Mba v merton 2013 ewca civ 1562

Judgment treated as irrelevant whether disadvantage suffered by ladele was ine she shared with identifizble group

ACCOMMODATING DIFFERENCE; how is religious freedom protected when it clashes with other rights; is reasonable accommodation the key?

John Bowers QC, Brasenose College

1 Introduction

The relationship between Church /religion (broadly so defined) and the State has been an age old concern, if not an obsession, across many parts of the world and has led in extreme cases to religious wars and to endless debate and division. In the modern legal context, however, the issue is often seen as one of the law facilitating compromise or accommodation between the rights of the religious and the rights of others, including the State or even between the adherents of different religions (or subsets of the same religion). This is the language of on the one hand clashing human rights and on the other reasonable accommodation between these rights and between those groups.

The requirement of proportionality which is built into most human rights treaties (and also into justification for indirect discrimination) in effect demands tolerance and accommodation on both (or all) sides and this requires some considerable legal ingenuity as to how the balance is to be properly struck between contrasting rights. The religious may not see why they need to accommodate with others, especially where those others follow or display practices which are anathema to those of the faith and which they regard as sinful, such as, in many of the decided cases, homosexuality.

This receives purchase in particularly sharp focus in the clash which surfaces from time to time between the religious and the gay communities (both of which have organised legal funds of some depth) but it is not confined to that special area of especially intense scrutiny and conflict. Can there be a reasonable accommodation in this fiercely contested area and should reasonable accommodation be the organising principle? Another important issue is the extent to which protection of religion should differ from the treatment of other protected characteristics because of its special character.

A ready conclusion might be that the courts of this country do not recognise a right to manifest a religious belief in a manner which conflicts with goals or values which society as a whole has decided are of importance, provided that the State has taken the religious views into account and has reasonably decided that other goals or rights take priority. This is close to a reasonable accommodation doctrine but it cannot be said to apply uniformly in all situations.

This article concentrates (although not exclusively) on religion in respect of employment. Religious rights do not end at the door of the workplace but they do need some modification to reflect the fact that, as the Advocate General pointed out in *Bougnaoui*[1] the employer in effect buys the time of his employee so that in particular he cannot use it to proselytise in the workplace and must accept some other limitations on the basis that this is not the right time and the right place for certain activities[2]. Religious manifestation may impact on the way in which the employee is prepared to carry out his duties.

[1] AG para 73

[2] Eg *Drew v Walsall Healthcare NHS Trust* EAT 378/12

As Lord Scott of Foscote put it in *Denbigh* at para 86 "'freedom to manifest one's religion' does not mean that one has the right to manifest one's religion at any place and in any manner that accords with one's beliefs."

On the employer's side, problems can arise in that the employer says it is concerned because of loss of custom or general reputation if religious interests are accommodated and the customers or clients do not like it[3]. This is seen in particular in cases on religious dress and not working on religious holidays.

There may also be resentment (actual or perceived) by non religious employees who for example have to pick up work on religious holidays by changing work pattern.

On the other hand, there may be positives for an employer in allowing religious diversity; as Elizabeth Griffith says "Allowing employees to manifest their religious belief as long as no harm is done to others could improve employee well being, improve a company's public image and help with the recruitment and retention of staff"[4].

The tension goes to the heart of how to respond to religious diversity in a democratic state and general issues of multi-cultural accommodation. Indirect discrimination may be an inadequate tool to address the difficulties faced by religious persons in the workplace because of the needs to prove group

[3] One area in which there is no accommodation in theory is the provision for religious education in accordance with the national curriculum as laid down by the School Standards and Framework Act 1998 s69 and sch 19 para 22(8) including provision for a daily act of collective worship, although this is often now honoured in the breach rather than observance.

[4] International Journal of Discrimination and the Law; 161 at 174.

discrimination, that is that a whole range of persons have been disadvantaged[5] and the rigidity of the justification / proportionality principle.

I consider in particular whether there should be one overarching principle of reasonable accommodation which can be used to explain the stance of the law (at least in most cases) and whether this should be adopted explicitly and to what extent this has influenced decisions in this heavily contested field.

2 Human rights protection; Right to manifest a religious belief

The right to hold and carry out a religion is fundamental to all human rights conventions. The other international provisions ultimately derive from the terms of Article 18 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance". What is clear is, as it was put in *Kokkinakis v Greece* (1993) 17 EHRR 397 para 31, the article 9 freedoms are "a precious asset for atheists, agnostics sceptics and the unconcerned".

