

IN THE COUNTY COURT IN NORTHERN IRELAND

—————
GARETH LEE

Plaintiff

V

ASHERS BAKING Co Ltd

1st Defendant

and

COLIN McARTHUR

2nd Defendant

and

KAREN McARTHUR

3rd Defendant

—————
Presiding District Judge Brownlie

Introduction

[1] The Plaintiff claims that he has been discriminated against contrary to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 - [2006 Regulations] and/or the Fair Employment and Treatment Order 1998 - [1998 Order].

[2] The Defendants deny that they have discriminated unlawfully and oppose the grant of any relief and, furthermore, assert that the Defendants are entitled to refuse to supply services which could conflict with freedom of conscience or religious belief.

Summary of evidence

Plaintiff's Evidence

[3] The Plaintiff, who is a gay man, is associated with an organization called QueerSpace which is a volunteer led organization for the lesbian, gay, bisexual and transgendered community in Northern Ireland. In his witness statement he said:-

“QueerSpace” seeks to increase visibility of the [LGBT] community in a positive manner and to counteract the disregard and negative images presented to the general public over the past centuries.”

[4] There had been political debate in Northern Ireland as to whether the Assembly should introduce similar legislation to that in England and Wales and Scotland which enables same-sex couples to acquire married status in civil law on the same basis as opposite sex couples.

[5] The Assembly voted for the third time on this issue on the 29th April 2014 and again rejected the motion calling for the introduction of same sex marriage in Northern Ireland but this time by a narrow margin.

[6] The Plaintiff was planning to attend a private event on Friday 17th May 2014 to mark the end of the Northern Ireland anti - homophobia week and to mark the political momentum towards legislation for same-sex marriage.

[7] The Plaintiff decided to purchase a cake for the event. He had previously purchased items at this branch of the 1st Defendant Company and had become aware from a leaflet that he could have a cake iced with a graphic of his own design.

[8] The Plaintiff placed the order on the 8th or 9th of May 2014. His order was accepted without any comment and he did not sense that there was any issue or concern about the graphic. He paid for the cake and was given a receipt.

[9] On Monday 12th May, the Plaintiff received a call from the 3rd Defendant indicating that the order could not be fulfilled as they are a Christian business and, in hindsight, she should not have taken the order. She apologized and arranged for a refund. The Plaintiff expressed disbelief in that it was only a cake and indicated that what they were doing was not right and that he would seek advice. He sent an e mail later that day in which he said:-

“... I was disappointed to receive a telephone call today advising that you will not follow through on the order as you are a “Christian business”. I am obviously very disappointed and at a loss to understand why you cancelled my order that I placed in good faith. It has caused quite a lot of inconvenience...”

[10] The Plaintiff was able to find another bakery in time to provide a cake with the required design.

[11] The Plaintiff described his reaction as shocked and bewildered and felt that the cancellation had been because he is gay and supports same-sex marriage. He did not believe that it was because it is a Christian business as he had grown up in a Christian tradition and not all Christians would make such a judgment. He said:-

“I am a middle aged man and have encountered homophobia in my life but this blatant refusal of a service made me feel like a second class citizen. It is not at all nice to think that a business will discriminate in the way that they provide services to me because I am gay or because I have political views about the need for legislation to support gay marriage or because I did not share their religious views.

...It is not right that I should have to consider every time I go into a shop whether the business can choose to serve me depending on its views of my sexual orientation, religion or politics.

...I was not asking the Defendants to share or support my perceived political views on gay marriage. The graphic did not say this. I was simply asking them to provide me with the service they advertise in their shops.

... I cannot believe that it is good for our community if one commercial organization with particular political or religious views can refuse to supply services to a member of the public who they identify as having the wrong kind of sexual orientation, politics or religion.”

The Defendants’ Evidence

[12] The 1st Defendant is a limited company in the bakery business. Whilst its name is derived from a reference in the Book of Genesis, Chapter 49:20 which says “Bread from Asher shall be rich, and he shall yield royal dainties”, it does not have any religious objectives in its Memorandum and Articles of Association nor in its advertising material or Terms and conditions.

[13] The 2nd and 3rd Defendants are Directors of the 1st Defendant Company and have worked in the bakery business all their working lives and formed the company in 1992. It has six branches with a staff of about 65 and net assets of over one million pounds. There is an on-line service and cakes are distributed throughout the UK and the Republic of Ireland.

