Appeal No. UKEAT/0183/18/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 22 January 2019
Judgment handed down on
19 June 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MS K BILGAN

MR M WORTHINGTON

MR RICHARD PAGE APPELLANT

NHS TRUST DEVELOPMENT AUTHORITY RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr Paul Diamond (of Counsel) Instructed by: Christian Legal Centre 70 Wimpole Street London W1G 8AX
For the Respondent	Mr David Massarella (of Counsel) Instructed by: Hempsons Solicitors 100 Wood Street London EC2V 7AN

SUMMARY

RELIGION AND BELIEF DISCRIMINATION

INDIRECT DISCRIMINATION

VICTIMISATION

The Claimant, who is a practising Christian, held the position of Non-Executive Director of an NHS Trust. He was also a lay magistrate sitting on family cases involving adoption decisions. The Claimant holds the firm faith-based belief that it is "not normal" for a child to be adopted by a single-parent or a same-sex couple. The public expression of those views led to disciplinary action in respect of his Magistracy. The Claimant participated in media interviews about that action without informing the Trust. The Trust instructed the Claimant to inform it before contacting the media. The Claimant was subsequently removed from the Magistracy. Before the Trust could speak to him about that removal, the Claimant took part in a further televised interview with BBC Breakfast News, during which he expressed the view that he could not see how adoption by a same sex-couple could ever be in the best interests of the child. The Claimant was thereafter suspended by the Trust and his term as a NED was not renewed. The Claimant issued claims of discrimination (direct and indirect) because of religious belief and victimisation. The Employment Tribunal dismissed the claims.

Held (dismissing the appeal): that the Tribunal had not erred in law in finding that the Claimant was treated as he was because of the manner in which the Claimant had expressed his beliefs (rather than because of the beliefs themselves), including the fact that he had spoken to the media without informing the Trust and had done so in the knowledge that his conduct would be likely to have an adverse effect on the Trust's ability to engage with sections of the community it serves. That finding as to the reason for the Claimant's treatment was a finding of fact which

cannot be said to be perverse. The Tribunal had also not erred in rejecting the claim of indirect discrimination on the grounds that the Claimant was unable to show group disadvantage. The Tribunal had correctly applied the Court of Appeal's decision in **Mba v Merton London Borough Council** [2014] 1 WLR 1501. Finally, the Tribunal had not erred in concluding, in accordance with the principles established in **Martin v Devonshires Solicitors** [2011] ICR 352, that the various reasons relied upon by the Respondent for its treatment of the Claimant were properly separable from the allegations of discrimination which the Claimant was making against the Lord Chancellor and others in respect of his removal from the Magistracy.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The Claimant appeals against the decision of the Croydon Employment Tribunal, Employment Judge K Bryant QC presiding, to dismiss his claims for discrimination on the grounds of religious belief and victimisation following the termination of his role as Non-Executive Director ("NED") of the Kent and Medway NHS and Social Care Partnership NHS Trust ("the Trust").

Factual Background

2. The Claimant is a practising Christian. He holds the firm belief that it is always in the best interests of every child to be brought up by a mother and a father. He accepted before the Tribunal that it is his view that it is not in the best interests of child to be adopted by anyone other than a mother and father and that it is "*not normal*" to be adopted by a single-parent or a same sex couple.

3. The Claimant had a successful career in finance for many years. In 2012, he commenced a fixed term appointment, expiring in June 2016, as NED of the Trust. The Non-Executive chair of the Trust at that time was Mr Ling. Appointments to the role of NED at the Trust were the responsibility of the Respondent. The Tribunal found that the Claimant was very much a "*hands on*" NED who had a "*high profile*" within the Trust. The Claimant had accepted before the Tribunal that the standards expected of him by the Trust included requirements to:

> **"11.8.1 uphold the provisions of the Equality Act 2010 that prohibit discrimination on grounds of sexual orientation, including in**

relation to adoption;

11.8.2 promote equality for LGBT members of the community;

11.8.3 resolve any conflicts arising from his personal interests, including his religious beliefs, that could influence or be thought to influence his decisions as a Board member;

11.8.4 act as a role model within the Trust;

11.8.5 reflect on how his behaviour may affect those around him;

11.8.6 support and follow reasonable instructions from the Chair of the Trust."

4. The Claimant also accepted that LGBT members of the community suffered disproportionately from mental health problems and that there had been significant difficulties in getting those members to engage with mental health services such as those provided by the Trust.

5. The Claimant held the office of Magistrate from 1999 until his removal from that office in March 2016. He sat as a Magistrate in criminal and family courts and participated in decisions involving adoptions. In 2014, the Claimant was part of a panel of Magistrates hearing an application by a same-sex couple to adopt a young child. Although the adoption application was unopposed and there was a comprehensive report from the social worker in support, the Claimant expressed views to his fellow magistrates that made it clear to them that he had a problem with the notion of a same-sex couple adopting a child. His fellow Magistrates complained, and the Claimant was reprimanded for his conduct, which was considered, amongst other things, to amount to a breach of his duty to decide adoption cases impartially.

6. The disciplinary action against the Claimant was reported in the Mail on Sunday and the DailyMail Online in January 2015. The online article referred to the Claimant as "*an experienced NHS manager*" although it did not identify the Trust specifically.

7. The Claimant did not inform the Trust or the Respondent about the disciplinary action taken against him in relation to his Magistracy or about his contact with the media.

8. When the Trust learned of the disciplinary action, Mr Ling arranged to have a meeting with the Claimant on 22 January 2015 to discuss the matter. The day before the meeting the Claimant participated in a live radio phone-in on Radio Kent. The Trust was not informed about this phone-in.