There are three different levels of protection which we need to consider and also to keep separate:

a. The Universal Declaration on Human Rights;
b. the European Convention on Human Rights;

[5] See discussion in *Eweida* in the Court of Appeal and *Mba.*

c. EU and domestic law, which concentrate on discrimination on the grounds of religion and belief which is subtly different.

Less obvious is the effect on the contract of employment since in *Johnson v Unisys* [2001] UKHL 13 Lord Hoffmann said the employment relationship must involve the observance of fundamental human rights although this has not been developed much in subsequent cases.

The difficulty in regulating religious activity is heightened by the fact that a person's commitment to his or her religion may inform every aspect of the manner in which they conduct their lives and contempt rather than sympathy may be expressed for those who leave the "faith", leading to shunning and avoiding, difficulties and embarrassment for those involved (including the family unit). As Justice Sachs suggested in the Constitutional Court of South Africa, "the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law".[6]

We also need to pay attention to the compound nature of religious discrimination and the competing interests which it engages. As Prof Lucy Vickers puts it in her book *Religious Freedom, Religious Discrimination and the Workplace* at p225[7] "Accommodation of religion upholds the religious freedom of the person accommodated but may simultaneously undermine the freedom of religion and belief of another". That is the crucial tension.

[6] *Christian Education South Africa v Minister of Education* [2000] 9 BHRC 53, paragraph 35.

[7] Bloomsbury 2016 2nd ed

ECHR law declares in Article 9 that "Everyone has the right to freedom of thought, conscience and religion". This has been interpreted to include the right to change religious views and it must as a necessary matter of interpretation incorporate the right to hold different views from the employer. There is the associated right to manifest beliefs and also the lack of belief in both private and public spheres.

3 European Union law

In European Union law, the issue arises most naturally in the shape of indirect discrimination as it does in the UK domestic law, that is where a practice is set down which has a particular impact on persons of one or other religious belief (or lack thereof[8]). This is most obviously of relevance in respect to dress codes[9]. The respondent is then required to justify why a restriction which bears most seriously on those of a particular religion should apply notwithstanding that detrimental impact and this brings in its wake the difficult and multifaceted principle of proportionality. Basically, this requires that a balance be struck because the interests of the employer may not be compatible with full protection for religious employees as those employees would wish to see it and the court ultimately has to weigh a balance which uses similar materials to those which are adopted in the human rights jurisprudence.

One can also see this interest operating at different levels with different concerns. There is the micro interest of religious and secular employers and employees, customers and service users and set against that are the more

[8] **See De Groen**

[9] See other article [yet to be published]

contextual or macro interests of the State in upholding equality and promoting social inclusion and cohesion as well as religious pluralism and tolerance[10].

Further portraying or pushing (a) particular religion(s) (especially in the form of proselytism may not be necessarily compatible with the employer's business interests and this may be taken into account to a significant or lesser degree depending on circumstances.

There is some degree of overlap in that the principles of proportionality apply (although in slightly different ways) both in human rights and discrimination law, where it normally comes in as part of the justification defence. It may also be proportionate to allow some level of religious discrimination by way of exemption from the general law in order to enable a religious employer to create a religiously homogeneous workplace. One curiosity is that the cost of measures for any such special provision for particular employees (and it may be high for example in providing special food) is not available in the justification defence for sex or race discrimination but may be for religion in terms of the human right of manifestation of that religious belief.

4 Definitional issues

This requires firstly a brief definition of the terms of the discussion. For the recognition of a religion or belief, there must according to ECHR jurisprudence be included these elements: cogency, seriousness, cohesion and importance[11].

[10] See p264 Vickers op cit.

[11] In general comment 22 (1993) the Human Rights Committee said art 18 on which the ECHR is based "protects theistic, non-theistic and atheistic beliefs as well as the right not to

The Explanatory Notes to the Equality Act 2010 says that the law will treat as religion those faiths with "a clear structure and belief system".[12] It is desirable to want to avoid courts being arbiters of the validity of beliefs.

A further definitional issue arises in human rights law because there is no precise definition of where worship ends and observance or practice sets in, so that the concept of manifestation may have flexible rather than hard edges. There cannot be any sensible view of the scope of encroachment on religious manifestation without knowing this context. There may in some cases be no firm distinction between compulsory religious prescriptions, observance and mere authorisations (practice).

In *Bougnaoui,* the Advocate General said[13] "not all of the religious practices are seen as core to his or her religious practices; what is considered essential may change over time". This may of course be seen as giving preference to those who are themselves seeking special treatment.

5. Proportionality

profess any religion or belief". Lord Nicholls in *Williamson* at para 23 said "a belief must satisfy some modest, objective minimum requirements".

