SUMMARY

2013/24 A requirement for a Christian employee to work on Sundays was not discriminatory (UK)

<p>The Employment Appeal Tribunal has decided that a requirement that a care worker work on Sundays was a provision, criterion or practice (“PCP”) that could put Christians at a particular disadvantage but that it could be objectively justified and was therefore legitimate in the circumstances of the case. This meant that the requirement for the employee to work on Sundays was not an act of unlawful indirect religious discrimination.</p>

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Facts

Ms Mba was recruited to work for the London Borough of Merton ("Merton") at one of its children's homes in Brightwell in July 2007. The home provided short residential breaks for children with disabilities and complex care needs.

The home was open seven days a week, 24 hours a day and was required by a national minimum standard to ensure that staff working at any given time were of both genders and with substantial experience for the role, a requirement which at times could be challenging.

Staff worked according to a three-week rota, which included two weekends in each three-week period. When Ms Mba was recruited she became the fifth employee at the home. Merton supplemented the employees' work with that of temporary agency staff and casual workers ("bank staff"). However, such staff cost more over the weekend period.

Ms Mba understood that she had been offered the job on the basis that she would not have to work Sunday shifts, given that she was a Christian. Merton, for nearly two years of Ms Mba's employment, accommodated her desire not to work on Sunday shifts. It had, however, denied that it promised Ms Mba that she would never be required to work on Sundays throughout her employment.

By June 2009, Ms Mba had raised a grievance about the approach of Merton (which by this point, was indicating that it would not be possible to accommodate her desire not to work Sunday shifts indefinitely). Shortly afterwards, the grievance was rejected and Ms Mba was scheduled to work on a Sunday, for the first time since she had commenced employment with Merton. However, Merton was prepared to arrange Ms Mba's shifts in a way which enabled her to attend church on Sundays.

Ms Mba did not work the Sunday shifts for which she was rostered. Merton instigated disciplinary proceedings against Ms Mba, who received a final written warning in early 2010. Ms Mba appealed the written warning but was unsuccessful. Five days later, Ms Mba resigned claiming that she had been indirectly unlawfully discriminated against on the grounds of her religion and that, therefore, she had been "constructively" dismissed.1 Ms Mba claimed that Merton, rather than requiring her to work on Sundays, should have taken steps such as using bank or agency workers; recruiting an additional female employee; or scheduling other female employees to work her Sunday shifts. Merton argued that it was 'justified' in requiring her to work on Sundays, in other words, that this requirement was a proportionate means of achieving a legitimate aim and therefore not discriminatory.

Ms Mba relied upon the Employment Equality (Religion or Belief) Regulations 2003 because the Equality Act 2010 had not at that point come into force.

Tribunal decision

The Employment Tribunal rejected Ms Mba's claim, finding that Merton's requirement for all care workers to work on Sundays when rostered to do so, was a justified practice.2

The Tribunal considered that Merton's aims were legitimate. The aims were to ensure: a mixture of genders on each shift; a mix of seniority levels; a cost effective service; fair treatment of other staff (who had to cover a disproportionately high level of Sunday shifts)

and continuity of care for service users.

The Tribunal then considered whether requiring staff to work Sunday shifts when rostered to do so was a proportionate means of achieving Merton's aims. The Tribunal considered the impact of this on the Claimant as against the reasonable business needs of Merton.

The Tribunal, in considering the disadvantage caused to Ms Mba by the practice of requiring staff to work Sunday shifts, noted that Merton had made efforts to accommodate her wishes for two years and had offered to allow her to attend church on Sundays, when rostered to work. The Tribunal also noted that Ms Mba's "belief that Sunday should be a day of rest and worship upon which no paid employment was undertaken, whilst deeply held, is not a core component of the Christian faith". Taking this into account, the Tribunal decided that the requirement to work Sunday shifts was proportionate and, therefore, Ms Mba's claim of indirect discrimination failed.

Ms Mba appealed to the Employment Appeal Tribunal.

Appeal

There were three strands to Ms Mba's appeal, namely that the Tribunal:

1.had been wrong to hold that not working on Sundays was not a "core" component of the Christian faith;

2.had failed to subject the employer's proportionality argument to sufficient scrutiny; and;

3.did not place the onus on Merton to justify its requirement to work on Sundays when rostered to do so, and instead placed it on Ms Mba to show that it was not justified.