9. The Tribunal describes the meeting with Mr Ling and a subsequent complaint about the Claimant as follows:

> **"11.18 A meeting took place on 22 January 2015 between the Claimant and Mr Ling as arranged. The Claimant confirmed that he had given an interview to the Mail on Sunday and had taken part in a radio phone-in the day before the meeting. Mr Ling asked the Claimant to consider whether readers of the newspaper and/or listeners to the radio phone-in might make a connection between the views he was expressing about same sex couples and his role with the Trust. The Claimant said that he had not thought about that. Mr Ling asked him why he had not alerted the Trust to the impending media coverage. He again said that he had not thought about it. Mr Ling told the Claimant that it was important that he alert him if there was going to be any further media coverage.**
>
> **11.19 On 3 February 2015 the Trust received a formal complaint by email concerning the Claimant, including as to his press and radio interviews. The complaint was from the Chair of the Trust's LGBT Staff Network. It referred to the views expressed by the Claimant in the media and said that '*This opinion is highly offensive to same sex parents, and if nothing is done about Mr Page's statements, then [the Trust] will be seen as complicit with that attitude'* and that '*It would be highly damaging if the LGBT community, and society in general, were to see [the Trust] as harbouring this type of opinion without action.'***
>
> **11.20 Mr Ling then arranged to meet with the Claimant again together with the Trust's Chief Executive and a further meeting took place on 11 February 2015. The Claimant confirmed his view that children need a mother and a father and that he stood by that view. The Claimant was asked to give an assurance that he would not express his views in a public forum but he would not give that assurance. He did, however, accept that he should have told the Trust about his contact with the media.**
>
> **11.21 There was then further correspondence between Mr Ling and the Claimant. Mr Ling reiterated that it was the Claimant's public expression of his views in the media that could undermine confidence that he would exercise his judgment in a way that was not affected by those personal views. The Claimant said in a letter dated 12 March 2015 that he was sorry that there had been an impact on the Trust. He apologised for any problems he may have caused and confirmed that his actions, discussions and decisions within the Trust would continue to conform strictly with the Trust's policies and procedures and with the standards for NHS Boards.**

> **11.22 The matter had been reported by the Trust to the Respondent but, in light of Mr Ling's instruction to the Claimant to inform him of any media interest and the fact that the Claimant had by then undertaken further equalities training, it was taken no further at that stage. As far as the Trust and the Respondent were aware, the matter had been resolved and there was no ongoing issue for the remainder of 2015.**
>
> **11.23 Unbeknownst to the Trust or the Respondent, the Claimant continued to engage with the media. On 12 March 2015, the same day as the Claimant's letter as mentioned above, he appeared live on BBC Breakfast News and, as the tribunal understands it, made much the same comments as he had in previous press and media appearances. The Claimant did not inform the Trust about this appearance and they did not find out until much later."**

10. During that interview on BBC Breakfast News ("the BBC Interview") the Claimant expressed his belief that it was in the best interests of the child to be adopted by a mother and a father. The Claimant was subject to further disciplinary action in respect of his Magistracy and was eventually removed from the Magistracy with effect from March 2016. The Claimant lodged proceedings in the Central London Employment Tribunal in respect of his removal, but his claims of discrimination were dismissed. His appeal against that decision is the subject of a separate judgment of the EAT – UKEAT/0304/18/LA – which is being handed down at the same time as this judgment.

11. The Trust first learned of the Claimant's removal from the Magistracy on 10 March 2016. Mr Ling and the Claimant arranged to speak the following week.

12. Before meeting with Mr Ling, the Claimant participated in further media interviews. Articles appeared in a number of national newspapers on 10, 13 and 14 March 2016.

13. On 14 March 2016, the Claimant was interviewed live on television. The Tribunal describes these appearances as follows:

> **"11.29 What is clear is that the Claimant had accepted invitations from, and was interviewed by, ITV News and Good Morning Britain, both on Monday 14 March 2016. Both interviews were shown on national television. The tribunal has seen, and taken into account, a transcript of the entire interview by Susanna Reid and Piers Morgan on Good Morning Britain. The interview began with discussion of the Claimant's dismissal from the magistracy but then moved onto wider issues. At no point did the Claimant decline to answer any of the questions put to him. Key passages include these:**

'PM: You talk[ed] about natural earlier. Do you think being gay is unnatural?

RP: It is not what is best for a child.

PM: That wasn't the question I asked you. Do you think being gay is unnatural

RP: Being homosexual … err … in scripture it doesn't say that being homosexual is good or bad …

PM: What is your belief

RP: What is wrong is homosexual activity

PM: Really[?]

RP: Yes. As sex outside marriage is not right

…

PM: You don't agree with same sex marriage

RP: I do not agree with same sex marriage

PM: You don't agree with same sex adoption

RP: I do not see that could ever be the best for the child …

that is my responsibility

…'

11.30 The Claimant had not informed the Trust that he intended to engage again with the media, including appearances on live national television. Mr Ling found out at some time during the day on 14 March 2016 and watched the interview on catch-up that evening."

14. Mr Ling met with the Claimant on 15 March 2016. The Claimant was told that his term of office as NED would not be renewed after June 2016 because Mr Ling wished to 'refresh' the Board and seek members with a different mix of styles and skills. As the Claimant had contacted the media without informing Mr Ling, the Claimant was told that he could resign voluntarily or that the matter would have to be reported to the Respondent with a request that he be suspended pending investigation. The Claimant did not resign and was therefore suspended.

15. The Tribunal referred to the suspension as follows:

"11.33 Mr Ling wrote the same day to the Respondent asking for authority to suspend the Claimant; authority to suspend Non-Executive Directors rests with the Respondent rather than the Trust or its Chair. Mr Ling's letter raised a number of concerns, including the impact of the Claimant's actions on staff, on patients and on the reputation of the Trust. He said that it was a concern that the

media attention the Claimant appeared to have sought would mean that a large number of patients would be aware of his views and would have less confidence that the Trust would treat them fairly. He also raised the fact that the Claimant had not kept him informed of the disciplinary process leading to his removal from the magistracy or of his continued engagement with the media, even though he had been told in 2015 to do so. After this Mr Ling had no further relevant dealings with the Claimant.