12 Note the extremes which are not included as shown in *Employment Division v Smith* 494 US 872 (1990) where two native Americans were dismissed from drug counsellor roles after ingesting psychoactive drug peyote during religious ceremonies long practiced in native American Church. This was not recognised as a religious ritual.

13 at Para 29

In the European Convention on Human Rights, freedoms of thought, conscience and religion are set out as absolute rights but manifestation is not, but instead is a qualified right, so that the difficult issue of determining proportionality inevitably raises its head.

Proportionality originated in 19th century Prussian administrative law. It aims to ensure that rights are not unnecessarily or overly restrictive. The general rubric applied is to identify a legitimate aim; find a rational connection between the aim and measure; check whether there are less restrictive means and then apply a balance. To focus the third element, a measure is necessary if there are no less restrictive means of fulfilling the goal to the same extent. The fourth element requires the extent and seriousness of the infringement of the right to be balanced against the importance of the conflicting interest[14].

It is not possible to define this rubric exhaustively because it is fact specific but an example may be found in the ECHR judgment in *Sahin v Turkey* app 44774/98 paras 104 – 111 which surveyed the bases on which proportionality rests, saying that the court recognises the need in some situations to restrict freedom to manifest religious belief, the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedom of others and the permissibility in some contexts of restricting the wearing of religious dress. This is a wider ranging set of criteria than might be applied in a test of reasonable accommodation discussed below although most of these factors

[14] See R (ota *Z and anlotyher) v Hackney London Borough council* [2020] UKSC 40

could be present depending on the facts in assessing the reasonableness of the accommodation being sought.

In *Ladele* (discussed further below), in terms of proportionality under Article 9(2) the question resolved as being: can the religious interest be accommodated so that staff might swap clients informally or in Ms Ladele's specific case, by not designating her as a registrar in regard to civil partnerships?

6 Reasonable Accommodation; Sameness and inequality

The idea of reasonable accommodation has an even longer pedigree: in Sept 1789 George Washington in letter to Annual Meeting of Quakers said "I assure you very explicitly that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire that the laws may always be as *extensively accommodated* to them, as a due regard to the protection and essential interests of the nation may justify an permit".

Although it is not formally presently enshrined as a legal doctrine, one can nevertheless see the broad notion of reasonable accommodation operating in the minds of some judges in many different areas of the religious arena and the concept has been brought out explicitly in a few cases.

As long ago as 2007 Lord Hoffmann suggested in *Denbigh High School* that implicit in much of the case-law of the European Court of Human Rights is an "expectation of accommodation, compromise and, if necessary, sacrifice in the

manifestation of religious beliefs".[15] The issues which may be seen to require such accommodation most obviously include the areas in respect of time off for religious observance during normal working hours; dress codes and the modification of duties to observe rituals which may be necessary in a workplace environment as well as conscientious objections to aspects of the work.

Lord Nicholls similarly stated in *Williamson v Secretary of State for Education and Employment* that "freedom to manifest belief is qualified" and "in a pluralist society a balance has to be held between freedom to practise one's own beliefs and the interests of others affected by those practices".[16]

In this area religious people will often be seeking different and not the same (or similar) treatment as others. Treating the same lies behind the principles of indirect discrimination because "indirect discrimination is more concerned with the effects of any behaviour rather than the nature of the behaviour itself"[17]. The request from the employee here is "please accommodate my practice which is compelled by my religion or at least my interpretation thereof". The employer says "no that is not reasonable in my sets of circumstances"; for example "because I have other staff and this may set off a snowball effect, all the staff will want the same concession, because of the cost or because of my reputation. Soon everyone will be wanting the same privileges religious or otherwise and I have a business to run. There will be a

[15] *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paragraph 54.

[16] *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, paragraphs 16-17.

[17] p155M Connolly Discrimination Law 2nd ed London 2011

snowball effect or at least resentment". An accommodation may however be of little practical inconvenience or cost to the employer.

As Gabrielle Caceres has put it[18]: "reasonable accommodation aims at relaxing generally applicable rules in order to guarantee a more substantive equality in which the specificities of everyone are taken into account".

The notion here is clearly to accommodate differences and that may mean adjusting or adapting existing policies, rules, practices or infrastructure to reduce barriers so that there is a reasonable accommodation. In this respect Brobosia, Ringlelheim & Rorive describe reasonable accommodation as expressing "an important idea in the evolution of the principle of equality". **REF** Reasonable accommodation would "allow for nuanced fact-specific conclusions which do not constrain subsequent cases"[19] because what may be reasonable in one situation will not be so in another.

