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Sexual orientation and religion or belief cases

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Section one

Introduction

1.1 Terms of reference

The TUC was funded by the DTI to carry out a project studying all cases concerning the sexual orientation and religion or belief Regulations, and to prepare a report of the conclusions of that study. The work involved analysing published employment tribunal decisions and any relevant higher court judgments, as well as liaising where possible with ACAS, the Employment Tribunal Service and other sources to obtain additional information about cases that have been withdrawn, settled or otherwise disposed of.

1.2 Quantitative research

ACAS provided a list of case numbers for sexual orientation and religion or belief discrimination cases. This amounted to 945 cases. These are categorised as follows:

Outcomes of sexual orientation and religion or belief cases		
	Sexual orientation	Religion or belief
Settled	238	216
Withdrawn	129	150
Full hearing	68	74
Other outcome	34	36

With the assistance of Anne Hayfield, consultant, another 28 tribunal decisions were located, which did not appear on the ACAS list. There was also a significant discrepancy between the ACAS figures and those in the ETS Annual report 2005-06. It identified 805 sexual orientation cases and 863 religion or belief cases. It proved impossible to gain access to ACAS files due to a data protection clause in the ET1.

However, ACAS, through their researcher, Ben Savage, has undertaken an extensive quantitative analysis of sexual orientation and religion or belief tribunal claimants including the nature of the claims and factors such as the sector and background of the claimant. This analysis was published in April 2007.

ACAS were asked to provide contact details of the representatives in each case. However, once again because of the data protection clause in ET1s, they were unable to do so. They did, however, agree to write to each representative inviting them to contact the researcher so that a brief discussion could be

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undertaken in relation to the progress of the case. However, very few representatives replied.

1.3 Qualitative research

A valuable meeting was held with Scottish LGB groups on 23 March 2006 and a successful meeting with stakeholder organisations was held on 19 June 2006. The TUC LGBT Conference was addressed on 29 June 2006.

1.4 Legal analysis

Copies of the decisions in 156 sexual orientation and religion or belief cases were obtained. These were provided by Anne Hayfield and by Gary Bowker at IDS. A visit was paid to the Employment Tribunal Service in Bury St Edmunds on 9-10 November 2006 and a further 93 decisions on the ETS database were noted but many of these were preliminary decisions. A range of these decisions were analysed and the IDS Annual Discrimination Law Conference was addressed on 28 November 2006. A second visit was paid to Bury St Edmunds on 29 November and Scottish decisions were obtained in January 2007.

Section two

Anticipated issues

2.1 Introduction

The Employment Equality (Sexual Orientation) Regulations came into force on 1 December 2003 and the Employment Equality (Religion or Belief) Regulations on 2 December 2003. These Regulations made it unlawful for employers to discriminate on the grounds of sexual orientation or religion or belief and enacted in UK law the sexual orientation and religion or belief provisions of the Framework Equal Treatment Directive (2000/78/EC).

The advent of the sexual orientation and religion or belief Regulations were met with great anticipation, extending the equality law agenda in Great Britain into two new fields. This is not to say that these are totally 'greenfield' areas for equality law. First, the European Convention of Human Rights (ECHR) already covers to some degree issues of freedom of religion and also non-discrimination on grounds of religion and sexual orientation. Freedom of thought, conscience and religion is protected by Article 9 of the Convention, which states:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Article 9 is hence a 'freedom of religion' rather than a non-discrimination measure. On the other hand, Article 14 of the Convention is a non-discrimination measure. It provides:-

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The 'other status' has been interpreted, by the European Court of Human Rights (ECtHR), to include sexual orientation. However, the bulk of the sexual orientation cases that have come before the ECtHR have been privacy cases based on Article 8, which provides the right to respect for private and family life.

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Secondly, there is a certain overlap between religion or belief and sexual orientation discrimination and existing regimes. In relation to religion or belief discrimination, there is a clear overlap with aspects of race discrimination law in that certain religious minorities will be seen through the ‘lens’ of race discrimination. Hence there has been some controversy over the coverage of the Race Relations Act in relation to ‘racial groups’ which have a strong religious focus, such as Jews and Sikhs, who have been held to be protected, and Muslims and Hindus, who have not been held to be racial groups.

A further element of overlap is that Northern Ireland already has a religious discrimination law regime, which has operated in various forms since 1976, in the form of a range of fair employment statutes. It transpires that the vast bulk of fair employment case law has been on issues of what can be described in Northern Ireland as ‘community background’, i.e. Catholic/nationalist or Protestant/unionist.

In terms of overlap with sexual orientation discrimination, there has been an ultimately forlorn attempt to equate sexual orientation with sex for the purposes, in particular, of EU gender equality law. These arguments included the point that ‘sex’ included notions of sexual identity (see, for example, the trans cases such as *P v S*) and that ‘on grounds of sex’ could include the sex of a partner (as in *Grant v South West Trains*).

Therefore, issues of religion or belief and sexual orientation discrimination were not unknown to tribunals and courts prior to the introduction of both sets of Regulations in 2003.

2.1.1 Meetings to discuss anticipated issues

It should also be mentioned that a number of useful meetings were held to discuss anticipated issues prior to the full initiation of this project. First, a meeting was held with the TUC’s Advisory Group on 20 April 2006. This Group is made up of members of the TUC’s Race and LGBT Committees. Secondly, the TUC helpfully arranged a stakeholders’ meeting on 19 June 2006. This was made up of representatives of religion or belief and sexual orientation NGOs and interested organisations such as Justice and the Equality and Diversity Forum.

2.2 Definitions

2.2.1 Sexual orientation

Sexual orientation is defined in the Regulations as being “a sexual orientation towards -

- (a) persons of the same sex;
- (b) persons of the opposite sex; or
- (c) persons of the same sex and of the opposite sex.”

There were no anticipated issues around the definition of sexual orientation.

2.2.2 Religion or belief

Religion or belief was defined in the original Regulations as “any religion, religious belief, or similar philosophical belief”. There was some discussion of the scope of the ‘religion or belief’ definition and concern was expressed by some that it was not apparent that lack of religion or belief was covered. The Equality Act 2006 substituted a clearer definition into the Regulations to provide as follows:

“(1) In these Regulations –

- (a) ‘religion’ means any religion,
- (b) ‘belief’ means any religious or philosophical belief
- (c) a reference to religion includes a reference to lack of religion, and
- (d) a reference to belief includes a reference to lack of a belief.”

As to what constitutes a religion, under ECtHR case law it has been accepted that Jehovah’s Witnesses, the Church of Scientology and the Moon sect were protected by Article 9(1) of the Convention. So also, the ECtHR has accepted that pacifists, druids, vegans and atheists are governed by Article 9. However, the ECtHR was considering ‘thought, conscience and religion’. Also the ECtHR makes a distinction, picked up at the stakeholder meeting, between the internal aspect of Article 9, the ‘pure’ belief and the ‘external’ aspect, namely manifestations of that belief. Significant anticipated issues are therefore around the scope of the religion or belief definition in the Regulations and the distinction between pure belief and manifestations.

There were a number of early cases under the Regulations where somewhat outlandish ideas, such as ‘national identity’, were argued as being within the scope of the religion or belief definition. Within the rulings there have been few references to the case law of the ECtHR but rather the tribunals have resorted to DTI guidance and the Oxford English Dictionary. A significant question is the potential inclusion of ‘political belief’, as is explicitly provided for in the fair employment legislation in Northern Ireland. The issue has inevitably arisen in relation to BNP membership and tribunals have so far not accepted that such beliefs are covered by the legislation – although one tribunal refused to dismiss a case at the preliminary stage on the ground that it was arguable that BNP membership was covered by the Regulations. However, it would appear that Court of Appeal case law on the Race Relations Act has established that such opinions should not be protected by anti-discrimination legislation.

The internal/external dichotomy has been more controversial. As will be discussed below, tribunals have made clear distinctions between religious belief and outward manifestations of that belief and have been inclined to treat issues of religious adherence as indirect rather than direct discrimination issues.

Anticipated Issues

2.3 Direct discrimination

2.3.1 Sexual orientation

A significant issue in relation to direct discrimination concerns the scope of the phrase ‘on grounds of’. Commentators argue that, in light of similar terminology in the RRA, direct discrimination can occur on the basis of presumed sexual orientation or on the basis of association with those of a particular sexual orientation. In the event, this issue has arisen in a preliminary hearing in a Northern Ireland case.

It was anticipated that many sexual orientation cases would be direct discrimination and/or harassment issues. A possible source of concern was the issue of whether tribunals and courts would make a distinction between sexual orientation and sexual practices, as was possible in relation to religious belief and religious practices. This issue has yet to arise in a decided case although it is the subject of litigation between a gay youth worker and an Anglican bishop.

So also there was concern that the Genuine Occupational Requirement (GOR) provisions might be used to prevent LGB workers from taking up certain positions in organisations with a religious ethos. But there has so far been no decided case on this issue.

2.3.2 Religion or belief

Similar issues of discrimination on grounds of perceived religion or belief, or association with those of a particular religion or belief, were also raised. In fact, this issue has arisen in one religion or belief case but has not received significant attention.

More generally, stakeholders were concerned at the neutrality of tribunals in relation to some examples of religion or belief discrimination. As the cases show, it has been difficult to establish direct discrimination in religious cases. For example, in cases such as *Azmi*, we find a tribunal, and now the EAT, accepting a teaching assistant wearing a balaclava helmet as a comparator to a Muslim teaching assistant wearing a veil. By treating many examples of religious adherence as indirect discrimination, respondent employers are given the opportunity to objectively justify their treatment of the individuals concerned.

Another source of concern amongst stakeholders was the potential use of genuine occupational requirements (GORs). It was reported that faith-based organisations were starting to use GORs associated with the ethos of their organisations. It transpires that this has proved to be a major issue in the *McNab* litigation concerning an atheist teacher applying for a job in a Catholic school.

2.4 Harassment

2.4.1 Sexual orientation

It was anticipated that many of the sexual orientation cases would be harassment cases and so it has transpired. Perhaps more than in potential religion or belief cases, the issue might arise in sexual orientation harassment cases as to the proper dividing line between ‘innocent’ banter and unlawful harassment. But in reality, most harassment cases have been examples of crude harassment.

2.4.2 Religion or belief

A significant issue in relation to harassment is the degree of objectivity and/or subjectivity to be applied to harassment claims, particularly those in which it is the effect of the alleged harassment rather than the purpose of the perpetrator which is at issue. Hence could it be argued, for example, that a ban on religious symbols had the effect of creating a hostile, intimidating or offensive environment? Despite considerable controversy over the banning of religious symbols in British Airways, the issue of religious symbols has only been considered in one case and that was as an aspect of direct discrimination. In fact, there have been no decided harassment cases on the grounds of religion or belief.

