

SUMMARY

2015/42 The dismissal of an employee for expressing negative views about a colleague's homosexuality was both directly and indirectly discriminatory on the grounds of religion or belief (UK)

An Employment Tribunal has found that the employer of a Christian nursery worker both directly and indirectly discriminated against her on the grounds of her religion or belief when they dismissed her for expressing negative views about homosexuality to a lesbian colleague. Her claim for harassment was not upheld as the Employment Tribunal found that the employer's conduct was not unwanted because the employee welcomed the disciplinary proceedings as an opportunity to express her religious beliefs in more detail.

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proceedings as an opportunity to express her religious beliefs in more detail.

Background

The European Framework Directive (2000/43/EC) which covers discrimination on grounds of religion or belief, disability, sexual orientation and age is, together with other European discrimination directives, implemented into UK legislation by the Equality Act 2010.

The Equality Act 2010 prohibits direct discrimination, indirect discrimination and harassment of a person because of a protected characteristic. Both religion or belief and sexual orientation are protected characteristics under Section 4 of the Equality Act 2010.

The Employment Appeal Tribunal case of *Nicholson - v - Grainger Plc* [2010] 2 All E.R. 253 laid down guidelines for determining what types of belief are capable of constituting a protected characteristic. For a 'belief' to be capable of protection, it must:

- be a genuinely held belief;
- be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance;
- be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others;
- "have a similar status or cogency to a religious belief".

As some religious groups hold negative views about homosexuality, there is the potential for conflict between the protected characteristics of religion or belief and sexual orientation. Employers may, therefore, find themselves in the position of having to balance competing rights. Specifically, employers may need to address the conflict in the situation where an employee, as in this case, expresses negative views about homosexuality in the name of freedom of religious expression.

Facts

Ms Mbuyi is an evangelical Christian who was employed as a nursery worker by Newpark Childcare (Shepherds Bush) Ltd. Newpark also employed another female nursery worker, "LP", who is a lesbian living with a civil partner.

There were various incidents that formed part of the disciplinary proceedings against Ms Mbuyi including Ms Mbuyi remarking to LP "Oh my god, are you a lesbian?", giving LP a Bible as a gift and giving another colleague a Christian book as part of a secret Santa Christmas gift exchange.

However, the key incident in the case was a conversation between Ms Mbuyi and LP. After Ms Mbuyi referred to activities at her church, LP said that she wouldn't be interested in attending church until it recognised her relationship so she could get married there. Ms Mbuyi replied that "God is not OK with what you do", adding that "we are all sinners". LP was upset by the discussion and was sent home for the day. Ms Mbuyi asserted that it had been LP who had instigated this conversation and provoked Ms Mbuyi to answer honestly.

Ms Myubi was subsequently called to a disciplinary hearing, during which she stated to the disciplinary panel that she believed that homosexuality was a sin. Following the disciplinary hearing, Ms Mbuyi was dismissed for discriminatory and "wholly inappropriate" conduct.

The disciplinary panel did not investigate Ms Mbuyi's allegation that LP had initiated the discussion and specifically asked Ms Mbuyi what God thought of her living arrangements.

After an unsuccessful internal appeal, Mrs Mbuyi brought a tribunal claim asserting direct and indirect discrimination and harassment on grounds of her religion or belief. Ms Mbuyi did not have sufficient length of service to bring a claim for unfair dismissal under UK law.

Judgment

The Employment Tribunal found that Ms Mbuyi had been discriminated against directly and indirectly on the grounds of her religion or belief but dismissed her claim for harassment.

With regard to direct discrimination, the Employment Tribunal found that Newpark's treatment of Ms Mbuyi was not because of her Christian faith in general, rather it was on account of her Biblical belief that homosexuality is a sin. The Employment Tribunal was prepared to accept this as a genuinely held belief, worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others. Therefore, they upheld Ms Mbuyi's claim of direct discrimination.

The Employment Tribunal upheld Ms Mbuyi's claim of indirect discrimination on the basis that dismissal was "not proportionate" and so not objectively justified. Newpark had conceded that it had applied a provision, criterion or practice – that employees should not express adverse views of homosexuality – which put employees with Ms Mbuyi's beliefs at a particular disadvantage. The Employment Tribunal found that although Newpark had the legitimate aim of providing its services in a non-discriminatory way, it had not adopted proportionate means of achieving this - for example, by imposing an absolute ban on discussing the matters in question and failing to make clear that dismissal would result.

The Employment Tribunal dismissed the claim of harassment on the grounds that Newpark's

conduct was not “unwanted” by Ms Mbuyi because she welcomed the disciplinary hearing as an opportunity to express her religious views.

The Employment Tribunal also noted that although Ms Mbuyi was not bringing a claim for unfair dismissal, there were numerous and notable procedural failings throughout the disciplinary process which would have rendered the dismissal unfair.

Commentary

The so-called “clash of rights” in the workplace between Christian religious beliefs and sexual orientation has recently come to the forefront, following a string of cases decided in the European Court of Human Rights. However, this latest case does not represent a turning point nor does it point to religion or belief prevailing over sexual orientation, as has been claimed in some quarters.

The decision was very fact-specific and, as an Employment Tribunal ruling, cannot be seen as a binding precedent for other cases. A key component of the judgment was the finding that there had been a number of procedural failings in the disciplinary process which clearly does not take the issue of conflicting rights any further forward. Further, there is nothing in the judgment which suggests a judicial change of direction or that any preceding conflict of rights cases would now be decided differently.

The main principle that can be drawn from the case is to remind employers that they should seek to be even-handed when dealing with a clash between sexual orientation and religious beliefs. Where an employee professes a genuinely held, legitimate Christian belief, the employer should not stereotypically assume his or her comments are homophobic without satisfying itself there is proper evidence of that.

More generally, employers should proceed with caution and tact when dealing with sensitive matters of this nature and attempt to find a mutually acceptable compromise where appropriate. In this case, it appears the employer moved far too quickly towards a disciplinary process without fully investigating the matter or considering other possible ways to defuse the situation.

Comments from other jurisdictions

Romania (Andreea Suci): According to a judgment of the Romanian Supreme Court of June 2013, if the court finds a dismissal ‘not proportionate’ and not objectively justified, it may replace that sanction by a lesser one. The Romanian court would have most probably considered Mrs. Mbuyi’s behaviour towards LP as discriminatory but not serious enough to

justify dismissal. Thus, it would have replaced the dismissal by another, lesser sanction, for example a written warning, salary reduction or temporary demotion and, if expressly requested by the employee, the court would have also have reinstated Mrs. Mbuyi retroactively. Length of service is not a condition under Romanian law for bringing a claim for unfair dismissal.

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