Accommodation of the environment may be needed as a modification or adjustment to allow persons with that characteristic to avoid disadvantage; which is a form of substantive equality. This is the principle of justice as even handedness but accepting that achieving formal equal treatment requires difference. It sees compensatory affirmative action as appropriate for fighting structural inequalities.

Reasonable accommodation is in some ways a more positive duty than proportionality. In other words, one group may be seen to gain benefits over

[18] B96 Bielefeldt 27.

[19] C Stychin "Faith in the future" 2009 29 OJLS 729.

and above the others in order to meet their special needs for some particular reason. This is of course a sensitive and highly charged political subject and is open to the charge that some because of their religious faith thereby gain "special privileges" on the grounds of religion. This special status is perhaps more easy to justify in the case of disability. It is for that reason no doubt that there is no similar provision save in that a similar feature may be said to be present in the treatment of the disabled who have to be given reasonable adjustments to secure a level playing field under s20 Equality Act 2010[20]. This indeed only operates one way in that a non disabled person cannot seek such adjustments.

As it was put by the ECHR in *Thlimmenos v Greece* [2001] 31 EHRR 15 "failure to treat different people differently is as unjust as failure to treat similarly people who are the same". This recognises that eliminating discrimination in this area may require some positive measures of adjustment in institutions, schools, offices and employment on behalf of certain individuals in order to allow them to live in accordance with their religion or belief. The important observation in *Thlimmenos* was made in response to the suggestion that a religious dress policy was equal across the board, when the court responded "to treat everyone in the same way is not necessarily to treat them equally; uniformity is not the same thing as equality" (para 111).

20

This recognises that changes to the workplace to allow full participation by disabled people will need to be individualised and not at a group level as it may be for race and sex.

It recognises that some persons do not go with the flow of the majority view. The interaction between the individual's characteristics and the environment in which he operates deprives him of the ability to take part along with others.

This is also the principle behind the legality for positive action measures which is quite limited in this area. There is also a zone in which the law leaves religions alone to reflect and protect their special character[21].

As Lucy Vickers says in *Religious Freedom, Religious Discrimination and the Workplace*[22] "treating everyone the same may not achieve full equality but may instead create inequality or at least allow inequality to remain, because of a failure to recognise the difficulties some groups may have in meeting what appear to be neutral requirements". She goes on "an equilibrium or 'practical concordancy' needs to be found between the rights of those who wish to practice their faith and those who wish to be free from such practices".[23] Overall she is against the introduction of this principle.

Such a requirement for reasonable accommodation was recommended to be adopted in legislation by the *Independent Review of the Enforcement of UK Anti Discrimination Legislation* by B Hepple, M Coussey and T Choudhury. The EHRC Guidance after the *Eweida* cases indeed suggests there is scope for reasonable accommodation under existing law stating that there should be

21 Sched 9 para 2 Equality Act states that organised religions may discriminate on the grounds of sex, sexual orientation and gender marriage reassignment in certain circumstances. To some extent this may be seen as reasonable accommodation in action.
22 Bloomsbury 2016 2nd ed, p165
23 p274

such accommodation unless there are "cogent or compelling" reasons not to[24] but this is running somewhat ahead of the caselaw.

It is this delicate balance which must be kept but it is a fine one with various factors involved and of course much depends on the facts of the particular case as they present and the context in which it arises[25].

7. USA and Canada

We look briefly at the two jurisdictions which do apply this accommodation doctrine in statutory form. In the USA, Title VII of the Civil Rights Act 1964 (as amended in 1972) requires an employer to make reasonable accommodation of an employee's religious practices, if it is possible to do so without imposing undue hardship on the conduct of business[26]. A similar principle applies in Canada.

In Canadian law, the concept is seen as a derivation of the equality principle. In *Central Alberta Dairy Pool v Alberta Human Rights Commission* [1990] 2 SCR

---

24 Religion or belief in the workplace: A Guide for Employers Following Recent ECHR Judgments Feb 2013.

25 This emphasis on the *reasonableness* of the accommodation also comes up against parts of religions which may not in themselves appear reasonable and may be at the extremes toxic and offensive to some and it thus raises the question whether there are limits to tolerance and accommodation defined of course by a reasonableness which may be different to different sets of people. In *Re G*, a family law case, the court said that "Some aspects of even mainstream religious belief may fall foul of public policy…." The regulator of the factor of reasonableness is of course important in this respect.

26 See application in *Ansonia Board of Education v Philbrook* 479 US 60 (1986) considered in para 48 of *Eweida et al.*

489 the court set out "a non exhaustive list of criteria to be considered" and this comprises; financial cost; disruption of a collective agreement, morale problems for other employees, inter changeability of workforce and facilities, the size of the employer and safety[27]. Clearly this will be fact specific.