[14] The 2nd and 3rd Defendants and their children are Christians. In her witness statement the 3rd Defendant states:-

“Whilst we are regular churchgoers, our Christian belief affects our lives in a much broader sense. We seek to live at all times in accordance with the doctrines and teaching of the Bible, as we understand them. We consider that it is necessary as Christians to have a clear conscience before God. This means that we must live out our faith in our words and deeds and that it would be sinful to act or speak contrary to God’s law.”

[15] The 2nd and 3rd Defendants oppose the introduction of same-sex marriage as do other members of their family and their views are described by the 3rd Defendant in her witness statement :-

“As part of my Christian belief, I believe that the only divinely ordained sexual relationship is that between a man and a woman within the bonds of matrimony ... Marriage is also to be between a man and a woman. No other form of marriage is permissible according to God’s law. This is my, and my husband and children’s understanding of what the Bible teaches about marriage ... Although, according to God’s law, homosexual relations are sinful, there is nothing in Christianity which forbids homosexual orientation.”

[16] When the 3rd Defendant gave the Plaintiff a leaflet stating the sizes and prices of cakes, she recalled him tell her that he was a member of a small voluntary group and wanted a cake with his own logo for an event. It was explained that if he brought the logo to the shop it would be scanned and put onto the cake. He returned on the 8th or 9th May, the order was taken and paid for. He provided an A4 sheet with a coloured picture of ‘Bert and Ernie’, the logo of QueerSpace and the headline caption “Support Gay Marriage.” The third Defendant said that she was a bit shocked to see the slogan, “Support Gay Marriage”. Her heart sank and she knew at the time she could not put that message on a cake and that she was not going to do the cake. She did not want to embarrass the Plaintiff nor did she want a confrontation in the shop. Having taken the order, she wanted to discuss with her husband and son how the issue could be best dealt with.

[17] In her witness statement the 3rd Defendant states:-

“Having taken the order, I immediately felt guilty about it. I knew that using our skills and creativity to produce a cake supporting gay marriage - which we consider to be

contrary to God's word, was something which would be on my conscience. If we provided the cake in these terms, I would feel that I was betraying my faith and failing to live in accordance with what God expects of me.

... Individually and as a family we decided that what was to be on the cake was against our Christian beliefs ...We could not promote same-sex marriage because it is against God's word.

... I wish to emphasize that this is in no way related to Mr Lee's sexual orientation. We have many gay customers whom we serve regularly without any difficulty. We also have at least one gay member of staff.

... Similarly, the decision was not based on Mr Lee's political opinion or religious beliefs... we had no idea what his opinions or beliefs were, if any."

[18] She accepted that cakes are normally used for special occasions. She had real concerns that the cake would have been identified as an Ashers' cake as there is a logo on the box.

[19] She was either "not sure or did not know at all" that there was a law prohibiting discrimination on the grounds of sexual orientation and/or religious beliefs or political opinion.

[20] The third Defendant explained that the image provided by the customer is scanned and individually put through the printer using inkjet, sized and placed on the cake. The lady who does the decoration is also Christian. She accepted that there is no limitation to the graphics in the company leaflet.

[21] The 3rd Defendant was aware there had been a debate about same-sex marriage as she had prayed about it in church and she understood the generality of it. She was not aware that there had been a vote 10 days before the order was placed.

[22] In his evidence, Mr Daniel McArthur, General Manager, said he was misquoted in an interview to the Daily Mail in which it was reported that there were 62 members of staff and only 5 of them were Christians and that the others would not know the McArthur's beliefs. He said, on reflection, it was more like 10, not including immediate family. He accepted that the law sometimes does have to compel a course of conduct provided by the legislature and agreed that it was not unlawful to campaign for same-sex marriage and as there are differences in opinion people should be able to argue on both sides. As Christians they believe the business must be run by God's wishes.

[23] Mr Daniel McArthur took full management of dealing with the lawyers for this case and approved all correspondence including the letter from Hewitt and Gilpin dated 31st July 2014.

[24] Mr Daniel McArthur spoke to his parents on Sunday 11th May and, although his Mother believed there may be litigation, they did not take advice as, whatever the law said, they couldn't make the cake. During those discussions it did not occur to them to consider any alternative measures other than cancelling the order.

[25] At the time the order was placed there were two people trained to use the computer system to place the icing on the cake.

The 2nd Defendant

[26] The 2nd Defendant did recall his wife mentioning the issue when he got home that evening. He felt differently than his wife at the time and might have made the cake but, over the weekend, he spent one or two days wrestling with the issue in his heart and mind and came to the same view as his wife that the cake could not be made.