2.5 Indirect discrimination

2.5.1 Sexual orientation

Much of the controversy surrounding cases of indirect discrimination on the grounds of sexual orientation envisaged scenarios such as requirements to be a married couple or requirements to disclose the identity of a partner (e.g. in relation to a list of ‘emergency contacts’). However, it transpires that there have been no decided indirect discrimination cases.

2.5.2 Religion or belief

By categorising cases of religious observance as indirect discrimination cases, a respondent can argue that the treatment is objectively justified. There is the added issue that the terminology of the Regulations and the EU Framework Equal Treatment Directive (FETD), which the Regulations implement, are different in terms of justifying indirect discrimination. Both require the employer to show a ‘legitimate aim’. However, the Regulations require that the means of achieving that aim must be ‘proportionate’ while the FETD requires that the means be ‘appropriate and necessary’. The latter being perceived to be a stronger test of objective justification.

2.6 Procedural issues

Some concern was expressed at the ability of tribunals to deal with new areas of discrimination law. This has already been mentioned above in relation to religion or belief. This concern could also apply to sexual orientation. Issues

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such as the training for tribunal members were raised and also, in the absence of a specialised agency to deal with religion or belief and sexual orientation, some concern was expressed at the extent of expertise.

In relation to sexual orientation, the issue was raised on restricted reporting orders and also the anonymity of details of cases on the public register. In a few cases, parties have been referred to as 'X v Y' etc and in one case the issue of a restricted reporting order was raised 3 days into a hearing by which time the tribunal considered that it would be otiose.

A further matter was the effect of the statutory dispute resolution procedures. It was felt that, despite an exception from invoking grievance procedures in some harassment cases, complainants in religion or belief, and particularly sexual orientation cases, might wish to 'externalise' their dispute as early as possible rather than go through an internal procedure. There were a few preliminary decisions involving the statutory dispute resolution procedures. However, they have not been examined in this report as the decisions have invariably been short decisions without reasoning. In addition, there have been no cases in which a complainant deliberately failed to invoke a grievance procedure on the basis of the harassment exception.

Section three

Direct discrimination

3.1 Introduction

‘Pure’ direct discrimination cases are considered in this chapter. Cases which cover both direct discrimination and harassment will be considered in the following chapter.

We have also first examined successful direct discrimination cases and then a number of significant unsuccessful cases, taking first sexual orientation and then religion or belief.

3.2 Direct sexual orientation discrimination

Direct discrimination is defined in Reg 3(1)(a) of the Regulations as being:-

“For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if—on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons.”

In Reg 3(2), it is provided: “A comparison of B’s case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.”

“On grounds of” covers ‘perceived’ sexual orientation and also ‘discrimination by association’.

3.2.1 Successful cases

3.2.1.1 ‘On grounds of sexual orientation’

The only Northern Irish case to be decided, and in this case, only at a pre-hearing review is *Brian Lacey v The University of Ulster and Paul Davidson* (Case Ref: 970/05, February 2007). This is, however, a significant decision. Mr. Lacey’s complaint on a failure to appoint was based on the inclusion on his application form of his research interest as including ‘homosexuality in Ireland’. The university sought to have the case struck out on the basis that claimant was not complaining about discrimination ‘on grounds of his own sexual orientation’. But a chair sitting alone concluded that ‘on grounds of sexual orientation’ was not restricted to the complainant’s sexual orientation. Consideration was given to commentaries upon the provision and the conclusion was reached that it was clearly arguable that a research interest in homosexuality could, if proven, come within the scope of ‘on grounds of sexual orientation’.

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3.2.1.2 Dismissal of a straight waitress

Mrs E Hegarty v The Edge (Soho) Ltd (Case 2200027/05 (4887/106) June 2005). The complainant was ‘made redundant’ from a mainly gay bar. However the Tribunal did not accept that this was a redundancy. Documentation indicated that the directors wished to ‘freshen’ up the Piano Bar in which the complainant, a heterosexual woman, worked. In fact, the Piano Bar formally reopened two months later. Those subsequently employed were exclusively male gay bar staff. The Tribunal was satisfied that this was unfair dismissal and direct discrimination on grounds of sex and sexual orientation. The burden of proof was on the employer to show that this was not sexual orientation discrimination and it failed to discharge that burden. An award of £3110.95, including £3000 for injury to feelings was made.

Commentary: This case is significant as it emphasises that the Regulations are ‘symmetrical’, i.e. they provide protection to both straight and LGB workers.

3.2.1.3 Refusal to employ a gay couple

Another bar case is *Mr David John Hubble v Mr Brian Brooks* (Case No 1600381/05 (4902/90) July 2005). The complainant rang Mr. Brooks about a vacancy for a bar in a small Welsh village. Asked whether he had a wife or a girlfriend, he informed Mr. Brooks that he was gay and had a long-term partner. According to the evidence accepted by the Tribunal (the respondent did not appear at the hearing), the owner stated there was “no way” he would employ a gay couple in his village pub. He said he had invested a lot of money in the pub and could not afford to lose money through having a gay couple.

An investigation by the local job centre revealed that Mr. Brooks ‘had nothing against gays’ but felt that employing a gay couple would be disastrous for his business. The Tribunal accepted that this was a blatant case of direct discrimination. Both the complainant and his partner were experienced bar managers and should have been considered for the position. The Tribunal awarded £3,500 compensation.

3.2.1.4 Dismissal of gay man after accidental communication of pornographic mobile phone message

In *X v Y* (Case No 2201308 (5135/33) October 2006), an undefended case in which the complainant accidentally sent a pornographic text message intended for his male partner to a female colleague. The Tribunal accepted that pressure was subsequently put upon the complainant to resign by the managing director of the firm, who had previously made homophobic comments about LGB people. The managing director indicated that X would never be believed at a disciplinary hearing and also expressed his surprise that X was a ‘pervert’. These pressures were repeated on four further occasions. A disciplinary hearing

was held but the Tribunal concluded that the firm, under the influence of the managing director, had already made up its mind to dismiss X. An appeal by X also failed.

The Tribunal decided that the reason for dismissal was X's sexual orientation and that he had suffered a detriment through the pressures put on him by the managing director on grounds of his sexual orientation. It awarded £39,268.74 including £6000 for injury to feelings.

Commentary: This significant decision shows that, once a Tribunal is satisfied that a dismissal or other act is on grounds of sexual orientation, it is prepared to award substantial compensation. X was an IT programmer on a good salary but he was also awarded a substantial sum for injury to feelings. The Tribunal was entitled to view the pornographic nature of the mobile message as a serious matter but the evidence indicated a heavily biased and homophobic attitude on the part of the employer.

3.2.1.5 Dismissal for alleged lewd behaviour

The most high profile sexual orientation discrimination case has been *XY v AB Bank* (Case No 3200440/2005 (5056/98) May 2006), in which XY was accused of gross misconduct and eventually dismissed by AB Bank after two members of staff reported incidents in which they claimed he had exposed himself in the company's gym facilities. This case is the only decided sexual orientation discrimination case to progress to a higher appellate court (see *Mr P Lewis v HSBC Bank Plc* (EAT/0364/06/RN) (Clark J) 19 December 2006).

The Tribunal determined that the respondent had been directly discriminated against at the first stage of the internal investigation into the incident. It found that the HR manager in charge of the investigation had embellished and exaggerated accusations against XY and that she 'had a closed mind' on his guilt.

However, the Tribunal rejected the remaining 12 complaints made by XY. It concluded that when a full disciplinary investigation was carried out, it "started afresh" and was not tainted by the earlier investigation. Although the chair of the disciplinary panel was aware of the earlier reports he was "not influenced" by them and the proceedings were not influenced by stereotypical thinking. Hence, the hearing and subsequent dismissal and appeal process were not discriminatory.

XY, by now identified as Peter Lewis, appealed to the EAT and the employer, now identified as HSBC Plc, cross appealed against the findings that the initial investigation had been discriminatory. The EAT rejected the claimant's appeal and remitted the issue of direct discrimination in the initial investigation to a differently constituted tribunal as it was held that the company had not been

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given an adequate opportunity to respond to the claim in the first tribunal hearing.

Commentary: It is essential to ensure that all senior staff receive comprehensive training on avoidance of homophobia to ensure that any disciplinary proceedings are conducted with no taint of discrimination. So, also, more general training should be given to all staff so that LGB workers are treated with respect. Employers and trade union representatives should be acutely aware of potential homophobic undercurrents in the workplace so that, if disciplinary matters arise in relation to LGB workers, there is no taint of discrimination in the treatment of them.

3.2.2 Unsuccessful cases

3.2.2.1 Postgraduate student not working under a contract for personal services

Mr E Ho v University of Manchester (Case No. 2401255/05 (4901/103) July 2005): Mr. Ho was a postgraduate student at the University of Manchester who had a series of complaints against the university, including sexual orientation discrimination. However, the Tribunal concluded that Mr. Ho was not working under a contract for personal services and so they did not have jurisdiction to hear his claim. At a late stage, it was contended that as he was also a residential warden, he was 'employed' by the university. The Tribunal decided that a fresh application would have to be made on that point. It appeared to the Tribunal that the appropriate course of action was to pursue a County Court case.

Commentary: This is not in itself a controversial finding. However it is important to appreciate that the sexual orientation Regulations also cover students at institutions of further and higher education (Reg 20). Hence, subject to any further consideration of the 'employment' point, Mr. Ho's correct course of action would have been to bring a case in the County Court. There his time limit would have been 6 months from 31 December 2004. The date of the Tribunal hearing was 12 July 2005.

3.3 Direct religion or belief discrimination

Originally, reg 2(1) of the Religion or Belief Regulations 2003 provided:-

"In these Regulations, "religion or belief" means any religion, religious belief, or similar philosophical belief."

However, s. 77 of the Equality Act 2006 amended Reg 2(1) so that the definition of religion or belief explicitly covers a lack of religion and lack of belief. The new definition is as follows:

"In these Regulations-

(a) "religion" means any religion,

- (b) "belief" means any religious or philosophical belief,
- (c) a reference to religion includes a reference to lack of religion, and
- (d) a reference to belief includes a reference to lack of belief."

The new definition took effect from 30 April 2007. The cases reported below were decided on the basis of the earlier definition.

3.3.1 Successful cases

3.3.1.1 Constructive dismissal of Non-Christian in Christian organization

Mr D Nicholson v The Aspire Trust (Case No 2601009/04 (4865/142) March 2005): This is the first of a number of 'definitional' cases', in which the scope of the 'religion or belief' ground is explored.