The general test to be applied for the concept was laid down in *British Columbia (Public Service Employee Relations Comm) v BCGEU* [1999] 3 SCR 3 at para 54 as "to show the standard is reasonably necessary it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer….Employers… must demonstrate that they have made every effort to accommodate an employee and that it would have been impossible to modify or eliminate a particular requirement without incurring undue hardship".

Central Okanagan School District No 23 v Renaud [1992] 2 SCR 970 shows that the burden of proving any problem of workforce morale on the employer is high; the test is whether interference with the rights of other employees was substantial.

8. The four ECHR conjoined cases: Eweida, Ladele, Chaplin & Macfarlane

How this reasonable accommodation principle might operate may be seen to most explicitly in the crucial conjoined cases of *Eweida, Ladele & Chaplin* [2013] IRLR 231 which surprisingly were only the second key sets of cases on manifestation of religious belief to come before the ECHR. The only claimant to

27 See also *Chambly (Commission Scolaire Regionale) v Bregevin* 1994 2 SCR 525.

succeed at the ECtHR in those four cases was Ms Eweida whose small discreet cross was banned from the work environment by BA in a manner that was deemed not to be proportionate to the circumstances. This successful result was reached because there was no evidence that her wearing a cross under her dress could have negative impact on the employer's brand image as they had claimed that it would.

She wore a cross to signify her religious devotion although it was not specifically mandated by the tenets of Christianity. When she was told that this was against the revised BA dress policy (because they said that they wanted to communicate a certain image of the company and to promote recognition of its brand and staff) she sued for discrimination on the grounds of religion and lost at the Court of Appeal level[28] but eventually succeeded in Strasbourg.

The UK Government argued as the Respondent before the ECHR that BA were entitled to conclude that the wearing of a uniform played an important role in protecting the business reputation of the company as the employer and to promote its brand, but the Court found that in particular there was in fact no evidence that the wearing of other previously authorised items of religious clothing such as turbans or hijabs had any negative impact at all on the BA brand or image, so that this was not likely to be borne out in the case of Ms Eweida's small cross. The conclusion reached by the Court was that "in these

---

[28] The Court of Appeal in *Eweida* said that there was not a pcp which would put someone at a particular disadvantage in the absence of evidence showing anyone else who share that particular belief because this was not group disadvantage. The right should not depend on whether the belief is a core belief of the particular belief system and shared by others; but what of crank theories?

circumstances where there is no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to protect her right to manifest her religion". In determining whether the measure was "justified in principle and proportionate, a fair balance has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the state"[29]. The proportionality principle was applied against the interests of the UK by a majority of 7 to 2.

In the conjoined and contrasting case of *Chaplin v Royal Devon and Exeter Hospitals NHS Foundation,* a Christian nurse was requested to remove a cross which she wore at work but this was held to be justified on health and safety grounds since it might cause injury if a patient pulled on it[30]. She worked with geriatric patients so that the likelihood of this problem occurring was quite high[31]. She lost her claim because the court thought that decisions on clinical safety were best taken at local level and found this decision to be justified and proportionate. This was "inherently of a greater magnitude than that which applied in respect of Ms Eweida" (para 99).

The case in which the application of the reasonable accommodation principle would probably have made a difference is that of Ms Ladele, the Christian

---

[29] Henrard says that the ECHR "hid behind the wide margin of appreciation granted to states, because either conflicting convention rights or clinical safety concerns are in play".

[30] This was linked with a change to V neck sweaters.

[31] It was said that the cross could swing forward or come into contact with an open wound.

Registrar who would not carry out civil partnerships introduced during the tenure of her employment by the Civil Partnership Act 2004. She was seen to be arguing for better treatment than others because of her beliefs and this was not permitted and there was in addition a clash with the rights of the gay community[32]. The London Borough of Islington was committed to the provision of services on a non discriminatory basis ie they were protecting the equal opportunities policy. This is the most difficult of the four decisions in my view because

a. The requirement on Ms Ladele to carry out civil partnerships was introduced long after she took on the role of Registrar with the Borough and had agreed what her duties comprised so that she would have thought then that she would only be required to officiate at heterosexual ceremonies; the dissenting minority of two judges placed emphasis on this aspect of the case[33];
b. The roster of the Registrars working for the London Borough of Islington could have been adjusted so that others could have officiated at those ceremonies without the need for Ms Ladele to do so.

[32] In the fourth case, Mr McFarlane worked as a counsellor for Relate Avon Ltd which provided a confidential sex therapy and relationship counselling service. He refused to provide services for gays as he thought homosexual activity was sinful and he should not do anything which directly endorse such activity. It was held to be a central part of his duties that he carried out such work.