11.34 By letter dated 21 March 2016 the Chair of the Respondent's Appointments Committee, Dame Christine Beasley, reiterated the key concerns raised by Mr Ling and confirmed the Respondent's decision to suspend the Claimant pending further consideration of his position; the letter said that suspension would be with effect from the date he received the letter but in fact a copy of the letter was emailed to the Claimant that day."

16. The Respondent referred the matter to its Termination of Appointments Panel ("TAP"). The TAP considered a report on the Claimant's conduct and arranged a meeting with the Claimant to consider the concerns raised in it. The Tribunal describes that meeting and the TAP's conclusions as follows:

"11.41 The meeting took place on 2 August 2016 as arranged. The Claimant attended and was accompanied by a friend. The TAP comprised five members, all of whom occupied senior NHS roles, and was chaired by Caroline Thomson, a Non-Executive Director of NHS Improvement and Chair of the Appointments and Remuneration Committee. The meeting lasted for just under an hour and it is clear to the tribunal that the Claimant was given every opportunity to respond to the concerns raised in whatever way he saw fit.

11.42 The outcome of the TAP meeting was set out in a letter to the Claimant dated 19 August 2016. The decision was unanimous. The TAP concluded that it was not in the interests of the health service for the Claimant to serve as a Non-Executive Director in the NHS. The reasons for the TAP's decision, as set out in the letter, centred on the Claimant's public response to the decision to remove him from the magistracy, the events following that decision and their conclusion that his position in relation to those matters was likely to have a negative impact on the confidence of staff, patients and the public in general in the Claimant as a local NHS leader. The TAP noted its concern that, when questioned on these issues, the Claimant failed to accept that statements made in public might impact on his credibility as a Non-Executive Director, failed to accept that he had any personal responsibility for ensuring that public statements he made were not open to misinterpretation and failed to demonstrate any remorse or insight into the impact that his actions might have.

11.43 Of particular importance to the TAP in reaching its decision was the Claimant's apparent inability or unwillingness to distinguish between his personal views and what it was appropriate, given his role as a Non-Executive Director with a high profile in the Trust, to say to the press and other media. Further, the TAP concluded that although the Claimant had denied courting publicity, he had actively engaged with the media and had accepted a number of invitations to appear on local radio and national television. This was compounded by the fact that Mr Ling had told the Claimant in 2015 to keep him informed of any impending publicity which he had failed to do. The TAP concluded that the Claimant was likely to engage actively with the media in future if the opportunity arose; the Claimant confirmed to the tribunal that he continued and still continues to be willing to talk to anyone from the media if

> **asked and this was demonstrated during the course of the tribunal hearing by a number of appearances on television news programmes."**

17. The Claimant lodged proceedings in the Employment Tribunal complaining that his suspension, the investigation by TAP and the decision that he should not continue to serve the Trust as NED, were acts of discrimination because of his religious belief. He brought claims of direct discrimination, indirect discrimination, victimisation and harassment, and sought to rely on Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) of the European Convention on Human Rights ("ECHR").

The Employment Tribunal's Judgment

18. The Tribunal found that the reasons for the Respondent's actions were not because of the Claimant's beliefs but because of the manner in which those beliefs were expressed. It held:

> **"52. Article 9(1) of the ECHR gives absolute protection for a person's right to freedom of thought, conscience and religion. That is not in issue here. Although the Claimant contends that action was taken against him by the Respondent because of his beliefs, the tribunal rejects that contention. The Respondent acted as it did because of the manner in which the Claimant expressed his beliefs. As discussed further below in the context of the direct discrimination claim, a valid distinction may be drawn between an individual's religion and/or beliefs and the way in which they express that religion and/or those beliefs. This is clear from a consistent body of authority (both pre and post-*Eweida* in the ECtHR)."**

19. This is further explained in paragraph 55 of the judgment:

> **"55. Here, the act or acts resulting in the Respondent taking action were not the Claimant holding or expressing his views as such, but the Claimant accepting invitations to appear, and then appearing, in the press and on national television, compounded by the fact that he did so without informing the Trust when he had been expressly told to do so. Expressing his views in that context was not something that the tribunal finds was intimately linked to his religion or his beliefs. There was, in the tribunal's judgment, no sufficiently close and direct nexus between the act and the underlying belief. Article 9(2) was not, therefore, engaged.**
>
> **56. The tribunal accepts that manifestation of religion or belief for the purposes of Article 9 could extend in a suitable case to the right to attempt to convince others of the merit of the religion or belief (see the comments of HHJ Eady QC to that effect in *Wasteney*) but in this case (as in *Wasteney*) the actions of the Claimant went further than that.**
>
> **57. In any event, even if, contrary to the above finding, Article 9(2) was engaged then the tribunal would have found, as the ECtHR did in *Chaplin*, *Ladele* and**