The Tribunal in *Nicholson* had to consider the beliefs of a complainant who was working for the Aspire Trust, which was established as a charity in 1995 to advance the objectives of an Evangelical Christian Church, the Elim Pentecostal Church. The complainant was not a practising Christian and was considered a 'non-Christian' in an otherwise Christian organisation. The Tribunal accepted that his non-belief in Christianity was a 'similar philosophical belief' for the purposes of the religion or belief definition. It considered it 'artificial' to distinguish between the positive and negative aspects of 'philosophical belief'. It also took into account the case law of the European Court of Human Rights on Article 9 of the European Convention. In *Kokkanikis v Greece* [1994] 17 EHRR 397, the ECtHR concluded that freedom of thought, conscience and religion "is also a precious asset for atheists, agnostics, sceptics and the unconcerned."

Although the complainant was acting manager of the Trust, he was not permitted to attend a management development course on the basis that a full-time manager would have to be a Christian. He resigned in response to what he considered to be the mishandling of his grievance over these matters.

The Tribunal were divided between the Chairman and lay members on a number of crucial issues. The majority decided that the complainant was constructively dismissed in response to his treatment. But the Chairman considered that he had already decided to resign and effectively 'constructed' his resignation. The majority concluded that his treatment over his grievance was 'clandestine' and that, as such, he was treated as a 'second-class citizen at a Trust'. They concluded that a Christian would not have been treated in the same fashion.

An award of £7513.70 was made, including £5000 for injury to feelings.

Commentary: What might have been an issue of continuing significance, whether people who are 'non-believers' are covered by the Regulations, is overtaken by the 2006 amendment. However, *Nicholson* shows that the tribunals were not going to be constrained in giving the definition of 'religion

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or belief' a narrow interpretation. Other equality law regimes, with the exception of the Disability Discrimination Act, are 'symmetrical' and Nicholson, even before the 2006 amendment, indicates that these Regulations also give protection to both believers and non-believers. This has significant implications, not just for discrimination issues, but also for harassment issues, particularly in relation to what may amount to an 'offensive environment'.

Another significant aspect of the case is that the majority, although agreeing that some of Mr. Nicholson's complaints were either in relation to events before December 2003, or were out of time, considered the environment in which he worked as evidence of a prima facie case that his treatment was on the ground of religion or belief.

3.3.1.2 Failure to recruit Muslim journalist

In *Mr Faisal Bodi v Teletext Ltd* (3300497/05 (4961/85) Nov 2005), the complainant was a Muslim who had spent 2 years working for Al-jazeera in Qatar. A Duty Editor post at Teletext was advertised in the Guardian. Rather than relying on the criteria set out in the advertisement, candidates were shortlisted on other 'typical' criteria described as being 'in heads of shortlisters'. Mr. Bodi claimed that Teletext made up these criteria to avoid appointing him but the Tribunal concluded that they were flexibly utilised in the recruitment exercise. However, they were not written down and had not been made available to applicants. None of the shortlisted candidates were Asian, although Mr. Bodi had been 'long listed'. Teletext made no attempt to monitor its workforce on grounds of racial origin or religious belief. No Asian Duty Editor had been appointed by the company in 10 years, which the Tribunal found 'surprising' as the catchment area, Greater London, was multi-racial. Mr. Bodi claimed both religious discrimination, on the basis that he was Muslim, and race discrimination, on the basis that he was Asian.

The Tribunal decided that he had established a prima facie case that he ought to have been shortlisted and that the company could not establish "compelling and convincing" evidence to the contrary. The tribunal noted that Teletext had not followed the CRE Code of Practice in important respects, including the use of consistent recruitment and shortlisting criteria, were not aware of the Code's contents and had not given adequate equal opportunities training to its managers. Indeed, it was a term of its licence to promote diversity within the organisation. Hence, Mr. Bodi's complaints of discrimination on grounds of race and religion or belief were upheld.

Commentary: This case provides a valuable example of how the lack of diversity within the workforce and inadequate procedures can give rise to inferences of discrimination and bring about a reversal of the burden of proof. Teletext was unable to counter the inference of discrimination because of the lack of monitoring and the ineptitude of its recruitment processes. It is

instructive that, as the case involved both race and religion or belief, the Tribunal was able to rely on the CRE's statutory Code of Practice but no mention was made of the non-statutory ACAS Guidance on religion or belief discrimination.

Clearly employers who fail to abide by accepted procedures are going to run into difficulties. Not only should guidance be sought from statutory Codes of Practice in areas such as race, sex and disability, but also ACAS guidance on religion or belief, sexual orientation and age should be taken into account.

3.3.1.3 Dismissal of Muslim in Hindu-dominated workplace

In *Mr F Shah v Harish Finance Ltd* (Case No 3302110/2004 (4887/26) July 2005), the complainant, Mr. Shah, was employed as a Jewellery Workshop Artisan. He was of Pakistani origins and a Muslim. The owners of the business and most of the workers were Indian Hindus. There was a range of controversies between the complainant and the Sales Director. These included a requirement that he did not cook in the staff kitchen and his lunch break on Fridays, during which he attended prayers at a nearby mosque, was shortened. There were also claims of altercations between the complainant and the sales director in which arguments over Indo-Pakistani relations, but also abuse directed at the complainant, were alleged to have occurred. The Tribunal was unconvinced about the complainant's version of events on these matters and, in any event, decided that his complaints were out of time. He was eventually dismissed without explanation in July 2005.

The company submitted before the Tribunal that the complainant's job had become redundant. However the Tribunal did not accept this explanation as there appeared to be plenty of work for him to do. Having found a case of unfair dismissal, the Tribunal proceeded to consider his claims of race and religion or belief discrimination. They noted there was no record of poor performance on the complainant's part. They also noted the racial balance of the workforce and the absence of an equal opportunities policy. On that basis, it concluded that a worker of a race other than Pakistani would not have been dismissed in those circumstances. In the absence of an adequate explanation by the company, it concluded that the dismissal was on the ground of race.

The Tribunal went through the same process in relation to the religion or belief claim. They noted the religious background of the workforce and the lack of an equal opportunities policy. They noted the company's approach towards the complainant's religious observance and concluded again that a prima facie case of religion or belief discrimination had been made out. Again, in the absence of an adequate explanation, it held that the dismissal was also on the ground of religion or belief.

An award of £7040 for loss of earnings and £7500 for injury to feelings was made

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Commentary: On this occasion, the unexplained dismissal of the complainant, linked to an unsatisfactory reason after the event, left the company in a vulnerable position. However, as in *Bodi*, the Tribunal was prepared to look at the racial and religious make-up of the workforce and take into account the absence of an equal opportunities policy. Although the Tribunal considered Mr. Shah's complaint on shortened lunch breaks to be out of time, it relied upon the company's insensitivity to his religious observance to establish the *prima facie* case, which the company could not rebut.

Basic principles of equal opportunities practice apply as much in workforces dominated by racial or religious minorities as in any other. Indeed, in such workforces extra care should be taken to ensure that allegations of discrimination can not arise. Even where an equal opportunities policy does apply, it is not sufficient just to add religion or belief to the list of grounds covered by it. Issues of religious observance should be carefully considered, first, because they may give rise to direct or indirect discrimination issues and secondly because, as in this case, they may provide evidence which sustains a *prima facie* case of religion or belief discrimination against the organisation.

3.3.1.4 Inapplicability of a GOR in a faith-based school

The anticipated controversy over use of exceptions, particularly GORs, by organisations with a religious ethos has not materialised, except for one case of considerable significance. In *Mr D McNab v Glasgow City Council* (S/107841, March 2006), the complainant had been a teacher of computing and then mathematics at St Paul's Roman Catholic High School since 1990 but had never been promoted. He failed in an application to be Head of Mathematics in 2004 and then decided to apply for a post of Acting Principal Teacher of Pastoral Care but was not interviewed. Although he was an atheist Roman Catholic schools had recruited non-Catholic teachers for many years. By 1991, this policy was articulated by education authorities, in what was described as 'the 1991 Agreement'. It provided that non-Catholic teachers could be appointed to any post in a Catholic school except that of head teacher, principal or assistant principal teacher of guidance or religious education, principal teacher of biology, teacher of religious education or senior teacher in a primary school.

Eventually pastoral care teaching emerged out of a reorganisation of responsibilities. The Tribunal concluded that the reorganisation meant that 'guidance teachers', as they were described in the 1991 Agreement, no longer existed and that pastoral care teachers did not replicate that role and so could not be classed as reserved posts for Catholics under the Agreement. Mr. McNab admitted that he had applied for the pastoral care teaching post 'to test the legislation', a stance which it was agreed he was entitled to do. Both the Tribunal and the EAT (Appeal No. UKEATS/0037/06/MT), concluded that a Catholic teacher would have been interviewed for the job and, even if

unsuccessful, would have been given feedback on his or her performance at interview etc.

The status of the 1991 Agreement was complicated by the existence of section 21(2)(A) of the Education (Scotland) Act 1980 which provides:-

“A teacher appointed to any post on the staff of any such school by the education authority shall satisfy the Secretary of State as to qualification, and shall be required to be approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted.” There was complicated discussion of the interplay between section 21(2)(A) and the 1991 Agreement. However, the Tribunal eventually concluded that the 1991 Agreement represented the agreed policy on which posts were to be exempted by a faith-based GOR and that the pastoral care teaching posts were not exempted by it.

The Tribunal then went on to consider whether the posts could come within either the GOR provisions of the Regulations (Reg 7(2) and 7(3)). Reg 7(2), which is the ‘standard’ GOR provision, provides:-

“(2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out -

- (a) being of a particular religion or belief is a genuine and determining occupational requirement;
- (b) it is proportionate to apply that requirement in the particular case;
- (c) either –
 - (i) the person to whom that requirement is applied does not meet it, or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,

and this paragraph applies whether or not the employer has an ethos based on religion or belief.”

Considering the application of Reg 7(2), the Tribunal found that the responsibilities of pastoral care teachers involved giving advice on a large number of issues related to the school curriculum or vocational support and only a small number of matters for which knowledge of the teaching or doctrine of the Catholic Church would be relevant. Furthermore, a pastoral care teacher in a Catholic school would be able to arrange for advice on such matters to be given by a teacher who was familiar with the Catholic doctrine.

The EAT agreed that this was a proper approach to Reg 7(2). The Tribunal had considered the nature and context of the post, noted that non-Catholics, including previously Mr. McNab, had acted as pastoral care teachers at St Paul’s. Hence being a Catholic could not be a ‘genuine and determining’ requirement.

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The Tribunal went on to consider the application of Reg 7(3) which provides organisations based on an ethos of religion or belief with a specific GOR exception:-

“(3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -

(a) being of a particular religion or belief is a genuine occupational requirement for the job;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either -

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.”