[33] The minority also said at Para 2 that they thought her case was really one of freedom of conscience. They also said that respecting her conscience could have been achieved without detriment to the overall services provided by the borough rid of obsessive political correctness; para 7. Further they referred to the "blinkered political correctness" of the Borough of Islington (which clearly favoured 'gay rights' over fundamental human rights"); para 5.

Ladele may thus be seen as a case in which there was accorded too great a level of autonomy to the employer to decide how its staff should be deployed and also because they wanted to establish the principle that all of the Registrars had to act in relation to civil partnerships as well as heterosexuals in relation to marriage. There was said the Court a margin of appreciation operating at the employer and State level too. This of course makes it more difficult for a claimant to succeed.

Again, the result is curious because there was demonstrated to be no specific detriment to the Council in allowing Ms Ladele to do as she wished but emphasis was laid by the Council on the need to comply with the Council's equal opportunities policy. If a reasonable accommodation rule had been applied, it might well have been seen as reasonable that the London Borough should reach accommodation with her religious views by deploying other Registrars without her religious views to deal with gay ceremonies without any detriment to the running of the Department.

9 Clashes between discrimination and religions in domestic law

I turn to examples of what may appear to be clashes between the religious and others in national discrimination law; *Lee v McArthur the Ashers case*, *Bull v Hall* [2013] UKSC 73 and *Smith v Trafford Housing Trust* in the UK and *Amselem v Syndicat Northcrest* [2004] 2 SCR 551 in Canada and then seek to draw lessons from them in a wider context of reasonable accommodation.

9a Ashers

The Ashers case pitted a gay activist against a Christian owned bakery which ran six shops in Northern Ireland. This business was so called because Asher's blessing in the Bible was to produce rich bread and delicacies fit for a king and the owners were strict Christians.

Mr Lee however wanted these bakers to produce a cake with the slogan "Support Gay Marriage" emblazoned on it. At that time gay marriage was not legal in Northern Ireland. The Bakery did not wish to fulfil this request for reasons of their Christian conviction, which told them that they should not do anything to promote a status which they actually thought to be sinful. They therefore cancelled the order and refunded Mr Lee's payment to the Respondent.

In his claim, Mr Lee relied on the prohibition of discrimination in respect of provision of goods and services on the grounds of sexual orientation which was contained in the Northern Irish variant of the Equality Act, that is the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, and on grounds of religious belief or political opinion, contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998.

The staff at the shop did not however know of Mr Lee's sexual orientation and did not react on that basis to him but rather because they thought that it was sinful to be seen to support gay marriage. The Northern Ireland County Court and Court of Appeal[34] both found in favour of the Claimant on the ground that this was associative discrimination, that is the refusal to bake the cake was for reasons which were associated with the LGBT community in general and Mr

[34] This court said at para 64 "if businesses were free to choose what services to provide to the gay community on the basis of religious belief the potential for arbitrary abuse would be substantial".

Lee being gay in particular, and both courts decided that this was therefore direct discrimination on the grounds of his sexual orientation.

The Supreme Court[35] however took a rather different view and said that "people of all sexual orientations…can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation"[36]. Lady Hale tested the point by saying that the bakery would have refused to make a cake for any customer irrespective of their particular sexual orientation.

It is notable that Article 9 cases were not deployed in the arguments here. This case was not decided on the basis of mutual tolerance or reasonable accommodation but can to an extent be seen in those terms, in effect that there had to be some leeway given to the Christian family who owned the bakery not to be required to associate with a message of which they fundamentally disagreed on religious grounds. That reasonable accommodation appears nowhere in the decision may be contrasted with the next case where the clashes were essentially similar.

9b The Christian hotel keeper

In *Bull v Hall* [2013] UKSC 73, a Christian hotel keeper was found to have discriminated on the grounds of sexual orientation against a gay couple to whom they refused to let a double room. Although there were competing human rights clearly in play, the Supreme Court was unanimous that there was no defence to the claim for sexual orientation discrimination under domestic law. Lady Hale[37] regarded "the criterion of marriage or civil partnership as indissociable from the

[35] Which heard the case in Northern Ireland.
[36] para 25.
[37] para 29.

sexual orientation of those who qualify to enter it". She relied on the fact that Parliament would have been aware that there were deeply held religious objections to what was being proposed but there was no express exception made in the statute as there might have been[38].

The hotel keepers would have been entitled to deny double bedded rooms to same sex and unmarried couples provided that they also denied them to married couples[39]. It was this differentiation which was the essence of the unlawful discrimination.

