UKSC 73), the Supreme Court had found that a bed

and breakfast owner’s policy of letting double-bedded rooms to married couples only, and not civil partners, was direct discrimination. But, at the time, only heterosexual couples could get married – which meant the policy was indissociable from sexual orientation, as a same-sex couple could never comply. The current case was different, because support for gay marriage is not a proxy for any particular sexual orientation, and people of all sexual orientations can and do support it. Therefore, the district judge had misunderstood the role ‘indissociability’ plays in direct discrimination.

The associative discrimination point

In relation to the associative discrimination point, the Supreme Court stated that Article 3(1)(a) of the SORs is not limited to less favourable treatment based on the sexual orientation of *that* person, as the definition does not contain the pronoun ‘his or her’ and as such it is possible that a person may be treated less favourably because of someone else’s sexual orientation. In this situation the question is how far that principle goes.

The Supreme Court said that there was no evidence suggesting that the reason for refusing to supply the cake was that Mr Lee was thought to associate with gay people. The reason was the objection to gay marriage and as such the Court of Appeal had been wrong to find that this was a case of associative discrimination.

The Supreme Court pointed to a few classic examples of associative discrimination including, in particular, the *Coleman* case (ECJ case C-303/06) in which a claimant with a disabled son was treated less favourably than others because her son was disabled. The Supreme Court noted in connection to this that even if the less favourable treatment has *something* to do with sexual orientation it is not necessarily ‘on grounds of’ sexual orientation – in the Supreme Court’s view a closer connection was required, and there was no such finding of fact by the district judge. Again, the Supreme Court noted that the bakery’s objection was to the message and not the messenger.

The Supreme Court did acknowledge the problem of discrimination against gay people, but did not find that such discrimination had occurred in this case, and it would serve no favours to the project of equal treatment to extend it beyond its scope.

The political beliefs claim

There was an additional argument that there had been discrimination against Mr Lee on grounds of his political opinion (something which is specifically covered in Northern Ireland and not the rest of the United Kingdom). The Supreme Court looked at this issue in a similar way, considering that the objection was to being required to promote the message on the cake, not to the fact that Mr Lee held a particular opinion. In addition, applying the rights to freedom of thought, conscience and religion and freedom of expression under the European Convention on Human Rights, the bakery owners should not be compelled to express a message with

which they disagreed, unless there was justification for doing so.

Commentary

On the face of it, this decision may seem something of a backward step in relation to the right not to be discriminated against because of sexual orientation. Additionally, the judgment did not provide the clarity many had been hoping for on the question of how to balance competing rights; in this case competing rights not to be discriminated against on grounds of sexual orientation and on grounds of religious belief. The Supreme Court took a rather technical approach in deciding this case when it considered whether the less favourable treatment was ‘on grounds of’ sexual orientation as required by the law and concluded that this was not the case here (it was the message – not the messenger).

This decision should not be seen as paving the way for service providers to refuse to provide services in this way without the risk of legal claims against them. For instance, it is possible that a different conclusion could be reached in a case involving another protected characteristic which is less subject to political or religious disagreement than LGBT rights. In theory, the law should apply in exactly the same way, but would a court be ready to find that, for example, it is not race discrimination if someone refused to provide a cake with a ‘support mixed-race marriage’ message if the refusal is based on a genuine religious belief that mixed-race marriage is wrong?

As mentioned above, indirect discrimination was not part of Mr Lee’s claim before the Supreme Court. Considering what an indirect discrimination claim involves – a provision, criterion or practice that is equally applied to everyone, but put those sharing a protected characteristic at a particular disadvantage – the Supreme Court’s decision does not rule out the possibility of bringing such a claim. In this case, the bakery applied a general policy of not providing cakes with slogans supporting gay marriage, and, arguably, this would put gay and lesbian people at a particular disadvantage as they would be more likely to order such cakes. If the Supreme Court had made such findings, the indirect discrimination would only be permitted if there was a legitimate aim justifying it and proportionate means were taken to achieve that aim. This would raise the interesting question of whether religious belief could amount to a valid justification and under what circumstances. No previous case law has dealt with this, so whether this would be the case is far from clear.

In this case there was no potential for a harassment claim as sexual orientation harassment is excluded from claims relating to the provision of goods and services under the UK Equality Act. Had a similar type of situation occurred in an employment relationship, a harassment claim might have been possible. For example, if an

employee expresses religious views against gay marriage to a colleague who feels offended as a result – assuming the employee expresses the same views to anyone, whether gay or straight – this would probably not amount to direct discrimination. This would, however, potentially tick the boxes of a successful harassment claim (the conduct would be unwanted, it would relate to sexual orientation, and would potentially have the effect of violating the dignity or creating a humiliating environment for him or her).