However, the Tribunal concluded that Glasgow City Council (the employer in this case) could not rely on Reg 7(3). The Council facilitated Catholic education within the state system but it could not claim to have a religious ethos of its own, even in part of its operations. This finding was endorsed by the EAT.

The Tribunal awarded the complainant £2000 compensation for injury to feelings, given that he would not have been appointed to the post in any event. The EAT refused to interfere with the quantum of damages.

Commentary: The scope of GORs, which was expected to be a major source of case law on the religion or belief Regulations (as was the ‘purposes of religion’ exception in the sexual orientation Regs) have so far failed to deliver a rich case law – with the exception of McNab. To some extent, the case was confused by the operation of s 21(2)(A), which is ‘saved’ from the effect of the Regulations by Reg 39(1)(b) of the Regulations.

More generally, the Tribunal approached Reg 7(2) in a rigorous frame of mind. The Tribunal reminded itself of recital 23 of the Preamble to the EU Framework Equal Treatment Directive, which states:

“In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.”

It is worth considering the position if the employer had been the Catholic Church rather than Glasgow City Council. But even here, the consistent policy of allowing non-Catholics in a Catholic school to be pastoral care teachers

undermined the contention that there was any requirement that pastoral care teachers had to be Catholics. To invoke a GOR requires careful consideration from the inception of the post in question. It is difficult, if not impossible, to introduce a GOR where the practice in the past has not been to apply it. Whether a requirement is ‘genuine and determining’ under Reg 7(2) or merely ‘genuine’ under Reg 7(3), it cannot be either unless there is some well-considered approach whereby a requirement is introduced despite no perceived need for it in the past.

Such an analysis applies with equal force to Reg 7(3) of the sexual orientation Regulations, the controversial measure examined in the union-driven judicial review, *R v Secretary of State ex parte MSF*.

Reg 7(3) provides:-

“This paragraph applies where -

- (a) the employment is for purposes of an organised religion;
- (b) the employer applies a requirement related to sexual orientation -
 - (i) so as to comply with the doctrines of the religion, or
 - (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; and
- (c) either -
 - (i) the person to whom that requirement is applied does not meet it, or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.”

The judicial review interpreted Reg 7(3) to only cover employment ‘for the purposes of an organised religion’, for example ministers, imams and rabbis, as opposed to teachers who are employed ‘for the purposes of education’ or health workers, who are employed ‘for the purposes of healthcare’. However, even within this narrow scope, organised religions will have, in light of *McNab*, to treat this exception with equal care. If restrictions on grounds of sexual orientation are to be imposed on this basis, it will have to be shown that exceptions to the requirement have not been informally tolerated in the past. It should also be noted that the last sentence of the first paragraph of Article 7.2 FETD states, “This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.” Hence, attempts by organised religions to discriminate on grounds of sexual orientation will also be subject to ‘strict scrutiny’.

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3.3.2 Unsuccessful cases

3.3.2.1 Membership of the BNP (1)

Mr R A Baggs v Dr P D A Fudge (Case No 140011/05 (4863/40) March 2005): This is the first of two cases on the compatibility of a prohibition on BNP membership with the religion or belief Regulations. A difficult issue is the extent to which membership of any political party, and in particular the BNP, can be categorised as a ‘similar philosophical belief’.

In this case, the Tribunal concluded that BNP membership did not come within the scope of the Regulations, on the basis that it does not “require members to belong to a particular religion or hold particular religious or similar philosophical beliefs. It has no proven links with religion or religious beliefs”. It was a political party like any other, despite elements of racial references in its objectives.

3.3.2.2 Membership of the BNP (2)

Baggs may be compared with *Finnon v Asda Stores Ltd* (2402142/05, August 2005). Here a Tribunal refused to dismiss another BNP member’s claim at a preliminary stage and granted a full hearing. The chair commented that “his views are the result of an ideology relating to the preservation of a British ethnic group which has some prospect of meeting the test in the 2003 Regulations”.

Commentary: This is a highly sensitive issue for trade unions, as shown by the recent success of ASLEF in *ASLEF v The United Kingdom*, (Application no. 11002/05), in which the European Court of Human Rights in its judgement of 27 February 2007 agreed that ASLEF could expel a BNP member. This approach is further supported by the judgment of the Court of Appeal in *Redfearn v Serco Ltd t/a West Yorkshire Transport Service* (25 May 2006). Here the Court of Appeal rejected the claim by a BNP electoral candidate that he had been discriminated against ‘on racial grounds’ when he was dismissed from his position as a passenger transport driver serving a largely Asian population. Mummery LJ concluded, “Properly analysed Mr Redfearn's complaint is of discrimination on political grounds, which falls outside the anti-discrimination laws.”

The Court concluded that the legislature could not have intended the Race Relations Act to be used to protect membership of a racially-based political party. It is suggested that *Redfearn* is also applicable to this issue of the scope of the religion or belief Regulations, even after the amendment of ‘similar philosophical belief’ to remove the adjective ‘similar’.

It may be that a Tribunal needs to consider this matter beyond a preliminary hearing. In that sense, *Finnon* is a justifiable decision. However, in light of the *ASLEF* case and *Redfearn* it can be anticipated that Tribunals and the higher

courts will not be sympathetic to attempts to utilise the religion or belief Regulations in cases of BNP membership.

3.3.2.3 Wearing of niqab by classroom assistant

A few cases have caught the public imagination such as *Ditton, Lewis and McNab*. However the controversy engendered by these cases pales in comparison with the furore invoked by *Mrs A Azmi v Kirklees Metropolitan Council* (Case No 1801450/06 October 2006): Mrs Azmi was employed on a 12 month fixed term contract in September 2005 as a Bilingual Support Worker at Headfield Church of England (Controlled) Junior School in Dewsbury. She was employed by Kirklees Metropolitan Council which also controlled the school. The pupils were made up of about 95% Muslim and/or ethnic minority origin, mostly of Pakistani and Indian extraction. About 25% of the teachers were also Muslim and/or ethnic minority origin.

The complainant normally wore a jabbah and a niqab covering her face. However she wore a full-length tunic and scarf to her interview in July 2005 and training sessions once appointed. It appears that it was at her husband's suggestion that she then insisted on wearing a niqab covering the lower part of her face when in contact with male teachers, even if this involved her relationship with her students.

It appears that the school's headmaster did not have a problem with the complainant wearing the full niqab in the corridor and in the staff room but objected to her wearing the niqab while in direct contact with the pupils. The Council became involved and appeared to endorse a total prohibition on the wearing of a niqab on the school premises. Eventually the headmaster's proposals were reinstated in February 2006 but no compromise could be achieved and, after a period of extended sick leave, she was suspended on 23 February 2006.

In terms of direct discrimination, the central issue was whether a manifestation of religion was direct discrimination or indirect discrimination. To the extent that it was direct discrimination, who was the appropriate comparator? The Tribunal also had to consider claims of indirect discrimination, harassment and victimisation.

On direct discrimination, the Tribunal avoided having to make a key decision on the 'religious manifestation' issue. It did this by concluding that no direct discrimination had occurred. First, it decided on a comparator. For the complainant it was argued that the comparator should be a Muslim woman who did not wear a niqab. Reg 3(3) provides that "A comparison of B's case with that of another person under... must be such that the relevant circumstances in the one case are the same, or not materially different, in the other." Hence the complainant argued that such a Muslim woman was the

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closest comparator and, in doing so, focused attention on her religious manifestation, the wearing of the niqab.

The Tribunal refused to accept this. Its chosen comparator was a non-Muslim person whose face was covered, for example by a balaclava or bandages following a head injury. In these circumstances, concluded the Tribunal, such a comparator would also have been suspended. The Tribunal then moved on to consider whether the Council's policy was directed at the wearing of the niqab or more generally at religious manifestations. The Tribunal concluded that there was no evidence of discrimination on religious grounds at the school. A policy had been developed towards the niqab because of the immediacy of two scenarios confronting the Council, one being Mrs Azmi's case.

In any event, the Tribunal, although not considering itself required to do so, concluded that religious manifestations must be considered as a matter of indirect discrimination, not direct discrimination. It did so first because Reg 26 on the wearing of turbans by Sikhs on construction sites is couched in terms of indirect, rather than a direct, discrimination. Hence, the Tribunal concluded that the legislature anticipated that issues of religious manifestation would be treated as indirect discrimination. The Tribunal also noted that the significant race discrimination House of Lords decision in *Mandla v Dowell Lee* [1983] IRLR 209 (HL) treated the wearing of a turban at school as indirect race discrimination. Finally, the Tribunal noted that Article 8 of the European Convention on Human Rights, as interpreted by the ECtHR, allowed States a margin of appreciation over religious manifestations.

In light of its finding, particularly on the appropriate comparator, the Tribunal declined to refer the case to the ECJ in Luxembourg.

This case has now been heard on appeal by the EAT (Appeal No. UKEAT/0009/07/MAA, judgment of 30 March 2007). The EAT has fully endorsed the reasoning of the Tribunal, both on the direct discrimination and indirect discrimination claims.

Commentary: We have already seen that the Tribunals are inclined to treat religious practices as an indirect, rather than direct, discrimination. In this case, the Tribunal also considered the reasoning behind the Council's thinking to see if it was tainted by religious discrimination. The Tribunal was satisfied that it was not and the school's treatment of Mrs Azmi, although not perfect, was at worst misunderstood or exaggerated by her. It was also satisfied that the policy which emerged was concerned with the educational experience of the pupils and not with her religious beliefs. Hence if the approach had been directed at cultural concerns over the wearing of the niqab, rather than purely educational ones, the approach might have been different.

The invocation of indirect discrimination gives room for negotiation and compromise on the balance to be struck between what, in this case, is a legitimate educational aim and the proportionality of the application of the

policy. However, care should be taken to ensure that any policy directed at religious manifestations for non-employment reasons might still fall foul of the Regulations direct discrimination provisions, despite the Tribunal's preference to categorise them, in a blanket sense, as indirect discrimination.

3.3.2.4 Dismissal in relation to appearance linked to religious observance

Mr M Mohmed v West Coast Trains Ltd (Case No 2201814/04 (4837/38) October 2004) has been considered at Tribunal and at the EAT (Appeal No. UKEAT/0682/05/DA, 30 August 2006). Mr. Mohmed, who is a Muslim, was a Customer Services Assistant (CSA) from 4 June 2003 until his dismissal on 2 February 2004. In September 2003, he was required to trim his 8" beard. His appearance was described by a manager as "strange" and "awful" but the Tribunal concluded that no prima facie case had been made out that connected his dismissal in February 2004 to religion or belief. The Tribunal concluded that this was an application of West Coast Train's uniform code. The reason for his dismissal was his lack of enthusiasm.