The Issues

- (i) whether there has been any direct discrimination on grounds of sexual orientation;
- (ii) whether there has been any indirect discrimination on grounds of sexual orientation;
- (iii) whether there has been any direct discrimination on grounds of political opinion or religious belief;
- (iv) whether there has been any indirect discrimination on grounds of political opinion or religious belief; and
- (v) If so, whether the relevant provisions of the 2006 Regulations or the 1998 Order should be read down so as to take account of the Defendants protected rights to manifest their religious belief in accordance with Article 9 ECHR or their freedom of non-expression under Article 10 ECHR.

[27] From the evidence I am satisfied that:-

- (a) The Plaintiff placed the order on the 9th May 2014.
- (b) The 2nd and 3rd Defendants hold genuine and deeply held religious beliefs.

[28] **Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 [2006 Regulations]**

Regulation 2

“(2) In these Regulations “sexual orientation” means a sexual orientation towards...

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

Regulation 3 Discrimination and harassment on grounds of sexual orientation

- (1) For the purposes of these Regulations, a person (A) discriminates against another person (B) if-
 - (a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons;...
- (2) 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”

Regulation 5 Goods Facilities or services

- (1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services -
 - (a) by refusing or deliberately omitting to provide him with any of them;
or...
- (3) The following are examples of the facilities and services mentioned in paragraph (1)-
 - (g) the services of any profession or trader,......

Regulation 16 Organizations relating to religion or belief

- (1) Subject to paragraphs (2) and (8) this regulation applies to an organization the purpose of which is –
 - (a) to practise a religion or belief;
 - (b) to advance a religion or belief;
 - (c) to teach the practice or principles of a religion or belief;
 - (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief.
- (2) This Regulation does not apply –
 - (a) to an organization whose sole or main purpose is commercial; or
 - (b) in relation to regulations 9, 10 and 11 (education)

...

Regulation 23 Liability of employers and principals

- (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 employers' knowledge or approval.

Regulation 24 Aiding unlawful acts

- (1) A person, who knowingly aids another person to do an act made unlawful by these Regulations shall be treated for the purposes of these Regulations as himself doing the same kind of unlawful act.
- (2) For the purposes of paragraph (1) an employee or agent for whose act the the employer or principal is liable under regulation 23 (or would be so liable but for regulation 23(5)) shall be taken to have aided the employer or principal to do the act.

Summary of Competing Legal Arguments

[29] Mr Allen QC on behalf of the Plaintiff makes the case that:-

1. The definition of discrimination extends to not only the Plaintiff's sexual orientation but to some other person by association. The 2006 Regulations were based on an approach taken in the Race Relations Order which is to like effect.

2. The Defendants refused to make the cake because they took an exception to gay sexual orientation as being sinful and that the only non-sinful sexual relations were those between married heterosexual couples.
3. The Defendants were not being asked to promote or support anything but just to bake a cake.
4. The fact that the decision to cancel the order was those of the 2nd and 3rd Defendants does not excuse the Defendants as Regulation 23 makes a company liable for the acts of their employees and agents which include the acts of the Directors and under Regulation 24 for aiding unlawful Acts.
5. The exemption for religious organizations under Article 16 excludes an organization whose sole or main purpose is commercial.

[30] Mr Scofield QC on behalf of the Defendants makes the case that :-

1. The 2006 Regulations protect sexual orientation but do not protect sexual conduct.
2. The Defendants did not have any knowledge and made no supposition of the sexual orientation of the Plaintiff.
3. The Defendants would have supplied the cake to the Plaintiff absent the message promoting same-sex marriage and would have refused a heterosexual or bisexual customer who requested a cake with the same message.
4. The order was refused because of the Defendants' religious belief that it would be sinful for them to promote a definition of marriage which included same - sex marriage.
5. Discrimination must be against a person and not a political slogan or campaign.
6. There is provision for reasonable accommodation.

[31] **Section 82 of the Equality Act 2006** provides that:-

- (1) The Office of the First Minister and deputy First Minister may by regulations make provision about discrimination or harassment on grounds of sexual orientation.
-
- (3) The regulations may, in particular -

(a) make provision of a kind similar to Part 3 of the Race Relations Order (discrimination on grounds of race)

[32] Prior to the making of the 2006 Regulations the OFMDFM conducted a consultation as to the content of the proposed Regulations and, in response to the consultation said:-

“ ...where businesses are open to the public on a commercial basis, then they have to accept the public as it is constituted ...