> ***McFarlane*** **(the other three cases decided with** ***Eweida*****), that his actions fell within the qualifications to Article 9(2) and there was therefore no breach of his ECHR rights. In the tribunal's judgment, the Claimant's actions were clearly in conflict with the protection of health, which is the Trust's and the Respondent's principal function, and with the protection of the rights of others (two of the qualifications in Article 9(2)). The Trust is subject to the Public Sector Equality Duty under EqA, s149 which includes a duty to advance equality of opportunity and to foster good relations between persons who share and those who do not share a protected characteristic. The Claimant accepts that there were, and had been, specific issues with LGBT members of the community suffering disproportionately from mental health problems and also difficulty persuading them to engage with the Trust's services. There had also been a specific complaint from within the Trust's organisation concerning the Claimant's actions. There is clear evidence that there was a specific and genuine concern on the part of the Trust and the Respondent as to the impact of the Claimant's actions on the Trust's ability to serve the entire community in its catchment area. Given the Claimant's high profile role within the Trust, the tribunal finds that this concern was justified. The Claimant himself confirmed in evidence that although he did not think about the effect of his public statements on others, even after Mr Ling had raised it with him in early 2015, he accepted that those reading, listening to or watching his interviews might have made a connection with his role with the Trust and/or in the NHS in a wider sense and that could be damaging for the Trust or the wider NHS."**

20. The Tribunal also concluded that the Claimant's Article 10 claim added nothing to the argument made under Article 9: see [62].

21. In relation to the claim of direct discrimination, the Tribunal found as follows:

> **"70. Contrary to the Claimant's submissions, the tribunal has already found that the Respondent's actions were not because of the Claimant's religion or because he held or expressed his views as such, but were because he accepted invitations to appear in the press and on national television without informing the Trust and when he had been expressly told to inform them.**
>
> **71. The Respondent does not accept the Claimant's contention that the Claimant's religion and/or views cannot validly be distinguished from the manner in which he expressed them. The Claimant says that this is a false distinction but it is one that has been made in a consistent line of previous cases and upheld as valid on appeal: see, for example, *Chondol*, *Wasteney* and *Trayhorn*.**
>
> **72. Nor is the Claimant assisted by arguments under the ECHR. The tribunal has already found above that Article 9 was not engaged in this case and, even if it was, it was not breached. In any event, in so far as the Claimant may have been seeking to argue that a causation test is replaced by a 'sufficiently close nexus' test in such a case, this argument has already been raised and rejected by the EAT in *Trayhorn*.**
>
> **73. Having found that the reason for the treatment of the Claimant was not his religion or belief, it is not necessary for the tribunal to consider further the dispute between the parties as to the correct construction of a hypothetical comparator. The 'reason why' approach (which the Claimant accepted in submissions was appropriate in this case) provides the answer to the direct discrimination claim.**
>
> **74. For those reasons, the Claimant's claim for direct discrimination fails."**

22. As to the claim of indirect discrimination, the Claimant had sought to argue that three provisions, criteria or practices (PCPs) had been applied to him. The Tribunal found that only one of these PCPs was in fact applied to him by the Trust; that was that "*in assessing suitability of any D for the office, the Respondent gives a high priority to securing the confidence and/or approval of the so-called "LGBT community"*". The phrase, "*so-called LGBT community*", was one used by the Claimant repeatedly during the hearing before the Tribunal and appeared to it to have been intended in some sort of pejorative way.

23. The Tribunal's conclusions in relation to the claim of indirect discrimination were as follows:

> **"79. However, the Claimant's indirect discrimination claim cannot succeed on the basis of the second PCP, and this is also a further difficulty in relation to the first and third, because there is no sufficient evidence on which the tribunal could make any finding of group disadvantage for the purposes of EqA, s19(2)(b). The Claimant has pointed to a number of documents in the bundle, including a petition supporting his position and a number of supportive press articles, including one that quotes the former Bishop of Rochester, but these fall far short, in the tribunal's judgment, of what is required for the tribunal to make a finding that the requirements of EqA, s19(2)(b) are satisfied in this case in respect of any of the PCPs relied on.**
>
> **80. The Claimant contends that where Article 9 is engaged there is no requirement to establish group disadvantage. In the alternative, he says that if there is a need to show group disadvantage then the hurdle is not high. One difficulty with these arguments is that the tribunal has already found that Article 9 is not engaged in this case. In any event, these arguments were raised and rejected by the EAT in *Trayhorn*. There is a group disadvantage hurdle to be overcome in this case and, however high that hurdle, it can only be surmounted on the basis of cogent evidence. There is no such evidence in this case and the tribunal cannot simply make assumptions, as invited to do by the Claimant, without any evidential basis.**
>
> **81. The Court of Appeal confirmed in *Mba* that a requirement to establish group disadvantage is consistent with Article 9 rights and that there remains a requirement to show group disadvantage in an indirect discrimination claim brought under EqA, s19 (see, for example, Elias LJ at ¶35). The Court of Appeal also confirmed that Article 9, when engaged, comes in at the justification stage, ie when considering EqA, s19(2)(d). Given the findings above, there is no requirement for the Respondent to satisfy s19(2)(d), but even if there was, the tribunal would have found the Respondent's actions objective justified under Article 9(2) of the ECHR and under EqA, s 19(2)(d) for the reasons already set out in the discussion of Article 9 above, the legitimate aims being the protection of health and the protection of the rights of others.**
>
> **82. For all the above reasons, the Claimant's claim for indirect discrimination fails."**

24. The Tribunal then dealt with the claim of victimisation in the following terms:

> **"83. Victimisation This aspect of the Claimant's case may be dealt with relatively shortly. The Respondent accepts that the Claimant did protected acts within the meaning of EqA, s27. Specifically, he said a number of times in the press and broadcast media before his suspension in March 2016 that he had been discriminated against on grounds of religion or belief by the Lord Chancellor and/or Lord Chief Justice. There is no suggestion that this was said in bad faith by the Claimant.**
>
> **84. The question is, then, whether the actions taken by the Respondent were because the Claimant had done one or more protected acts. In so far as the Claimant contends that it is not possible to distinguish between what he said in various press interviews and the manner in which he said it, the Tribunal has already rejected that contention. Further, the Tribunal has already made specific findings as to the reasons for the Respondent's actions, and the protected acts played no part in those reasons.**
>
> **85. That being so, the Claimant's claim for victimisation fails."**

25. The Tribunal also dismissed the Claimant's claim for harassment, noting that this was not a claim that was actively pursued during the course of the hearing.