The EAT upheld the Tribunal judgment although there was some concern at the Tribunal's approach to the burden of proof. The company's dress code permitted tidy beards and another Sikh employee kept to the dress code. The matter of Mr. Mohmed's beard had been resolved (on the basis of a tidy 4" beard) in Sept/Oct 2003. The burden of proof did not shift to the employer in this case as the Tribunal found that there on which it could draw an inference that the complainant's dismissal was on the ground of his religion. In summing up HHJ Peter Clark explained:-

"the fact that the issue was ...resolved undermines the Claimant's case that the beard issue had anything to do with his religion and everything to do with the Respondent's concern to enforce its uniform standard. ... On the primary facts found by the Employment Tribunal it was open to them to conclude that no inference of less favourable treatment could be drawn in circumstances where it was agreed that the Claimant could maintain his beard at one fist's length, in accordance with his religion, provided it was tidy. In considering the comparison with a hypothetical non-Muslim comparator it was open to them to note (Further Reasons, paragraph 6) that beards were permitted (as was the Claimant's) and that the Sikh employee was not required to cut or trim his beard, he having kept it tidy, in accordance with his religion. The Tribunal was thus entitled to find that there was no difference in treatment, let alone less favourable treatment, when comparing the Claimant's case with that of a non-Muslim employee. In other words, the beard issue had nothing to do with the Claimant's religion and, having been resolved, had no bearing on the dismissal. It was therefore unnecessary to require an explanation from the Respondent for the dismissal; no prima facie case of unlawful discrimination had been made out."

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Commentary: At first sight, the employer's reaction to the complainant's beard appears to raise a prima facie case that his dismissal was linked to his appearance, which in turn was linked to his religious observance. Ultimately, both the Tribunal and the EAT concluded that there was no causal link between the complainant's dismissal and his appearance and hence no basis for claiming that there was either direct or indirect discrimination on grounds of religion or belief. This case is a reminder that care must always be taken to ensure that a dress code is fairly and consistently applied.

3.3.2.5 Distribution of homophobic material

A significant case on the overlap between religion or belief and sexual orientation discrimination law is *Mr T Apelogun-Gabriels v London Borough of Lambeth* (2301976/05 (5016/62) Feb 2006): The complainant, a Christian, was dismissed for distributing 'Biblical extracts' to members of work-based prayer group and 'interested parties'. He used a search mechanism on a CD of the Bible to locate, download and printout a range of quotes which his employers, the London Borough of Lambeth, considered homophobic, and distributed the literature across the workplace.

The Tribunal said that the "material ... on any view was totally hostile to those of a homosexual sexual orientation" and the fact that the employer provided a prayer room showed that it did not seek to discriminate on grounds of religion or belief. The tribunal concluded that a non-Christian who distributed similar literature would have been treated in a similar fashion and that it was the complainant's conduct in distributing homophobic literature which was the reason for his dismissal, not his religious beliefs.

Commentary: This is an important case on the dividing line between religion or belief and sexual orientation discrimination. It makes clear that tribunals will be reluctant to give latitude to homophobic actions apparently based on the religious beliefs of the perpetrators. It is an example of the delicate balancing act between religion or belief and sexual orientation discrimination. Equal opportunities policies should take account of both. However, clashes between the two will cause difficulties. Many trade union representatives and employers will be inclined to treat any homophobic behaviour with the utmost seriousness and will examine with scepticism claims that it is protected by the religion or belief Regulations. The outcome of *Apelogun-Gabriels* should encourage them that that is the right approach, but situations may arise in which the finding the right balance between the two is more difficult.

3.3.2.6 Issue of perceived religion or belief

Mr S Mayet v HM Customs and Excise (Case No. 23018700/04 (4830140) December 2004): This case involved a series of grievances which the

complainant had with the employer including a failure to promote him, and various other employment-related decisions such as requiring him to attend a language course. Without dwelling on the point, the Tribunal was prepared to accept that the complainant's line manager perceived him to be a Muslim, but it proceeded to decide that the decisions that were taken were made on grounds of suitability and were not based on his perceived religion.

Commentary: Both employers and trade union representatives should be working to dispel stereotypes. In areas such as religion or belief (and sexual orientation discrimination) it is often the perception of religion or belief which is the source of the discrimination. The actual religion or belief is almost irrelevant.

3.3.2.7 Proselytising in YMCA

Mr H Monaghan v Leicester Young Men's Christian Association (1901830/04 (4831/24) December 2004): There was a range of disputes between the complainant and the employer, Leicester YMCA, which considers itself to be a multicultural and multi-religious organisation, although it has a Christian ethos. For the purposes of the religion or belief claim, the Tribunal had to consider an instruction from the complainant's manager that he should not seek to convert those using the YMCA's services to Christianity. It concluded that the reason for the complainant's treatment was not his religion or belief but rather his desire to convert others to his religion. The tribunal considered that the manager would have applied this requirement to any worker seeking to convert users of its services. The complainant had therefore not been treated less favourably than a comparable person of another religion or belief who was also seeking to convert others.

Commentary: This case raises important issues of the 'neutrality' of the working environment. This is a difficult matter for employers, providers of services and trade union representatives. It is very difficult to maintain a 'neutral' working environment in the face of cultural diversity and this diversity may manifest itself as much by religious adherence as other cultural manifestations. In this case, the employer, despite its Christian ethos, was able to maintain a prohibition on proselytising on the basis that it had a well-considered policy.

3.3.2.8 Limits of religion or belief

In two cases, tribunals were confronted with somewhat far-fetched claims that particular beliefs of the complainant came within the scope of Regulations. In *Mr A Williams v South Central Ltd* (2306989/03 4765/42) June 2004), the complainant entered into conflict with his employer over his insistence that he be allowed to wear a 'Stars and Stripes' badge sewn on to his reflective jacket.

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The employer was prepared to let him wear a slip on badge under his jacket but this was not acceptable to the complainant. He claimed that ‘loyalty to native country’ was a ‘similar philosophical belief’ within the meaning of the Regulations. The tribunal invoked the Oxford English Dictionary definition of religion as being “persuasion of the truth of anything or opinion or doctrine or recognition of an awakening sense of a higher being controlling power or powers and the morality connected therewith, rights of worship or any system of such belief and worship” and concluded that the complainant’s beliefs were not within the scope of the Regulations.

In *Mr C Devine v Home Office* (Immigration and Nationality Directorate) (Case No. 2302061/2004 (4788/5) August 2004), the complainant was refused employment in the Home Office’s IND on the basis of some previous work on immigration issues while he was employed in a Citizen’s Advice Bureau. This was considered to be a potential conflict of interest by the IND. The complainant sought to construct a religion or belief case on the basis that he had “sympathy for underprivileged asylum seekers and disadvantaged people [which] was a demonstration of the Christian virtue of charity”. The Tribunal considered this to be “too vague and ill defined” to amount to religion or belief discrimination and dismissed that part of his claim.

Commentary: These are both early cases in the life of the religion or belief Regulations and it is not unusual for rather far-fetched claims to be made in such early litigation. We have seen in other cases that the tribunals have not sought to examine what are seen to be genuine religious beliefs. However both these sets of arguments received short shrift from the respective tribunals.

Section four

Harassment

4.1 Introduction

Harassment is defined in Reg 5 of the sexual orientation Regulations as being:-

5.—(1) For the purposes of these Regulations, a person (“A”) subjects another person (“B”) to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of—

(a) violating B’s dignity; or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

Relevant, in particular, to harassment cases is Reg 22 which provides:-

“(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

(3) ... it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.”

As in chapter 3, we have first examined successful direct discrimination cases and then significant unsuccessful cases, considering first sexual orientation cases and then religion or belief cases.

4.2 Sexual orientation harassment

4.2.1 Successful cases

4.2.1.1 Constant regime of homophobic behaviour

Mr R Brooks v Findlay Industries UK Ltd (1304323/04 (4862/129) March 2005): The complainant had previously been employed at Land Rover, to which Findlay Industries was a supplier, but left, according to his account, when it became known that he was gay. His difficulties with Findlay started when his line manager visited Land Rover and later phoned him to inform him that former work mates had ‘revealed’ that he was gay. This, the Tribunal

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decided, was communicated with a degree of hilarity which it took to be a violation of his dignity. A senior colleague became aware of his sexual orientation and the news spread around the workplace. The complainant was subjected to a regime of crude insults which the Tribunal decided were at least partly directed at him even though another colleague, who was openly gay, also engaged in 'banter' in the workplace. The Tribunal also found that the complainant's confidential emergency contact details had been inappropriately circulated around the workplace. It concluded that his dismissal, which followed an altercation after which he took sick leave and indicated that could not work with colleagues, was unfair. It found that although his line manager and the senior colleague were aware of the course of events, they did nothing to stop it and it was satisfied that behaviour amounting to sexual harassment would have been treated differently.

It is significant that the Tribunal reached conclusions on harassment against the employer even though the complainant in this case had specifically refused to make a formal grievance. The Tribunal took guidance from the European Commission Code of Practice on Sexual Harassment to the effect that a harassed person may be unwilling to 'make matters worse' by initiating a complaint. The Tribunal was influenced by the fact that the employer had not adapted its equal opportunities policy to include sexual orientation discrimination and did not acknowledge the possibility of sexual orientation harassment in its disciplinary policy.

An award of £15727.40 was made for unlawful discrimination and harassment and £7500 compensation for unfair dismissal.

Commentary: This is a valuable application of the sexual orientation harassment provision. First, the Tribunal concluded that the telephone conversation with the line manager was for the purpose of violating Mr. Brooks' dignity. Secondly, the spreading of rumours about his sexual orientation was treated as having the effect of "creating an intimidating, hostile, degrading, humiliating or offensive environment for B". Thirdly, the course of conduct towards Mr. Brooks and the escalation in this conduct when his sexual orientation became more generally known, was considered to be for the purpose of violating B's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment. Fourthly, when B sought to confront his colleagues, his treatment by them was again for the purpose of violating his dignity. It is also valuable for the Tribunal to acknowledge that "unwelcome conduct" may be occurring even if the harassed person may be reluctant to make a formal complaint about the conduct.

A failure to adapt policies to take sexual orientation discrimination and harassment into account will be evidence relied upon by tribunals, particularly if it indicates that sexual orientation discrimination and harassment is being treated differently than other areas of inequality. Even where policies are formally adapted, employers will be advised to show that training on the

sexual orientation issues has been conducted. Employers need to be particularly aware of the demarcation line between ‘banter’ and actionable harassment. So-called ‘banter’ which causes distress to LGB workers can no longer be tolerated.