In respect of ‘Christian businesses’ again the Government accepts that some people hold very forthright views and do not want to provide a service to some people because of their sexual orientation. Having considered this issue the Government is firmly of the view that any person or organization that opens a business to the public for the purpose of providing goods, facilities or services has to be prepared to accept the public as a whole no matter how that public is constituted. It would not be acceptable for a hotel owner to turn away a person on the basis of their skin colour or if they were disabled any more so than because of their sexual orientation.

Some respondents argued that people should be able to refuse to drive a car for a couple attending their civil partnership ceremony, or for a photographer to refuse to take pictures of such a ceremony. These Regulations do not prohibit people from turning down business from any source, but they do protect people from having their sexual orientation used as the reason for turning the business down.”

[33] In the Consultation at [4.6] it states:-

“We also intend, to make unlawful, discrimination against a person where he is motivated by the sexual orientation, or perceived sexual orientation, of another person with whom they are known to associate, for example by sharing accommodation or engaging in social activities.”

[34] The 2006 Regulations were made with an Explanatory Memorandum which explained as follows:-

7. Policy background

...

7.2 The Regulations will protect people from direct discrimination i.e. where a person treats another person less favourably because of his sexual orientation. They also prohibit indirect discrimination.

...

7.3 The main areas where the Regulations will impact include, ...; in the area of religion, where the Government has acknowledged a difficulty with doctrinal teaching and practice and provided an exemption within the Regulations for such bodies...

...

7.6 Those that were not covered by the wording of the exemptions in the Regulations were generally asking for something that could not be defined legally, such as a "Christian business" or asking for exemptions that were too wide and would have made the Regulations unenforceable."

The Regulations were challenged by way of a Judicial Review brought by a number of religious organizations. As a result of the Judicial Review the only changes were to the Harassment provisions. I shall make further reference to this Judicial Review below.

[35] The Defendants are not a religious organization; they are conducting a business for profit notwithstanding their genuine religious beliefs and in accordance with Regulation 16[2] are not therefor exempted by the Regulations.

[36] The Defendants argue that the Regulations only protect sexual orientation and not sexual conduct.

The Plaintiff submits that this point was argued in Bull & Bull v Hall & Preddy [2012] EWCA Civ 83 before the Court of Appeal and in the judgment of Rafferty LJ at paras [15] - [17] and was discounted.

It seems to me if there is any merit in this argument it would have been raised and considered in the Supreme Court but it is not referred to in the judgment. I prefer the Plaintiff's submission that same-sex marriage is or should be regarded as a union between persons having a sexual orientation and that if a person refused to provide a service on that ground then they were discriminating on grounds of sexual orientation.

[37] The Defendants make the case that they had no knowledge or perception of the Plaintiff's sexual orientation and that this played no part in their decision to cancel the order.

In their letter of the 31st July 2014, Hewitt and Gilpin, Solicitors for the Defendants expressly stated:-

“in fulfilling your client’s order, our client would have been acting so as to promote and support your political campaign for a change in the law of Northern Ireland so as to enable same-sex marriage which objective is directly contrary to our client’s religious faith and conscience”.

[38] Furthermore, the 3rd Defendant in her direct evidence said that she was aware of an ongoing debate about same-sex marriage as she had prayed about it in church. The Plaintiff told her that he was a member of a small voluntary group and wanted to take the cake to an event and he wanted his own graphics on the cake. She said that the problem was the message on the cake because as a Christian she does not support gay marriage and, at the time, she knew she would not be able fulfil the order.

[39] I find, on the evidence before me, that the Defendants did have the knowledge or perception that the Plaintiff was gay and /or associated with others who are gay. The reasons for this finding are that the Defendants must have known that the Plaintiff supported gay marriage and/or associated with others who supported gay marriage as this was a cake for a special event the Plaintiff was attending; it was known to the 3rd Defendant that the Plaintiff was a member of a small volunteer group; he wanted his own graphics on the cake; those graphics included ‘support gay marriage’ together with a reference to ‘QueerSpace’ and the 3rd Defendant was aware of the ongoing debate on same-sex marriage. Furthermore, although from her own evidence she said that she didn’t think “perhaps we have to do it” [meaning complete the order], it is clear when she discussed the issue with her son on the Sunday, she mentioned that there may be litigation.