On the first point, Ms Mba argued that it was not for the Tribunal to make an evaluative judgment as to the tenets of faith. Ms Mba argued that the Tribunal should have considered the fact that abstaining from work on a Sunday was critical to *her* religious beliefs and not whether the Tribunal viewed this particular belief as a core component of the Christian faith.

The EAT said that the Tribunal did not express itself elegantly on this point and its phraseology could have suggested that the Tribunal was judging the tenets of faith, which would have been a misdirection of law. However, having considered the context of the Tribunal judgment and the legal principles referred to, the EAT held that the Tribunal was not adjudicating on the qualitative importance of Ms Mba's belief, but rather considering how many Christians shared that belief.

The EAT said that such a consideration is relevant to assessing proportionality because "the

weight to be given to the degree of interference with religious belief of a certain kind will inevitably differ depending upon the numbers of believers who will be affected by the particular PCP concerned". The EAT thought that a PCP which affects virtually every Christian will have a greater discriminatory impact than a PCP affecting only a small number of Christians. Accordingly, the EAT thought that the Tribunal was entitled to take into account the fact that many Christians work on Sundays when applying the proportionality test.

On the second point, the EAT held that there was nothing to suggest that the Tribunal failed to apply proper scrutiny to the issue of proportionality and no reason to regard Merton's justifications as lacking cogency.

On the third point, the EAT did not accept that the Tribunal had misdirected itself by placing the onus on the employee to show that the PCP was not justified. The Tribunal had placed the burden on the employer.

The EAT noted generally that on a correct reading of UK law, the issue to consider was the discriminatory impact of a PCP on a group and not on the particular claimant (although the individual must also be disadvantaged as falling within that group). The tribunal had therefore been wrong to focus solely on the impact on the claimant. However, in doing so it was adopting a test which was likely to be more favourable to the claimant than the correct test and so nothing turned on its mistake.

The EAT dismissed the Claimant's appeal. Ms Mba's appeal to the Court of Appeal is outstanding.

Commentary

Whilst this case has been heralded as an attack on Christians' rights in some articles in the mainstream press, this is not accurately reflecting the position. Mr Justice Langstaff who handed down the EAT judgment was at pains to stress that "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... will both be disappointed. No such general broad issue arises. The questions must be determined in the specific circumstances of this particular case alone."

It is clear that a PCP of requiring Sunday work will put those sharing Ms Mba's belief at a particular disadvantage and within the scope of the indirect discrimination provisions. Whilst Merton was able to justify its Sunday working requirement in the circumstances of this particular case, not all employers will be able to do the same.

The EAT considered how the proportionality test should be applied in these circumstances, noting that a group disadvantage is necessary when seeking protection under UK legislation. The legitimacy of the requirement to show a group disadvantage under domestic legislation has been called into question in light of the subsequent European Court of Human Rights ("ECHR") decision in *Eweida and Others - v - United Kingdom*. In that case, the ECHR upheld Ms Eweida's complaint about being prevented from wearing a cross visibly at work, notwithstanding the fact that the UK courts thought that she had failed to show a "group "disadvantage. The ECHR focused on the right to a personal expression of faith which it said was a matter of "individual thought and conscience".

Following *Eweida*, it will be interesting to see how the Court of Appeal deals with Ms Mba's appeal in relation to the group disadvantage point which has thus far underpinned domestic indirect discrimination legislation in religious belief cases. Arguably, in light of *Eweida*, Ms Mba may succeed in her indirect discrimination claim on the basis that her individual thought and conscience in relation to abstaining from Sunday work should be protected.

Comments from other jurisdictions

Austria (Martin Risak): It is interesting that up to now no employee in Austria ever came up with a similar argument in order not to be scheduled to work on a Sunday. This may have to do with the legal requirements on the allocation of working time. Under Austrian law, working times must be agreed on in the contract of employment, in a "works agreement" or in a collective agreement. The employer may only change previously agreed working times unilaterally in the event the right to do so has been stipulated expressly in writing and the interests of the worker opposing this change are less substantial than the employer's interests justifying the change. It is very likely that a case like the one at hand would have been dealt with under Austrian law using this argument and that an employee would not take recourse to the anti-discrimination legislation.

Germany (Klaus Thönißen): From a German point of view this case raises two interesting issues: indirect (religious) discrimination on the one hand and an employee's right to practice his or her religion during working hours on the other hand.

The "discrimination part" of this case is fairly easy. I don't think that a German court could determine an indirect discrimination at all under the German Equality Act (the "AGG").