4.2.1.2 Failure of public authority to deal adequately with homophobic bullying

Mr F Gismondi v Durham City Council and Mr Edmund Tutty (Case Nos 2502956 & 2508300/04, April 2005): This case involved both constructive dismissal and the operation of the sexual orientation Regulations, although many of the facts occurred prior to the introduction of the Regulations in December 2003. The complainant was employed as a group bookings officer at the Gala Theatre in Durham from June 2002. A colleague who was originally appointed as the theatre’s press officer in 2002 but was made Mr. the complainant’s manager as part of a reorganisation later in 2002. The Tribunal accepted, on evidence from the complainant, his partner, and one of his former colleagues, that his manager made comments in an offensive or aggressive fashion towards the complainant and that these comments were motivated by his distaste for the complainant’s open sexual orientation. Eventually, having made a complaint to the theatre’s manager without response, the complainant complained directly to the Chief Executive of Durham City Council.

The Tribunal concluded that the Council consistently failed to apply its grievance procedures to the complainant’s complaints. Nonetheless, his manager’s duties were subsequently changed and he no longer managed the complainant. However, he continued to make comments about his work and referred to him behind his back as ‘gay boy’. Eventually, the complainant made a formal complaint in February 2004 but this was also badly handled by the Council. The appropriate officers were not appointed to investigate the complaint and disciplinary proceedings against the manager were conflated with the investigation of the complainant’s grievance. The manager received a formal warning in April 2004 and moved to other premises but the complainant was not told of this outcome. Eventually the Chief Executive formally rejected his grievance, although a ‘de novo’ investigation, as required by Council’s procedures, was not followed. In consequence, the complainant resigned.

The Tribunal concluded that a series of events dating back to the summer of 2002 justified the complainant’s decision to resign and that there was no potentially fair reason for his ‘dismissal’. The Tribunal went on to conclude that, although a breach of the Regulations could not be based on acts prior to December 2003, those acts could provide the basis for evidence of continuation of that pattern of behaviour after December 2003. Having concluded that Durham City Council was largely responsible for the constructive dismissal, describing the Council’s procedures as a ‘shambles’, the

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Tribunal decided that it had not discriminated against the complainant. There was ample evidence that the manager had harassed (and directly discriminated against) him over a considerable period of time. Although the harassment was less serious than when he managed the complainant prior to December 2003, his behaviour had both the purpose and effect of violating the complainant's dignity.

The Tribunal had to consider reg 22(3) which provides the employer with a defence for harassment undertaken by employees. It states:

“(3) ... it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.”

Although the Council eventually took some measures to move the manager, the Tribunal concluded that the Council had “signally failed in their duty to an employee who had been bullied and harassed contrary to their express policies”. An award of £4000 was made.

Commentary: *Gismondi* is a significant and well-publicised decision on sexual orientation harassment. As in a number of other successful cases, it was important that the complainant had corroborating evidence from a fellow worker. It is interesting that the Tribunal took evidence from his partner, who was a police officer with experience of equality and diversity matters – largely on the basis of his attendance, as ‘best friend’, during the course of the grievance procedure.

The evidence against the manager was substantial and the Tribunal had no difficulty in placing vicarious liability upon Durham City Council. Having found against the Council on the basis of constructive dismissal and vicarious liability, the Tribunal did not pursue the issue of primary liability of the Council. Nonetheless, given the direct involvement of senior officers, including the Chief Executive, in procedures which the Tribunal considered to be a ‘shambles’, it must be enquired as to whether complaints of sexual or racial harassment would have been treated in a similar fashion.

This is also a classic case of an employer with good, up-to-date policies totally failing to apply them in a consistent and sensitive fashion. It is evidence that issues of sexual orientation harassment must be taken as seriously as issues of other forms of harassment such as racial or sexual harassment. There has to be an environment in which workers can make complaints about their own treatment and that of co-workers and these complaints must be taken seriously. Trying to ignore complaints, or taking ‘informal’ measures to alleviate a situation, reflect an unwillingness to treat sexual orientation harassment as seriously as other forms of harassment.

4.2.1.3 High compensation outcome after short period of harassment and dismissal

After *Lewis*, the most high profile outcome amongst the sexual orientation cases has been *Mr Jonah Ditton v C P Publishing Ltd* (Case Nos S/101638/06 and S/107918/05 (F080/199) May 2006). It would appear that the company has gone into receivership but the case nonetheless is instructive in that harassment and dismissal from a high earning position can result in very substantial compensation.

According to the evidence, an inquiry was made of the complainant as to whether he was gay by the partner in the publishing company who interviewed him for the job. His difficulties began with the other partner who, during the week's training prior to Mr. Ditton taking up his managerial position, made racist remarks about Asian customers but quickly applied similar prejudicial attitudes towards him. Mr. Ditton was subjected to a range of persistent homophobic comments by the partner including 'Stoke on Trent' as rhyming slang for 'bent' and 'you wee poof' and repetition of comments by Mr. Ditton in an effeminate tone of voice. He also sought to undermine him with derogatory comments about his ability to undertake a managerial role, relating these criticisms to his sexual orientation.

After only 8 days' employment, Mr. Ditton was dismissed by the agency which had been involved in his recruitment. He was described as not 'psychologically balanced' by the partner who originally interviewed him. He was not allowed back on the premises to collect his belongings and was threatened with physical violence by the other partner.

The Tribunal had no difficulty in determining that Mr. Ditton had suffered both direct discrimination and harassment on the ground of sexual orientation. The partner's conduct was both for the purpose and had the effect of harassing him. There was ample evidence to conclude that company's behaviour towards him was on the ground of sexual orientation and, in the absence of the company at the Tribunal hearing, there was no evidence to rebut that presumption.

It was also clear that Mr. Ditton had been seriously affected by the unfavourable treatment and harassment he suffered. Medical evidence determined that he had been psychologically damaged by the experience, which explained his inability to get further employment. In view of the potential earning power of the job rising to £85,000 per year, the Tribunal awarded £10,000 for injury to feelings, £76,937 for pecuniary loss, £5,291 interest and £26,081 for the company's failure to follow statutory procedures.

Commentary: Senior staff in an organisation who indulge in deeply homophobic behaviour leave their organisation open to very substantial compensation awards. To the extent that, particularly in the SME sector, policies and practices are more likely to be altered by high profile tribunal

Harassment

cases, this outcome raises the profile of the Regulations and is a warning call to all employers.

4.2.1.4 Discrimination against bar staff by a sports club

In *Mr A Gaman v Mr John Vickery* on behalf of himself and the members of the Committee of Bristol County Sports Club (Case No 1400100/06, 1400246/06 (5112/8?) August 2006), the complainant had been a bar steward at the sports club since 1996 when he was 19 years of age. His sexual orientation appears not to have been an issue in his employment and indeed he had a relationship with a club committee member. He also resided over the club and his new partner frequently helped out in the club.

However, one club member made homophobic remarks about him and another commented upon his sexual orientation. He had additional grievances concerning working hours and the National Minimum Wage and it was these issues which caused a deterioration in his relationship with some committee and club members during late 2004 and into 2005. They also caused deterioration in his health and concern was expressed at his absences from work.

The situation deteriorated further when the daughter of a Committee member who had previously made homophobic remarks about the complainant was employed by the Committee to work with him. This led to a series of altercations including one in which the woman threatened the complainant and his partner and further threats were made by another club member.

In the end, the case was more concerned with a highly unsatisfactory disciplinary hearing against the complainant in October 2005, which was held during opening hours while Committee members consumed alcohol and members of the club could see and overhear the proceedings.

Amongst other findings, the Tribunal was satisfied that remarks made by one of the club members were homophobic. Although some of these remarks were made while he was a mere member of the club, he became a member of the Committee in July 2005 and they were held to continue after that date. Hence, without much consideration of the issue, the Tribunal accepted that the club was liable.

4.2.1.5 Inadequate response to homophobic abuse

Mr C Martin v Parkham Foods Ltd (1800241/06 (5120/107) August 2006): The complainant was subjected to graffiti on a toilet wall in May 2005 identifying him as an openly gay man. He was also subjected to offensive remarks in the presence of his supervisors. There was an investigation by the

employer and, in consequence, his name was removed but the graffiti remained. No action was taken over the offensive remarks.

In October 2005, the complainant was about to enter into a civil partnership. He wished to be known by his double-barrelled name. He then found that an obscene version of his name had been reinstated beside the existing graffiti. The employer considered the graffiti serious and put up a notice indicating that such acts would be the subject of disciplinary action. The complainant was advised to seek counselling but found another job and resigned instead.

The tribunal found the complainant had been constructively dismissed, directly discriminated against, and harassed. The employer had failed to follow its harassment policy. There was a failure to investigate the complainant's original complaints adequately and to the graffiti was not removed. In fact, the employer treated the complainant as the 'problem'.

Commentary: This is a valuable case of an employer having equal opportunities and harassment policies but not applying them. The tribunal was satisfied that a comparable heterosexual person would not have been treated in the same way if a complaint about harassment had been made.

It is clear from this case that it is insufficient to have adequate policies without applying them. There was a degree of 'banter' and acrimonious conversations in the workplace. However it was the graffiti and its reinstatement which was the major element in this case. It seemed to be the case that the employer took a minimalist approach to the grievances. Complaints of homophobic harassment need to be taken as seriously as other forms of harassment and need to be rigorously investigated.

4.2.2 Unsuccessful cases

Boyd v Little Haven Hotel (2502182/06 (5080/65) June 2006): This case can be contrasted with Martin. The Tribunal accepted that various remarks were made to the complainant by another chef and that he was provoked by these comments to strike the other chef. He was subsequently dismissed. The Tribunal accepted that the hotel had a strong equal opportunities policy which was properly enforced in this case. It was satisfied that the employer had a rigorous anti-bullying policy and would have disciplined the other chef, had there been corroborating evidence against him. The company was not held to be liable for the alleged homophobic remarks and therefore there was no sexual orientation discrimination or unfair dismissal.

Commentary: This is a case in which the complainant was dismissed for reacting to homophobic comments. Whereas in other cases, employers have failed to follow their policies, in this case, the tribunal was satisfied that the employer had brought themselves within the statutory defence by doing everything practicable to apply its equal opportunities policy.

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Employers and trade union representatives ought to ensure that equal opportunities and harassment policies are rigorously enforced in sexual orientation cases. Employers are not necessarily liable for homophobic behaviour on the part of their employees. By convincing the tribunal that it took a strong stance against bullying, the employer in this case escaped liability.

4.3 Religion or belief harassment

There have been no decided religion or belief harassment cases.