Legal Framework

26. The appeal focuses on the claims of direct and indirect discrimination, and victimisation. The relevant provisions of the Equality Act 2010 ("2010 Act") are therefore as follows:

> **"… 10 Religion or belief**
>
> **(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.**
>
> **(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.**
>
> **(3) In relation to the protected characteristic of religion or belief—**
>
> **(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;**
>
> **(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief. …**
>
> **Chapter 2 Prohibited conduct**
>
> **13 Direct discrimination**
>
> **(1) A person**

(A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

…

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation.

…

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case. …

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation

(whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

…"

27. As the claim concerned the termination or non-renewal of an office rather than employment, it was not in dispute that discrimination in relation to such an office is brought within the reach of the 2010 Act by s.50 thereof.

28. The Claimant also relies upon Articles 9 and 10 ECHR. These provide as follows:

"Article 9 Freedom of thought, conscience and religion

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 10 Freedom of expression

> **1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.**
>
> **2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."**

Grounds of Appeal

29. The Claimant's Notice of Appeal contained six grounds of appeal. Permission was granted to proceed on only three grounds relating to the claims of direct discrimination, indirect discrimination and victimisation:

    a. Ground 1 - the Tribunal misdirected itself in relation to the "reason why" approach to **direct discrimination** in that it failed to identify any appropriate comparators. The Claimant contended that an appropriate comparator was a person who gave similar interviews to the media but spoke in favour of same-sex adoptions rather than against them.

    b. Ground 2 – the Tribunal erred in its approach to the test of group disadvantage for the purposes of determining the complaint of **indirect discrimination** and failed to construe relevant Strasbourg authority correctly.

    c. Ground 3 - The Tribunal erred in its analysis of the Claimant's **victimisation** claim in that there were insufficient findings in respect of the protected act(s) and a failure to find that the "*manner*" in which the Claimant made his statements to the media was not properly separable from the making of statements, which were clearly protected acts as they included allegations of discrimination against the Respondent.

Submissions

30. The Claimant was represented (as he was below) by Mr Diamond of Counsel. On occasion, the way in which Mr Diamond developed his arguments differed somewhat from the focus of the specific Grounds of Appeal. Thus, whilst Ground 1 as set out in the Notice of Appeal focused on the incorrect application of the 'reason why' test and the failure to identify comparators, Mr Diamond, in his oral submissions, made the following additional points:

a. Whether or not the detriment to which the Claimant was subjected, namely the prohibition on expressing his views on same-sex adoption, was because of his religious beliefs involved a simple test of causation and that the "reason why" test amounted to a judicial gloss on the proper approach:

b. That the prohibition on airing his views was clearly an act related to his religious beliefs and was accordingly, an act of direct discrimination. Reliance was placed on case of **Copsey v WBB Devon Clays Limited** [2005] ICR 1789, in which the Court of Appeal considered whether the termination of employment of a Christian employee who did not wish to work on Sunday involved an infringement of Article 9 ECHR. Mummery LJ said as follows:

> **"36. <u>In the absence of the commission rulings, I would have regarded this as a case of material interference with Mr Copsey's article 9 rights.</u> The rights would be engaged and interference with them would require justification under article 9 (2). Under the 1998 act, however, this Court must take the commission rulings into account, so far as they are relevant in determining a question which has arisen in connection with a Convention right: section 2(1)(c). They are relevant. It is not a case of an isolated ruling. So far as the Commission is concerned it seems to be well established they qualified article 9 rights of a citizen in an employment relationship to manifest his belief is not engaged when the employer requires an employee to work hours which interfere with the manifestation of his religion or dismisses him for not working or agreeing to work those hours because he wishes to practice religious observances during normal working hours. As Lord Nicholls of Birkenhead said in Williamson, and para 38:**
>
> > **"What constitutes interference depends on all the circumstances of the case, leading the extent to which in the circumstances individual can reasonably expect to be at liberty to manifest his beliefs in practice."**
>
> **37 Applying that approach to the specific situation of Mr Copsey in the light of the Commission rulings, there was no material or significant interference with his article 9 right and the decision of the employment Tribunal article 9 not engaged was correct in law…" (Emphasis added)**

Mr Diamond relies upon the underlined passage in support of his submission that there was, similarly in this case, an interference with the Claimant's article 9 rights since the prohibition was clearly connected with the expression of views which stemmed from his religious belief.

c. Reliance was also placed upon the case of **Thlimmenos v Greece** (2001) EHRR 15. In that case, a Jehovah's Witness was refused employment due to a previous conviction even though that conviction was for a faith-based conscientious objection to wearing a military uniform. The ECtHR held that there was a violation of Article 14 (right not to be discriminated against in the enjoyment of ECHR rights) in conjunction with Article 9 (freedom of religion). Mr Diamond places emphasis on the fact that the offence for which the applicant had been convicted was "prompted" by his religious beliefs led the ECtHR to conclude that the matter complained of fell within the "ambit" of Article 9.

d. Reference was then made to the case of **Eweida v UK** (2013) EHRR 8, in which it was held that the dismissal of an employee for wearing a discrete cross, amounted to a violation of Art 9. It was submitted that, as in that case, there was in the Claimant's case a "*sufficiently close and direct nexus*" between the Claimant's religious views and the prohibition on speaking to the media for there to be a violation of Art 9. Mr Diamond contends that had that test been applied by the Tribunal then it would have concluded that there was an interference with Article 9 rights which had to be justified and that the Tribunal failed to carry out any such analysis.