Importantly, for present purposes[40], Lady Hale said "I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment at least in some cases" but this did not arise here because there were no rights of the religious couple in play as against the gay couple. That religious background was only something which related to their motivation to discriminate on grounds of the guest's sexual orientation and motivation to discriminate is irrelevant in discrimination law[41]. One can conclude that even if there had been a general principle of reasonable accommodation the result here would have been the same because of the intention of Parliament.

9c *Bringing religious views into work*

In *Smith v Trafford Housing Trust* [2012] EWHC 3221 CH, Mr Smith a practising Christian, in his Facebook wall page said amongst other things that "gay

[38] para 38
[39] para 39
[40] para 47

[41] See eg *R(ota E) v Governing Body of JFS* [2010] IRLR 136 at paras 20 35 65 116 & 132.

marriage was an equality too far". He had listed on the site as his occupation that he was employed by the Trafford Housing Trust for whom he was employed as a housing manager. This controversial post was put up in response to a story which he had read on the BBC website. He was suspended on full pay and found to have been guilty of gross misconduct but in the light of his long service he was not dismissed by the Trust but was instead demoted, which also meant that he suffered a phased 40% reduction in his pay. He brought High Court proceedings for breach of contract[42]. The defendant's case was, in summary, that the postings were "activities which may bring the Trust into disrepute", and that he was also "failing to treat fellow employees with dignity and respect", all of which breached the Code of Conduct and Equal Opportunities Policy of the Housing Trust.

Briggs J (as he then was) concluded that

a) the claimant's "moderate expression of his particular views about gay marriage in church, on his personal Facebook wall at a weekend out of working hours, could [not] sensibly lead any reasonable reader to think the worse of the Trust for having employed him as a manager."

b) The claimant had not been promoting religious views on behalf of the Trust partly because his Facebook page was inherently non-work related and also because the page was not a medium for the claimant used to "thrust his views upon his work colleagues, in the sense in which a promotional email sent to all their addresses might fairly be regarded".

[42] He did not recognise this as a dismissal.

c) His postings were not "judgmental, disrespectful or liable to cause upset or offence" and he was responding to enquiries using moderate language and therefore he had not mistreated fellow employees.

This could be analysed (especially c) as applying a doctrine that it was a reasonable accommodation with his views and his right to express them that was required from others although the central feature of the judgment was that these were not work related.

9d Religion and planning law

A good example of a case where what would be the normal rights had to give way to religious sensibilities because of the need for reasonable accommodation albeit in a rather unusual area is *Amselem v* Syndicat Northcrest [2004] 2 SCR 551 which was decided by the Supreme Court of Canada in 2004. This was based on the terms of the 1982 Canadian Charter of Rights and Freedoms and the 1985 Canafian Human Rights Act.

Moise Amselem, an Orthodox Jew, lived in a building in Montreal. He wanted to build a Succah on his balcony for nine days each autumn for the Jewish Festival of Succot. A succah is a small hut or booth in which he and his family would eat their meals and conduct prayers in fulfilment of what they understood to be a religious obligation which commemorates the 40 years during which the Children of Israel wandered in the desert after leaving Egypt.

Mr Amselem had bought the property subject to the regulations governing all the homes in the development in which it was placed. One of the regulations prohibited the building of any structures on balconies.

Five of the nine judges in the Canadian Supreme Court nevertheless held that the interests of the co-owners, who were concerned about the damage to the aesthetic appearance of the building and the possible diminution in the value of their properties because of the construction of this structure albeit temporary, must in these circumstances give way to the religious rights of Mr Amselem, even though the restrictions on use were clearly stated when Mr Amselem bought the property.

Justice Iacobucci, for the majority, relied on the principle of "mutual tolerance".[43] This was a clear example of the reasonable accommodation doctrine operating in practice as it does in Canada.

10 Other aspects of manifestation: adjustment of hours of work

There are other aspects of manifestation of a religious belief and accommodation thereto which frequently arise in the caselaw such as requiring an adjustment of hours of work to meet religious obligations and this may also be seen through the prism of the need for reasonable accommodation. This may be a manifestation of religious belief but may be accommodated by extra time off eg *Kontinnen v Finland* 1996 87 DR 68. There may also be a refusal of work

[43] 595-596, paragraph 87. Similar issues were raised by the complaint of Lynne Bloch that the residents' association in her building in Chicago were interfering with her rights as an Orthodox Jew by refusing to allow her to fix a Mezuzah - a small casing containing a piece of parchment on which is written biblical passages - to the outer doorframe of her flat. Last November, the United States Court of Appeals for the Seventh Circuit allowed Ms Bloch's claim to proceed to trial on the facts : *Bloch v Frischholz* (2009) 587 F 3d 771 (US Court of Appeals, 7th Circuit, sitting en banc). At an earlier hearing, Judge Wood noted how inappropriate it was for the written brief for the residents' association to complain that Lynne Bloch and the other claimants were "trying to get their 'pound of flesh'": *Bloch v Frischholz* (2008) 533 F 3d 562 (US Court of Appeals, 7th Circuit).

tasks eg selling alcohol or handling meat (eg for Muslims). I will look at only one case here.