It is significant that the 2nd named Defendant would have been prepared to fulfil the order but, after discussing the issue with the 3rd Defendant and, ‘wrestling with his heart and mind’, he changed his view. During those discussions it must also have been abundantly clear that the Plaintiff supported gay marriage and that in all the circumstances the 2nd Defendant must either consciously or unconsciously have had the knowledge or perception that the Plaintiff was gay and/or associated with others who are gay.

[40] Additionally, I do not accept the Defendants submissions that what the Plaintiff wanted them to do would require them to promote and support gay marriage which is contrary to their deeply held religious beliefs. Much as I acknowledge fully their religious belief is that gay marriage is sinful, they are in a business supplying services to all, however constituted. The law requires them to do just that, subject to the graphic being lawful and not contrary to the terms and conditions of the company. There appears to have been no consideration given to

any other measures such as the non - Christian decorator icing the cake or, alternatively, sub-contracting this order.

[41] The Defendants submit that they would have supplied the cake to the Plaintiff without the message 'support gay marriage' and would also have refused an order from a heterosexual customer whose order included the same graphics.

I do not consider that this is the correct comparator for the reason that it oversimplifies the enquiry. In Gill v Northern Ireland Council for Ethnic Minorities [2001] NIJB 289 Girvan LJ at p.7 para 1 said:-

"Discrimination, whether it is on grounds of gender, sexual orientation, religion, race or political opinion, is something which may be subtle, insidious or hidden ... What is central to the enquiry is the working and thought processes of the alleged discriminator, what is to be examined is whether that person acted in the way he did on grounds of political opinion. That may be the opinion of the respondent discriminator or the opinion of the claimant or it may be based on the Respondent's perception of the Claimants political opinion or lack of them...."

In R on the application of (E) v Governing Body of the Jews Free School [2008] EWHC 135, [2008] All ER, Lord Phillips of Worth Matravers said at p.19 :-

"In the phrase "grounds for discrimination" the word 'grounds' is ambiguous. It can mean the motive for taking the decision or the factual criteria applied by the discriminator in reaching his decision ... In deciding what were the grounds for discrimination it is necessary to address simply the question of the factual criteria that determined the decision made by the discriminator. This approach has been well established by high authority. In R v Birmingham City Council [1989] AC 1155 the entry criteria applied by the council for admission to selective single sex grammar schools was in issue. More places were available in boys' schools than in girls' schools. The motive for the disparity was, no doubt, that this was necessary to ensure that entry to the schools was determined on merit. The House of Lords held, nonetheless, that the disparity constituted unlawful discrimination contrary to the Sex Discrimination Act 1975 which prohibited discrimination against a woman 'on the ground of her sex.'"

In the same case Lady Hale at p.34 said:-

“The distinction between the two types of ‘why’ question is plain enough; one is what caused the treatment in question and one is its motive or purpose. The former is important the latter is not. But the difference between the two types of “anterior” inquiry, into what caused the treatment, is also plain.... there are obvious cases, where there is no dispute at all about why the complainant received the less favorable treatment, the criterion was not in doubt... There are other cases in which the ostensible criterion is something else usually in job applications that elusive quality known as merit. But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realize he is doing so, but that is in fact what he was doing.”

In the Nagarajan case, [2000] 1 AC 501 Lord Nicholls at p. 512 said:-

“... an employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough investigation of a claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realized it at the time or not, race was the reason why he acted as he did .. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of Section 1 (1) (a)”

In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337:

“para 7..... When the claim is based on direct discrimination.... the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.

... employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it the proscribed ground which is the foundation of the application.”

[42] In applying the reasoning from the authorities cited, it is my view that, if a comparator is required, the correct comparator is a heterosexual person placing an order for a cake with the graphics either "Support Marriage" or "Support Heterosexual Marriage."

What is required is proof of a factual matrix of less favourable treatment on the ground of sexual orientation and not the motive. I regard the criterion to be "support for same sex marriage" which is indissociable from sexual orientation. There is also an exact correspondence between the advantage conferred and the disadvantage imposed in supporting one and not the other.

In Bressol v Gouvernement de la Commaunite Francaise Case [2010] ECR 1-2735, para 56, [2010] 3CMLR 559:

"I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification".

[43] My finding is that the Defendants cancelled this order as they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs. Same sex marriage is inextricably linked to sexual relations between same sex couples which is a union of persons having a particular sexual orientation. The Plaintiff did not share the particular religious and political opinion which confines marriage to heterosexual orientation.