Section five

Indirect discrimination

5.1 Introduction

Indirect discrimination is defined in Reg 3(1)(b) of the sexual orientation Regulations as follows:-

3.—(1) For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if—

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B, but—

(i) which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared with other persons,

(ii) which puts B at that disadvantage, and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

5.2 Indirect sexual orientation discrimination

There have been no decided indirect sexual orientation discrimination cases.

5.3 Indirect religion or belief discrimination

5.3.1 Successful cases

5.3.1.1 Resignation after requirement of Sunday working

As with *Nicholson* above, *Williams-Drabble v Pathway Care Solutions* (Case No 2601718/04 (4837/112) January 2005) is a case of constructive dismissal, once again in a childcare scenario. As with some other cases, the employer did not enter an appearance and was not represented at tribunal. The complainant represented herself. She was a Church-going Christian, who worked for Pathway Care Solutions from November 2003, first in one care home, in which she was unhappy and then in the second home, Rose Villa, from January 2004. Her relationship with two co-workers, both Muslims, was not good, which she put down to the discovery that she was a practising Christian in light of her refusal to work on Sundays. Although other allegations were made by her, including concern at the treatment of children under Pathway’s care, her reason for resignation was a change to her working rota so as to include a twice-monthly shift from 3pm on Sunday until 10 am on Monday. The only available church service in her local church was at 5pm on Sunday.

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Although the complainant claimed both direct discrimination and indirect discrimination, the Tribunal chose to treat the case purely as an indirect discrimination case. She had argued that her Muslim colleagues had sought to belittle her religious beliefs, but she could not be sufficiently specific to substantiate these claims. Arguments might have been put on the issue as to whether a deliberate change of hours could amount to direct discrimination but this point was not addressed by the Tribunal. In any event, the Tribunal found that she had been placed at a particular disadvantage by the revised shift arrangements. In the absence of any evidence from the employer, the Tribunal concluded that there was no objective justification for her treatment and hence that she had been the subject of indirect discrimination.

It proceeded to conclude that she was entitled to resign and hence also upheld the indirect discrimination complaint. An award of £5001 including £4000 for injury to feelings was made.

Commentary: In the circumstances, it is understandable that the Tribunal decided to concentrate on the indirect discrimination aspects of the case. It was not provided with sustainable evidence of direct discrimination in the complainant's dealings with her colleagues. On these facts, it was not difficult for the Tribunal to find indirect discrimination, particularly as the employer was not at the hearing to provide an objective justification.

Trade union representatives should always be aware that what might appear to be a neutral policy or practice may disadvantage members of religious minorities. What is clear from this case is that a particular religious group must be treated with respect in the workplace. Employers need to have a legitimate aim in altering work patterns if they have disadvantageous implications for members of religious groups and they must also ensure that the means used are proportionate. Hence an equality audit of working practices, and alterations to them, ought to be undertaken with the position of different religious groups in mind.

5.3.1.2 Dismissal for refusal to work on a Sunday

A second case is similar to *Williams-Drabble* is *Mr Joseph Estorninho v Zoran Jokic t/a Zorans Delicatessen* (Case No 2301487/06 (5110/76) August 2006). In this case, both parties represented themselves but a wider range of issues were ventilated. The complainant had agreed to work as a chef for delicatessen in April 2005 on the basis that, as a devout Catholic, he could not work on Sundays, although he would attend Sunday staff meetings. When another chef who had 2 yrs' experience was promoted to Head Chef over the complainant, who had 18 yrs' experience as a chef, he complained to the employer.

The Tribunal accepted that this promotion was not connected to the complainant's religious beliefs. The main issue transpired to be his refusal of Sunday working. The employer instructed him to work on Sundays in February 2006. At a meeting on 3 March, he was told he should finish at the end of the month.

On the issue of Sunday working, the Tribunal decided that a non-Christian comparator would have been required to work on Sundays. Hence there was no direct discrimination. However, on the issue of indirect discrimination, the Tribunal concluded that the complainant had suffered a 'particular disadvantage' because practising Catholics are required to attend church on Sunday and the employer's 'provision criterion or practice' of Sunday working placed him at a particular disadvantage compared to non-Catholics. As the employer had sought to justify his dismissal on the basis of the quality of his work, a reason for dismissal rejected by the Tribunal, he did not put forward justification for the change in work patterns. Nonetheless, the Tribunal did consider whether there was evidence of an increased need for Sunday working and concluded that there was not. It also considered that the employer had not considered other ways of arranging Sunday working without infringing the complainant's religious beliefs and practices and hence had not adopted proportionate means.

5.3.2 Unsuccessful cases

5.3.2.1 Wearing of niqab by classroom assistant

We have already considered *Mrs A Azmi v Kirklees Metropolitan Council* (Case No 1801450/06 October 2006) above. The Tribunal went on to consider whether the council's policy could be indirectly discriminatory. Clearly Mrs. Azmi was placed at a particular disadvantage by the policy. However it concluded that the council had worked out a coherent policy which had a legitimate aim in enhancing the education of the pupils. In restricting the wearing of the niqab to classroom contact with the pupils, KMC was acting in a proportionate fashion.

This conclusion has now been approved by the EAT.

Commentary: This appears to be a coherent application of the indirect discrimination principle. Clearly a more general prohibition on the wearing of the niqab would have involved a non-educational aim which would have been more difficult to justify as legitimate. Similarly, such a prohibition would have been more difficult to categorise as proportionate.

In the case of the British Airways employee who was prohibited from wearing a cross, the company eventually backed down in its approach towards a 'neutral working environment' in which its dress code excluded religious manifestations. It is more difficult, but not impossible, to justify a neutral working environment as a legitimate aim of the organisation. So also the

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proportionality of a prohibition of religious manifestations which are not clearly work-related, as in *Azmi*, will be more difficult to justify.

It is suggested that reliance on indirect discrimination is a more manageable approach for trade union representatives and employers. The use of ‘legitimate aim’ and ‘proportionate means’ enables a coherent assessment to be made between the need for respect for diversity in the workplace against the operational needs of the organisation. This makes general prohibitions on religious manifestations a significantly more difficult issue to justify.

5.3.2.2 Distribution of homophobic material

We have already considered *Mr T Apelogun-Gabriels v London Borough of Lambeth* (2301976/05 (5016/62) Feb 2006). The Tribunal briefly went on to consider whether the complainant could have had any more success by arguing indirect discrimination as opposed to direct discrimination. Even if the London Borough of Lambeth’s policy of prohibiting the distribution of homophobic literature did place him at a particular disadvantage, it clearly had a legitimate aim and its means were proportionate. Hence the policy was objectively justified.

5.3.2.3 Requirement to teach during period of religious observance

In *Mayuuf v The Governing Body of Bishop Challoner Catholic Collegiate School* (3202398/04, December 2005), the Tribunal had to consider the position of Mr. Mayuuf, a mathematics teacher at a Catholic school who was an adherent of the Maliki School of Islam. It was a requirement of his faith to attend a mosque for Friday afternoon prayers. Concern was expressed, including by Mr. Mayuuf, at the attainment of pupils in mathematics and the school put in place a plan to improve their results. Initially, despite no commitment to do so, the school was able to accommodate M’s request not to work on Friday afternoons. But eventually it decided to give him a Friday afternoon class so that the improvement plan could be carried through.

The Tribunal treated the case as one of indirect discrimination. The policy of requiring Friday afternoon teaching placed Mr. Mayuuf at a significant disadvantage. The Tribunal acknowledged the “seriousness of hardship” for him but this had to be weighed against the “colossally disruptive and damaging” effect on students if he did not deliver these classes. Mr. Mayuuf argued that a supply teacher could provide the mathematics teaching in this period but the school successfully argued that this was an unacceptable outcome in view of the need to improve the students’ performance. Hence school’s policy was objectively justified.

Commentary: This case is an interesting comparison with *Williams-Drabble* and *Estorninho* above. Whereas the Tribunal did not have coherent arguments from the respondent employers in these cases to objectively justify the changes to working patterns, the employer in this case could show that it had examined a range of options before deciding that it had no choice but to impose a change in working patterns.

As in *Azmi*, the legitimate aim of school's policy was not doubted. It was the issue of proportionate means which was most controversial. If these were extra classes to improve the students' attainment in mathematics, was it necessary for Mr. Mayuuf, as opposed to a supply teacher, to undertake the work, particularly in light of the discriminatory effects on him?

It can be seen that a well-considered policy has more chances of success in the context of indirect discrimination. Ultimately Mr. Mayuuf's core religious beliefs, as a requirement to undertake certain religious observance, was not protected in circumstances in which the educational needs of the school were given precedence over them.

5.3.2.4 Seventh-day Adventist refused job on Saturday

Ms E James v MSC Cruises Limited (Case No. 2203173/05 (5046/42) April 2006): The complainant, a Seventh Day Adventist, applied for telesales post selling MSC cruises and fly-cruise deals to travel agents. This included a Saturday morning roster which staff would work every 3-4 weeks. Ms James was an 'orthodox' Seventh-day Adventist and was not prepared to work from sunset on Friday until sunset on Saturday. She also participated in religious services and taught at a Sabbath Day School at her local church. She did not mention her religious adherence during the course of her interview with MSC but did disclose it when a formal job offer was made. This offer was then withdrawn by MSC.

The Tribunal found that MSC accepted that staff did not like Saturday morning working but it was considered essential to the growth of the company. It was considered impossible to compete in the cruise market without Saturday working. Part-time alternatives were not viable as they would not know enough about the business.

The case was treated as an indirect discrimination case. The Tribunal accepted that the Saturday working policy was a 'provision, criterion or practice' in the context of Reg 3(1)(b). It asked itself whether MSC had demonstrated a 'real business need' for Saturday working and concluded that it had. It then weighed up what it considered to be a significant disadvantage to the complainant against the business needs of MSC. It appeared crucial to this assessment that MSC considered it 'unfair' to make exemptions from this policy although a 'maternity returner' was given at least a temporary exemption from Saturday

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working. Hence the Tribunal concluded that these business needs outweighed the discriminatory effects on the complainant and hence dismissed her claim.

Commentary: There is much controversy over objective justification for indirect discrimination. The statutory test is “which A cannot show to be a proportionate means of achieving a legitimate aim” although FETD actually provides that the means must be ‘appropriate and necessary’. Nonetheless there has been disquiet that the *Bilka* test from sex equality law, which refers to a ‘real business need’ has become lost in these various definitions. This case shows that any application of the test will cause difficulties in religion or belief indirect discrimination cases. If the Tribunal had gone back to the statutory test, it could have established that MSC had a ‘legitimate aim’ in requiring employees to work on Saturday mornings. It ought then to have considered the issue as to whether it was either ‘proportionate’, or indeed ‘appropriate and necessary’, to require Mrs James to work 1 week in 4 on Saturday mornings.