10a accommodation to religious holidays

In *Francesco Sessa v Italy*[44]*,* a Jewish lawyer complained that the refusal by the court to adjourn a case of his where he was an advocate to a date which did not coincide with the Jewish holidays of Yom Kippur and Sukkot (when the orthodox Jew would not be allowed to work) was an interference with his right to manifest his religion. His complaint was dismissed by 4 to 3.

This hearing was concerning the immediate production of evidence which in Italian law could only be adjourned in normal circumstances if the public prosecutor or defence counsel was absent and not the counsel for the complainant as Sessa was. The majority who found against Sessa pointed to the fact that he could have been replaced at the specific hearing in order to comply with professional obligations. Importantly, the original Judge had noted that the complainant did not have to appear with counsel at the hearing. There was a competing human right: To adjourn the hearing to accommodate Sessa would he concluded infringe the rights of the parties to be tried within a reasonable time.

The majority of the judges of the Court in dismissing the application relied on two of its previous cases; in *Konttinen v Finland* No 24949/94 there was no protection for a public servant who was a Seventh Day Adventist who said his religion did not allow him to work after nightfall on a Friday. Also not covered was the claimant in *Kalac v Turkey* (1997) 27 EHRR 552 where the engagement

[44] *App no 28790/08 ECHR 3 4 12*

of an army officer with fundamentalist views was terminated. In both cases the action was held to be justified by contractual arrangements.

The majority of the Court in *Sessa* held that this refusal to adjourn was prescribed by law and was justified in the interests of the protection of the rights and freedoms of others, namely in the court to proceed with its cases in a timeous manner in the interests of criminal defendants.

The minority of the judges in the Court however pointed out that for a measure to be proportionate the authority must choose the means which is least restrictive of rights and freedoms. They concluded that "seeking a reasonable accommodation of the situation in issue may in the circumstances constitute a less restrictive means of achieving the aim pursued" (para 9). It was also not clear to them how much disruption would really be caused by granting the request beyond administrative inconvenience. Mr Sessa had given the court they said sufficient notice of the problem with which his religious concerns presented themselves and reorganising the lists to accommodate him would in fact cause minimal disruption. Overall, they concluded that it was "a small price to be paid in order to ensure respect for freedom of religion in a multi-cultural society " (para 13). This may be seen as a disagreement between majority and minority about what accommodation was reasonable in the particular circumstances rather than a difference as to the test to be applied[45].

---

[45] In the same area was *Bayatan v Armenia* 7 7 11 App No 23549/03 where it was held that interference with freedom of conscience cannot be deemed necessary if there exist "viable and effective alternatives capable of accommodating the competing interests". See also Vivien Prais 1976 ECR 1589 competition to hire translators; first day of Jewish holiday Shavuot; in order to avoid indirect discrimination the European institutions must as much as possible accommodate the dates of the tests to religious observance

Conclusion

So having reviewed the position what would be gained by a reasonable accommodation approach

a. It may allow a more individual approach based on the accommodation to the needs of that individual, whereas proportionality looks through a wider societal lens
b. It addresses more barriers to participation of particular groups
c. There is no need for comparators as there would be in direct and indirect discrimination;
d. It is individual based; it does not seek equality for the group to which he is a member. It addresses the issues of group identification raised in *Eweida* and *Chaplin but t*here is no need to prove group disadvantage
e. It may lead to a more structured so that the employee asks for the specific accommodation and the employer says that is not reasonable in my circumstances
f. It would change burden of proof away from the claimant and provide a more transparent framework
g. Badging it as such may lead to a more open dialogue between employee and employer; they may both know more clearly where they stand.

But it may be asymmestric; just as only in favour of disabled employees

Overall it seems appropriate to deal with these cases where religious manifestation rubs up against other human rights as matters in which reasonable accommodation is required. This Is best seen as something separate and distinct from the proportionality principle.

Gibson's conclusion[46] is that "adopting a Canadian model of reasonable accommodation would help facilitate better judicial engagement with individual interests as balanced with competing factors". I agree.

JOHN BOWERS QC

[46] 2013 The God dilution: religion discrimination and the case for reasonable accommodation 616