Suppose a bakery such as Ashers had a practice of giving employees who are getting married a wedding cake. It would be direct discrimination if the bakery refused to follow its practice because the employee was entering into a same-sex union. If the employer initially agrees to provide the cake but then refuses because the employee asks for the cake to read, ‘support gay marriage’, the legal picture becomes more confused. Under the Supreme Court’s reasoning, this should not amount to direct discrimination. Whether or not it would amount to harassment would probably depend on the other circumstances such as, for example, whether the company normally allows employees to choose wording for their cake.

In its judgment, the Supreme Court discussed the situation where someone is refused a job because of a political (or outside Northern Ireland, philosophical) opinion, such as supporting same-sex marriage. The Court said: *“there is here a much closer association between the political opinions of the man and the message that he wishes to promote, such that it could be argued that they are ‘indissociable’ for the purpose of direct discrimination on the ground of political opinion”*. An employer could not then refuse a job because of an applicant’s belief in same sex marriage. However, if something arises during the employment relationship which requires the employer to express a belief that the employer genuinely disagrees with, they may be allowed to refuse to express that belief, provided that they do not harass the employee in doing so. On a separate note it is quite remarkable that this judgment was handed down only four months after the US Supreme Court’s decision in the *Masterpiece Cakeshop* case ((2018) 44 BHRC 535), in which a baker refused to provide a wedding cake for a gay couple because of the baker’s religious beliefs. In its judgment the UK Supreme Court debated the US Supreme Court judgment. As pointed out by the UK Supreme Court, the factual circumstances in *Masterpiece Cakeshop* and *Lee – v – Ashers* were not the same, and as such the two Supreme Courts dealt with different questions of law. The question in *Masterpiece Cakeshop* rather was whether the administrative agency deciding that the refusal to provide the cake was discrimination had been hostile towards the religious beliefs of the baker – and therefore the US Supreme Court did not expressly consider whether a service provider’s beliefs would have to yield to a state’s interest in protecting the rights of same-sex couples. In essence the US Supreme Court said that the baker *“was entitled to a neutral decision maker who would give full and fair consideration to his religious*

objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided” and it therefore set aside the order of the Colorado Civil Rights Commission (the administrative agency) for showing anti-religious bias.

Mr Lee said after the UK Supreme Court’s judgment that he is now considering his options, including potentially making a claim to the European Court of Human Rights.

Comments from other jurisdiction

The Netherlands (Peter Vas Nunes): This case does not deal with employment law, but it is noteworthy for practitioners of employment law because of its analysis of several aspects of the concept of discrimination. One is the concept of ‘indissociability’. The Supreme Court states, “By definition, direct discrimination is treating people differently”. This sounds obvious, but it hardly does justice to the complexity of the concept of discrimination.

We are all agreed that an employer that adopts a policy ‘we do not hire pregnant applicants’ discriminates directly, not indirectly, on the ground of gender. Strictly speaking, such an employer does not reject applicants ‘because of’ their gender, but because of another characteristic. However, pregnancy and gender are so closely connected (‘indissociable’) that, as the Supreme Court might say, pregnancy is a ‘proxy’ for being female. In *Dekker (C-177/88)*, the ECJ went one step further. Rejecting an applicant for the reason that she will not be available for the first few months of her employment constitutes direct, not indirect, discrimination if the unavailability is the result of pregnancy. Such unavailability is indissociable from being female, even though at any given time only a tiny proportion of working-age women (my guess: 3% at most) is pregnant and thus unavailable.

One of Mr Lee’s arguments seems to have been: ordering a ‘gay’ wedding cake is indissociable from being gay. Admittedly it is possible for a customer who is not gay to order a ‘gay’ cake, but how likely is that to happen? Can one argue that this is so unlikely that, to all intents and purposes, refusing to sell ‘gay’ cakes is behaviour that detriments only gay persons? My reply is: no, and I agree with the Supreme Court’s reasoning and decision. Nevertheless, there is a gray area between direct and indirect discrimination on grounds of religion. The headscarf issue is an example. The Dutch Human Rights Commission has sometimes found a headscarf ban at work to discriminate indirectly, but more often directly, depending on the nature of the ban and its underlying motive. The *Achbita* judgment (C-157/15) may lead the Commission to lean further in the direction of indirect discrimination. Another example is the *Preddy – v – Bull* precedent ([2013] UKSC 73) of the

UK Supreme Court, to which it makes reference in this judgment. Refusal to let a double-bedded room to unmarried couples is detrimental to all sorts of couples, gay and straight. Yet the Supreme Court held the refusal to discriminate directly for sexual orientation (because at the time same-sex marriage was impossible). I expect that a Dutch court might have reasoned: the refusal impacts gay couples more often than straight couples, and therefore discriminated indirectly.

Subject: Discrimination, Sexual orientation

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