Firstly, both Directive 2000/78 and the AGG require that "*an apparently neutral provision, criterion or practice would put persons having a particular religion or belief [...] at a particular disadvantage compared with other persons unless...*". In the case at hand, every employee – based on a three week rota – has to work on every day of the week. Therefore, Ms Mba cannot

be indirectly discriminated **particularly** as a Christian, because the employer's practice would affect **every** member of **every** religion equally (a Jew had to work on a Saturday, a Muslim on a Friday etc.).

Secondly, under the "AGG" – which is similar to the EU/UK provisions

–the criterion "justification" as part of the definition of indirect discrimination had to be considered as satisfied. Here, the employer had the legitimate aim to save costs in order to keep the children's home going 24/7. Therefore the employer needed its five regular employees. In 2011, the Federal Labour Court (the "BAG") found that an employer did not indirectly discriminate a Muslim employee, who worked in a supermarket, by firing him when the employee refused to touch any can or bottle that contained alcohol. In that case the BAG held that it was the employer's legitimate aim to terminate an employment relationship, where an employee is unwilling to perform his duties under his employment contract for subjective reasons.

However, the case at hand also addresses another question which is getting more and more important: what must an employer do in order to support its employees in practicing religion during working hours? Basically, an employer in Germany has to recognize its employees' religious needs as long as there is no negative effect on its business. In the BAG case mentioned above the court also found that the employer did not sufficiently show that there was no way to put the Muslim employee in another department of the supermarket (e.g. bakery, non- food etc.). So the BAG found that the termination would be considered unlawful if the employer did not show that there was no alternative position for the Muslim employee. Therefore the BAG referred the case back to the Regional Labour Court. A final judgment has not been rendered yet.

In addition, some of our clients are confronted with their (Muslim) employees' demand to establish prayer rooms on their premises. So far, no court decision has been made on that very issue. But a Regional Labour Court found, in 2002, that an employer needs to grant its employees breaks for prayers. Based on that ruling, the employee's right derives from the constitutional right to free expression and practice of religion and an employer has to recognize it in an employment relationship. This raises the question of whether an employer also has to provide its employees with a prayer room. I don't think that an employer has a legal duty to install such a prayer room as long as every member of a religion is able to perform his or her prayers in a clean spot. But it might be practical or useful for an employer to have a multi-religious prayer room. An employer with hundreds or thousands of employees might be better off with one prayer room rather than having employees spread out all over his premises.

The Netherlands (Peter Vas Nunes):

1.Does it make a difference describing the practice (PCP) at issue as "requiring Sunday work" or as "requiring work on all days of the week"? Probably not, but if I had been the employer I would have preferred the latter wording.

2.The definition of discrimination in the UK Equality Act 2010 differs from that in Directives 2000/43, 2000/78 and 2006/54, but the UK definition of indirect discrimination does follow the system of those directives in that a practice is only indirectly discriminatory if is not objectively justified. The Dutch statutes on discrimination avoid the use of the term "discriminate", referring instead to "distinguish". A practice that distinguishes between, for example, Christians and others, can be indirectly distinguishing, in which case it is unlawful unless it is objectively justified. Thus, the element of justification is not a part of the definition. Although this difference between EU/UK and Dutch law is no more than a terminological one, it can create confusion. A Dutch court, if it followed the same reasoning as the EAT in the case reported above, would have held that the London Borough of Merton did "discriminate" (in the neutral meaning of "distinguish") indirectly, but that it was justified in doing so.

3.The issue of whether an employee may require an employee to work on Sundays has a long and contentious history in The Netherlands, despite the fact that no more than a small percentage of all employees attends church services. Basically, an employee may not be compelled to work on Sundays (or, if he or she has another religion, on that religion's holy day), unless

(i) the nature of the work requires such work and (ii) the parties have explicitly agreed to work on Sundays, for example, in their contract of employment. Re (i): the nature of, for example, a police officer's work requires work on Sundays, the nature of a shop assistant's work as a rule does not. Re (ii): an exception is possible with the works council's consent, but even then the employee may refuse. A dismissal on the ground that the employee has refused to work on a Sunday is invalid.

Footnotes

1. Constructive dismissal is where an employee resigns on account of a fundamental breach by his or her employer of a term of the contract of employment (e.g. discriminatory conduct). In such a situation, the employee is considered as having been dismissed by the employer. Had Ms Mba's claim of discrimination been upheld, she could have claimed damages.

2.The Equality Act 2010 covers situations where a "provision, criterion or practice" (a "PCP") is discriminatory. The case of Ms Mba dealt with a practice.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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