31. Although the Claimant did not develop his argument in relation to comparators in oral submissions, we summarise very briefly what he says about that issue in his Grounds of

Appeal. The short point, as we understand it, is that it was incumbent upon the Tribunal to test its conclusions as to the "reason why" issue by constructing appropriate comparators. Reliance is placed on the judgment of Mummery LJ in **Stockton on Tees Borough Council v Aylott** [2010] ICR 128 at [45]:

> **"I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to crosscheck by constructing a hypothetical comparator. But there are dangers in attaching to much importance to the construct and to less favourable treatment as a separate issue, if the Tribunal is satisfied by all the evidence that the treatment… was on a prohibited ground."**

32. The Notice of Appeal contends that the Tribunal had failed to make adequate findings on the reason why the Respondent acted as it did and ought to have adopted the good practice recommended by Mummery LJ of cross-checking its conclusions by constructing a hypothetical comparator. As stated above, that hypothetical comparator, according to the Claimant, was a person giving similar interviews to the media but speaking in favour of same-sex adoptions rather than against them.

Ground 1 – Discussion and Conclusions

33. There are fundamental difficulties with almost every aspect of the Claimant's arguments. First and foremost is the Claimant's failure to identify correctly the reasons found by the Tribunal as being those relied upon by the Respondent for acting as it did. Mr Diamond suggests that the reason why the Respondent dismissed the Claimant was because he had failed to inform the Respondent of his engagement with the media having been told to do so. In our view, that is not a correct reading of the Judgment. Whilst that would appear to be the sole reason if one were to read paragraph 70 of the judgment in isolation, it is clear that the Tribunal was in that paragraph referring back to its earlier findings – "the Tribunal has already found" – and that those findings include other reasons for the Respondent acting as

it did. As stated, for example, in [53], [55] and [57] of the Judgment, the Respondent acted as it did "*because of the manner in which the Claimant expressed his beliefs*", the fact that he had appeared in the press and on TV without informing the Trust when he been expressly told to do so, the fact that his actions were clearly in conflict with the protection of health, which is the Trust's and the Respondent's principal function, and because there was a specific and genuine concern on the part of the Trust and the Respondent as to the impact of the Claimant's actions on the Trust's ability to serve the entire community in its catchment area. All of these matters answer the 'reason why' question which the Tribunal was required to ask itself. None of them were found to relate to the Claimant's religious belief. These conclusions are all findings of fact which are not challenged by the Claimant on the grounds of perversity or otherwise.

34. The Claimant's contention that the 'reason why' test is a judicial gloss on a broader causation test which ought to have been applied is rejected. It is well-established that in considering whether an act was "because of" a protected characteristic the question to be determined by the Tribunal involves a consideration of the alleged discriminator's mental processes in order to determine the reason why he acted as he did: see the analysis in **Page v Lord Chancellor** UKEAT/0304/19/LA at [46] to [50] in which Mr Diamond attempted to run a similar argument. In our judgment, the Tribunal approached the matter entirely correctly in asking itself the 'reason why' question and did not err in so doing.

35. In many cases, by concentrating on the 'reason why' a person was treated as he was, the need to identify any comparator is obviated. There is no obligation to identify a comparator in every case: see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 at [10] to [11]. Where a Tribunal has made express findings of non-discriminatory reasons for the treatment alleged, there can be no criticism of it for not

constructing a hypothetical comparator: see **D'Silva v NATFHE** [2008] IRLR 412 at [30]. As set out above, the Tribunal in this case made clear findings as to the reason for the treatment alleged and it cannot be criticised for not constructing a comparator. In any case, the Claimant's suggested comparator seems to us to be wholly inappropriate as it does not take account of the reason for the treatment. An appropriate comparator would be one who, for reasons unrelated to Christianity or to any religious belief, spoke to the media against the Trust's instructions, and whose remarks would have been likely (by reason of indicating bias or a lack of impartiality) to have a negative effect on the Trust's ability to serve the community in its catchment area. There can be little doubt that any such comparator would have been treated by the Respondent in precisely the same manner as the Claimant.

36. The decision in **Copsey** does not assist the Claimant. The conclusion in that case was that Article 9 was not in fact engaged because of the Commission's approach to the exercise of those rights in employment situations where the infringement could be avoided by choosing alternative employment. Mummery LJ's obiter remark that there would, but for the Commission's approach, have been an interference with Article 9 rights is understandable on the facts of that case. The employer's insistence in that case that the employee should work on a Sunday was potentially an interference with the right to manifest his religious belief. The instruction in the present case, which was merely not to engage with the media without informing the Trust first, and the Trust's expectation that he would not make remarks which would be likely to diminish its ability to engage with a section of the public, do not interfere with the Claimant's ability to manifest his religious belief. As Mr Massarella submitted, the Claimant did not need to give interviews or to make the remarks that he did in order to manifest his faith.

37. The decision of the ECtHR in **Eweida** also does not assist the Claimant. At [82] of **Eweida**, it was stated that:

> **"82… In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a <u>sufficiently close and direct nexus between the act and the underlying belief</u> must be determined on the facts of each case…" (Emphasis added)**

38. The "act" in the underlined passage is the act on the part of the religious adherent said to be a manifestation of faith; it is not, as appears to be suggested by the Claimant, a reference to any act on the part of the alleged discriminator. The 'sufficiently close and direct nexus' is one that must exist between the act on the part of the employee (e.g. refusal to work on Sunday) and his faith in order for that act to amount to a manifestation of faith within the meaning of Article 9. The existence of such nexus tells one nothing about the employer's reason for the impugned treatment (e.g. dismissal for not working on Sunday) of the employee: see also **Trayhorn v Secretary of State for Justice** UKEAT/0304/16/RN at [35] and [41].