There is a temptation to conclude that the complainant’s particular religious beliefs, which will be seen ‘on the periphery’ of mainstream Christian thinking, did not receive the respect which other religious beliefs might have received.

At least, in this case, the employer had a well-established policy on Saturday working. Clearly, any attempt to impose a policy in response to the complainant’s assertion of her religious adherence would have been subject to stricter scrutiny by the Tribunal. However, it is arguable that employers and trade union representatives should consider carefully the issue of proportionality. Many might feel that, if there are others who can perform a particular function, and the discriminatory effect on a person of particular religious beliefs is acute, every effort should be made to accommodate that person, particularly if that person’s religious adherence had no serious detrimental effects on the position of others.

Section six

Conclusions

6.1 Introduction

This survey of cases on religion or belief and sexual orientation discrimination reveals many interesting aspects of these two new areas of non-discrimination law. Some of the anticipated issues have arisen in the judgments while others have yet to be deliberated upon.

There has been a preponderance of direct discrimination cases on religion or belief, no cases on harassment and a range of cases in which religious adherence has been treated primarily as an indirect discrimination issue. In relation to sexual orientation cases, there has also been a preponderance of direct discrimination cases but many cases have been direct discrimination and harassment cases. On the other hand, there have not yet been any decided indirect discrimination cases on sexual orientation discrimination.

6.2 Definitions

6.2.1 Sexual orientation

There has not been any controversy over what amounts to sexual orientation. A case at present at hearing will consider the issue of the possible distinction between sexual orientation and 'sexual practices' but this is an issue in relation to direct discrimination rather than the definition of sexual orientation itself.

6.2.2 Religion or belief

A few early cases have raised the issue of the definition of religion or belief. We find a couple of cases, *Devine* and *Williams*, in which issues only vaguely connected to religion or belief have been rejected by tribunals as being outside the scope of the Regulations. The tribunals have had no difficulty in accepting bona fide religions, such as Seventh-day Adventists, as recognised religions. Issues such as paganism and witchcraft have not arisen.

The main issue here has been whether membership of the BNP can be included within the scope of the religion or belief definition. It appears clear from the Court of Appeal decision in *Redfearn* on the scope of the Race Relations Act that membership of the BNP will not be protected by the Regulations. So also it is clear, even before the amendment to the religion or belief definition in the

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Equality Act 2006 that the tribunals would consider philosophical beliefs such as atheism as being covered by the Regulations.

It remains to be seen whether the tribunals will place some constraints on the concept of religion or belief, for example, in relation to Satanism but it would appear that they would be reluctant to do so.

6.3 Direct discrimination

6.3.1 Sexual orientation

In terms of direct discrimination cases, there has been a willingness on the part of tribunals to find in favour of LGB claimants, particularly if they have corroborating evidence. Most of these cases have been direct discrimination/harassment cases. In the most high-profile direct discrimination case, *Lewis*, the complainant had limited success at the tribunal stage but this was overturned at the EAT. The tribunal did consider early stages of the disciplinary investigation to be tainted by direct discrimination but considered that the concluding stages were free of any discrimination. *Lewis* shows that ‘underlying suspicions’ e.g. in relation to homophobic phone calls and alleged homophobic remarks made by some parties, may not convince a tribunal that an organisation is engaging in sexual orientation direct discrimination. So also the tribunal was unwilling to interfere where an employer chooses to believe a straight person, admittedly corroborated by another, rather than a gay man facing serious allegations.

On the other hand, there were a number of successful sexual orientation direct discrimination cases, although a feature of some of these cases was the absence of any appearance by the respondent. As yet, issues of the purported distinction between sexual orientation and sexual practices has not emerged in the decided cases, although this may alter in the foreseeable future. So also, despite judicial review proceedings on the ‘faith-based’ GOR in the sexual orientation Regulations, no cases have yet been decided on this point.

6.3.2 Religion or belief

The main issue to emerge from the religion or belief direct discrimination cases is the unwillingness of tribunals to treat issues of religious adherence as a direct discrimination issue. In some cases, for example, *James*, the issue has only been argued as an indirect discrimination case. In *Azmi*, a deliberate attempt was made both to argue that this was a direct discrimination case and was not an indirect discrimination case as the criterion at issue was not ‘apparently neutral’. In confronting the issue of direct discrimination, the tribunal in *Azmi*, endorsed by the EAT, concluded that the appropriate comparator was another teaching assistant wearing a similar face covering, such as a balaclava helmet.

It is difficult to avoid the conclusion that the wearing of a veil was a core element to Mrs. Azmi's adherence to her religious beliefs. Drawing comparisons with a person wearing a balaclava helmet is a rather embarrassing means of reaching a conclusion on the direct discrimination issue. The difficulty of finding direct discrimination in such cases is three-fold. First, issues of direct discrimination have traditionally been treated with great seriousness in relation to race and sex discrimination. Only the most clearly defined exceptions have been contemplated (although this 'iron rule' has now been breached in relation to direct age discrimination). Secondly, it is attractive to tribunals to treat such cases as indirect discrimination as it gives the tribunal some latitude to control the outcome through the application of objective justification to the circumstances of the case. Thirdly, the GOR exception in GB law is narrower than that in the FETD. Hence, it is the particular religion or belief which must be the GOR in GB law while it is sufficient that a 'characteristic related to religion or belief' can be the GOR under the Directive.

Hence, in *Azmi*, it was not a requirement that Mrs. Azmi be (or not be) a Muslim which was at issue but whether the school could impose a requirement that a teaching assistant's face should not be covered when in direct contact with children. If a wider GOR had been available to the tribunal, the case might have been treated as a direct discrimination case without recourse to questionable comparisons which significantly limit the scope for findings of direct discrimination in religion or belief cases.

A wider consideration is that the extension of equality law into new areas may place traditional thinking under greater strain. Hence it may be that we have to consider more regular use of exceptions to direct discrimination in order to preserve the integrity of the direct discrimination principle.

The second major issue to emerge has been the scope of the GOR principle in religion or belief cases. Adopting what may be considered to be a 'traditional' approach, the tribunal and EAT in *McNab* first refused to allow Glasgow City Council to rely on the 'faith-based' GOR in the religion or belief Regulations. Hence we still await an authoritative ruling on the faith-based GOR. In relation to the general GOR, both the tribunal and the EAT were unsympathetic to the arguments that the pastoral care post should be reserved for a Catholic. Hence it is clear that it will be difficult to invoke GORs in cases in which only some elements of a post could be subject to a requirement in relation to religion or belief, particularly when arrangements could be made to alleviate this requirement.

6.4 Harassment

6.4.1 Sexual orientation

There has been a range of successful sexual orientation harassment cases. However they have all been examples of 'crude' harassment with the possible

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exception of *Gaman*, in which the tribunal took a robust approach towards the line between ‘banter’ and unlawful harassment. It is significant that successful complainants had corroborating witnesses.

We did not encounter cases in which there was detailed consideration of the component elements of an ‘unacceptable’ environment in the harassment definition. In most cases, the tribunal concluded that the harassment was both ‘purpose-based’ and ‘effects-based’. By and large, sexual orientation harassment allegations have been sympathetically treated by tribunals.

It is also clear that once a tribunal is satisfied that procedures are not being followed, as in *Gismondi*, the prospects of a successful outcome are heightened.

Although there has been considerable controversy recently, in the context of the sexual orientation goods, facilities and services Regulations, over the potential of harassment provisions to precipitate litigation on ‘subjective’ views of an offensive environment, there is not a single case in which this was an issue before the tribunals.

6.4.2 Religion or belief

The significant finding on religion or belief harassment cases is that there have not been any. It is instructive that there has been intense controversy over the inclusion of a harassment definition in the religion or belief goods, facilities and services provisions in the Equality Act 2006. The provisions in the Bill were removed on the basis that it could be the basis of challenges to theatrical performances etc in which those of strong religious beliefs would claim that an ‘offensive’ environment had been created. These issues are outside the scope of this report. However the absence of any religion or belief harassment cases indicates this is not necessarily a vital issue at least in employment.

On the other hand, outside the scope of litigation, there was major controversy over the wearing of religious symbols in British Airways. If that claim had come to tribunal, it might have been that the prohibition could have been treated as a harassment issue. In those circumstances, an authoritative ruling on the relationship between an ‘objective’ and ‘subjective’ perspective on effects-based harassment could be made. However, in these circumstances all ‘effects-based’ harassment cases are likely to turn largely on their own facts.

6.5 Indirect discrimination

6.5.1 Sexual orientation

As with religion or belief harassment cases, the significant finding is that there have not been any decided cases of indirect sexual orientation discrimination. Experienced commentators have speculated on potential indirect discrimination cases but this report has not thrown up any practical examples. There has been some speculation over married couple criteria testing the scope

of indirect discrimination in sexual orientation cases. Although since the passing of the Civil Partnership Act and the equivalence given to civil partnership status in the Sex Discrimination Act, such cases will be difficult to argue.

6.5.2 Religion or belief

We have examined a range of ‘religious observance’ cases as indirect discrimination cases. As it happens, some Christian complainants succeeded in circumstances in which the tribunals seemed to consider that the imposition of ‘Sabbath day’ working was introduced in a gratuitous fashion. Where a respondent had a carefully considered policy, prospects of success were somewhat weaker. In *Azmi*, the school eventually developed a fair policy which attempted to accommodate Mrs. Azmi’s wish to wear a veil with the needs of the students she was assisting. However, relatively little weight was given to complainants’ religious observance in *Mayuuf* and *James*.

In *Mayuuf*, a senior maths teacher was deprived of his post as a result of a reorganisation of teaching commitments in conflict with his religious observance. In *James*, the employer was not prepared to countenance an exception to accommodate the complainant’s need to undertake religious observance on a Saturday. Hence if your Sabbath happens to be a Sunday, tribunals may be sympathetic to you if Sunday working is imposed on you. But if your Sabbath happens to be a Friday or Saturday, and your employer has to change arrangements or make an exception for you, your prospects of success are arguably much lower.

6.6 Procedural issues

There has been little of note in relation to procedural issues. There have been restricted reporting orders in a couple of sexual orientation cases and a belated attempt to introduce one during the course of proceedings in *Gismondi*. In terms of the ‘neutrality’ of tribunals, it cannot be said that tribunals have been unsympathetic to LGB complainants. If there are concerns, it is with the willingness of tribunals to objectively justify policies which conflict with religious observance other than on a Sunday.

In terms of awards, there have some substantial awards particularly in sexual orientation cases, although it appears to have transpired that the respondent in *Ditton* is no longer solvent and hence that the complainant may not see any of £125,000 he was awarded.



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