39. **Thlimmenos v Greece** was an Article 14 case asserting discrimination related to Article 9 rights. It cannot assist here because there was no requirement for the applicant in that case to establish that there was any interference with his Article 9 rights; it was sufficient that the facts upon which the applicant relied for the purposes of the Article 14 claim fell within the 'ambit' of Article 9. As the ECtHR stated in that case:

> **"42. However, the applicant does not complain of the distinction that the rules governing access to the profession make between convicted persons and others. His complaint rather concerns the fact that in the application of the relevant law no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences. In this context the Court notes that the applicant is a member of the Jehovah's Witnesses, a religious group committed to pacifism, and that there is nothing in the file to disprove the applicant's claim that he refused to wear the military uniform only because he considered that his religion prevented him from doing so. In essence, the applicant's argument amounts to saying that he is discriminated against in the exercise of his freedom of religion, as guaranteed by Article 9, in that he was treated like any other person convicted of a felony**

> **although his own conviction resulted from the very exercise of this freedom. Seen in this perspective, the Court accepts that the "set of facts" complained of by the applicant—his being treated as a person convicted of a felony for the purposes of an appointment to a chartered accountant's post despite the fact that the offence for which he had been convicted was prompted by his religious beliefs—"falls within the ambit of a Convention provision", namely Article 9.**
>
> **43. In order to reach this conclusion, the Court, as opposed to the Commission, does not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him amounted to interference with his rights under Article 9(1) . In particular, the Court does not have to address, in the present case, the question whether, notwithstanding the wording of Article 4(3)(b) , the imposition of such sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9(1)." (Emphasis added)**

40. The ECtHR did not, therefore, reach any conclusion on Article 9 beyond stating that the set of facts complained of by the applicant fell within its ambit. There is no warrant for treating that conclusion as authority for the proposition that, in order for Article 9 to be engaged, all that is required is that an act is "prompted" by religious belief .

41. The clear conclusion of fact on the part of this Tribunal was that the Respondent's reasons for the Claimant's treatment had nothing to do with his religious beliefs. Mr Diamond's valiant attempts by reference to Article 9 and the tests for causation to circumvent that finding do not succeed. The Claimant did make mention of Article 10 rights in his skeleton argument. However, those arguments were not developed in oral submissions. It would appear that a similar stance in respect of Article 10 was taken below:

> **"60. Turning now to Article 10, in his oral closing submissions the Claimant's representative said that the starting point was Articles 9 and 10. The Tribunal notes that Article 10 is mentioned in the Claimant's ET1 and also in paragraph 39 of the Claimant's written opening where reference was also made to the *Fuentes Bobo* case. However, no clear argument based on Article 10 was developed further during the hearing or in the Claimant's written closing or in oral submissions or in the supplementary written submissions presented after the conclusion of the main hearing. In oral submissions the extent of the argument was, in effect, to say that Articles 9 and 10 are engaged in this case and the EqA must be construed so as to comply with the requirements of Articles 9 and 10. Although the Claimant did expand on his case based on Article 9, no specific argument based on Article 10 was developed further."**

42. As this was not a matter developed below, and as nothing of substance was said about it before us, we do not consider it necessary to deal with the Article 10 point in any detail. Suffice it to say that we do not see any basis on which the Claimant's position under Article 10 could be any more favourable to him than that under Article 9.

43. Ground 1 of the appeal therefore fails and is dismissed.

Ground 2 – Indirect Discrimination.

Submissions

44. Mr Diamond's submission under this ground focused on the Tribunal's conclusion that there was no group disadvantage shown in this case. He submits that where Article 9 is engaged, there is no requirement to establish group disadvantage, or that if there is such a requirement it is not an onerous one. Reliance is placed on the Court of Appeal's decision in **Mba v Merton London Borough Council** [2014] 1 WLR 1501. In that case, a Christian care worker resigned after being disciplined for refusing to work on Sundays. Her claim of indirect discrimination on the grounds of religion or belief was dismissed by the Employment Tribunal. The Claimant's appeal was dismissed. However, in considering the Tribunal's reasoning, Maurice Kay LJ said as follows at [17]:

> **"17. I do not agree that there was no error of law in the Employment Tribunal's reasoning. Regulation 3(1)(b)(i) envisages a PCP which applies or would apply equally "to persons not of the same religion or belief" as the Claimant and which puts or would put "persons of the same religion or belief" as the Claimant at a particular disadvantage when compared with other persons. The fact that those at the requisite particular disadvantage are described in the plural—"persons"—is the reason why the test is sometimes described as one of "group disadvantage". However, the use of the disjunctive—"religion or belief"—demonstrates that it is not necessary to pitch the comparison at a macro level. Thus it is not necessary to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage. It is permissible to define a Claimant's religion or belief more narrowly than that. In my judgment, this is where the Employment Tribunal went wrong. It described the Claimant's Sabbatarian belief as "not a core component of the Christian faith". By so doing it opened the door to a quantitative test on far too wide a basis."**

45. On this particular issue, Maurice Kay LJ was in disagreement with Elias and Vos LJJ, although his ultimate conclusion was that the legal error could not have made any difference: see [21] and [24]. The views expressed at [17] of the judgment are therefore obiter.

46. Elias LJ in the same decision stated as follows:

> **"33. The President went on to say that this is what the Tribunal was driving at in para 88(iii), notwithstanding its inelegant phraseology; it was suggesting that the justification hurdle was less onerous because the group affected was relatively small. I respectfully agree with his analysis both of the law and of what the employment Tribunal was intending to say. In my view, the potential extent of the impact is a factor which a Tribunal was entitled to consider, giving it such weight as it deemed appropriate. In practice, I find it difficult to imagine that, once a prima facie group disadvantage has been established—as it was in this case and must be in order for justification to be required—a court will give much weight to the fact that the size of the pool adversely affected is in principle potentially large if that is not in fact the case in relation to the particular employer. So I would not have expected that factor to be of any real weight in the context of this case, although in other circumstances it is a consideration which may gain greater currency. But in my view, looking at the matter purely in terms of establishing indirect discrimination, the Tribunal was certainly not wrong to have regard to the overall impact of the criterion when assessing proportionality.**
>
> **34. <u>However, in my judgment the same analysis does not hold sway where the right to religious freedom under article 9 is engaged, as it directly is in this case, given that the council is a public body. The protection of freedom of religion conferred by that article does not require a Claimant to establish any group disadvantage</u>; the question is whether the interference of that individual right by the employer is proportionate given the legitimate aims of the employer: see the analysis of the *Strasbourg court in Eweida v United Kingdom [2013] IRLR 231* , paras 79–84. In substance the justification is likely to relate to the difficulty or otherwise of accommodating the religious practices of the particular individual Claimant." (Emphasis added)**

47. Mr Diamond places particular reliance on the underlined passage in support of his contention that there is no need for group disadvantage in a claim such as the present one, which is also against a public body. However, this passage must be read with the one immediately following it in which Elias LJ said as follows:

> **"35. Article 9 cannot be enforced directly in employment Tribunals because claims for breaches of Convention rights do not fall within their statutory jurisdiction (although the Strasbourg court in Eweida does not seem to have appreciated that fact): see *X v Y [2003] ICR 1138* . The Eweida decision in Strasbourg has not, and could not, affect the reach of the statutory jurisdiction, and therefore the Claimant's article 9 right is incapable of direct enforcement in the employment Tribunal. However, domestic law must be read so as to be consistent with Convention rights where possible, in accordance with section 3 of**

> **the Human Rights Act 1998 . <u>In my judgment, it is simply not possible to read down the concept of indirect discrimination to ignore the need to establish group disadvantage</u>. But I see no reason why the concept of justification should not be read compatibly with article 9 where that provision is in play. In that context it does not matter whether the Claimant is disadvantaged along with others or not, and it cannot in any way weaken her case with respect to justification that her beliefs are not more widely shared or do not constitute a core belief of any particular religion. It is for this reason that in my view the employment Tribunal was wrong to make reference to this factor as one assisting the employer." (Emphasis added)**

48. In our view, far from concluding that it was unnecessary to show group disadvantage in a claim of indirect discrimination under the relevant provisions now contained in the 2010 Act, the judgment in **Mba** confirms that it is not possible to read down those provisions so as to ignore that requirement. The fact that Article 9, which is not directly enforceable in the Employment Tribunal, does not require group disadvantage to be shown does not therefore assist the Claimant in this claim, not least because the Tribunal concluded that Article 9 was not even engaged.

49. On the footing that there was a need to establish group disadvantage, it seems to us that the Tribunal was entirely correct to consider whether the Claimant had done so. It concluded that the evidence in this regard was not sufficient: see [79]. That was a finding which the Tribunal was entitled to reach and is not one that is challenged as being perverse or otherwise unsound.

50. For these reasons, Ground 2 of the appeal fails and is also dismissed.

<u>Ground 3 - Victimisation</u>

51. It was not in dispute that there were protected acts. These comprised the numerous occasions for his suspension in March 2016 where the Claimant had alleged that he had been discriminated against on the grounds of religion or belief by the Lord Chancellor and/or Lord Chief Justice. The question for the Tribunal, therefore, was whether or not the acts relied upon, namely the suspension, investigation, and non-renewal, were done because the Claimant had done the protected acts. The Tribunal rejected the Claimant's contention that it was not possible to distinguish between what he said and the manner in which he said it. The Tribunal cross-referred to earlier findings as to the reasons for the Respondent's actions and confirmed that the protected acts played no part in those reasons: see [83] and [84].

52. The Claimant submits that this was an inadequate analysis and maintains that the things he said and the manner in which he said them were so intertwined as to make it impossible to distinguish one from the other. It was submitted that, insofar as the Tribunal sought to treat the reasons relied upon as being separable from the protected acts, it erred in doing so and failed to apply the principles established in **Martin v Devonshire Solicitors** [2011] ICR 352.

53. In our judgment, there is nothing in this ground (which was not developed to any significant extent by Mr Diamond in oral submissions). It is quite clear that the various reasons relied upon by the Respondent for taking the steps that it did were properly separable from the allegations of discrimination which the Claimant was making against the Lord Chancellor and the Lord Chief Justice. As stated by the EAT in **Martin v Devonshires** [2011] ICR 352, and bearing in mind that arguments as to separability may be open to abuse:

> **"… Employment Tribunals can be Trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."**

54. There is no suggestion here that the Respondent was seeking to abuse the argument of separability or that the Tribunal reached conclusions that were perverse or unsupported by the evidence. Insofar as the Tribunal referred to the manner in which the Claimant gave his interviews, the Tribunal was not thereby referring to the tone which he adopted in doing so. Clearly, a Tribunal would exercise great caution before treating as properly separable from the making of the allegation, the fact that it was made in rather intemperate or outraged terms. An allegation of discrimination is often likely to arouse strong feelings in both the accused and the accuser, and it would diminish the protection conferred by the legislation if employers could take action against an employee with impunity just because an allegation was made adopting a tone to which the employer takes objection. However, in this case, the Respondent's reasons for taking action were not about the tone, but about the failure to follow instructions and the failure to consider the potential impact of his remarks on vulnerable sections of the public with which the Trust needed to engage. In our judgment, the Tribunal's conclusion that the protected acts played no part in those reasons is unassailable.

55. Ground 3 therefore fails and is dismissed.

Conclusion

56. For all of these reasons, we dismiss this appeal.