The Defendants are not a religious organization; they are conducting a business for profit and, notwithstanding their genuine religious beliefs, there are no exceptions available under the 2006 Regulations which apply to this case and the Legislature, after appropriate consultation and consideration, has determined what the law should be.

In Bull and another v Hall and another [2013] UKSC 73 at p.8 Lady Hale said:-

"[37] To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We would not normally allow people to behave in a way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation (or indeed

heterosexual orientation) because of a belief, however sincerely held, and however based on the biblical text, would be to do just that.”

[44] The purpose [of the Regulations] was to secure that people of homosexual orientation are treated equally with people of heterosexual orientation by those in the business of supplying goods, facilities and services. Parliament was very well aware that there were deeply held religious objections to what was being proposed and careful consideration had been given to how best to accommodate these within the overall purpose. For the reasons explained in the Explanatory Memorandum ..., Parliament did not insert a conscience objection clause for the protection of individuals who held such beliefs.

[45] Lady Hale was referring to the Regulations in England and Wales but her comments are just as applicable to the 2006 Regulations in Northern Ireland. The Assembly, after a full consultation process and, having specifically acknowledged the difficulties facing Christian businesses, chose not to incorporate a conscience clause well aware of the objections. By doing so it specifically excluded Christian businesses from the exemption at reg 16. It is easily understood that the reason for doing so is entirely legitimate which is to ensure certainty of the law and its enforceability.

[46] I find that the 2nd and 3rd Defendants have unlawfully discriminated against the Plaintiff on the ground of his sexual orientation contrary to reg 5[1] of the 2006 Regulations and that this is direct discrimination for which there can be no justification.

If I had not reached a finding of direct discrimination but found there was indirect discrimination, I would have concluded that there was no justification.

The Fair Employment and Treatment (Northern Ireland) Order 1998 [1998 Order]

The competing arguments

[47] Mr Allen QC for the Plaintiff makes the case:-

- (1) Political opinion means ... an opinion relating to the policy of government and matters touching the government of the state and that there are similar provisions under the 2006 Regulations and the 1998 Order.
- (2) There is no exception from the reach of the legislation for religious objection to compliance with its main terms.
- (3) As a matter of fact it is beyond doubt that each of the Defendants disagreed with the proposition “Support Gay Marriage” ... and that this is a political and religious disagreement.

- (4) It is wrong that in fulfilling the order the Defendants would be promoting and supporting a change in the law of Northern Ireland so as to enable same sex marriage in that they were doing no more than obeying the law and providing the Plaintiff with a service.
- (5) The proposition "Support Gay Marriage" was an obvious allusion to the political campaign for legislation by the Assembly to enable same-sex couples to be married in Northern Ireland.
- (6) The Plaintiff on the one hand and the 2nd and 3rd Defendants, and by extension the 1st Defendant which they controlled, held different and opposing political opinions about the desirability of the State in Northern Ireland supporting the status of same sex marriage. In this case, this difference of opinion was also a difference of religious belief as the Plaintiff did not share the same religious belief as to the nature of marriage as the Defendants.
- (7) It is immaterial whether the Defendants knew the Plaintiff's religious belief or political opinion on gay marriage as under the 1998 Order, discrimination can take place on the grounds of the discriminator's religious belief and political opinion.

[48] Mr Scofield QC for the Defendants makes the case that:-

- (1) The application of the 1998 Order contended for by the Plaintiff is far removed from the mischief which the 1998 Order was principally designed to combat, namely the effects of traditional community sectarianism in Northern Ireland and that the court should bear this in mind.
- (2) It is necessary to determine what political opinion and/or religious belief the Plaintiff claims to hold which forms the basis of the allegation of discrimination.
- (3) There was no reason for the Defendants to have any knowledge or perception of the Plaintiff's religious belief or political opinion.
- (4) The 1998 Order does not protect the right to take action in support of a religious belief or political opinion and that the court must distinguish the means of achieving a political end from the political opinion itself. The protection relates to the holding of an opinion or belief, rather than its promotion.
- (5) The Plaintiff's campaign activities for a change of the legal definition of marriage are not included within the expression 'political opinion or religious belief'.

- (6) The correct approach to the interpretation of the relevant provisions of the 1998 Order should be as under section 45(1) of the Equality Act 2006.
- (7) Reference must be made to an appropriate comparator which in this case would be a heterosexual customer and/or a customer not sharing the Plaintiff's support for same-sex marriage in which case the Defendants approach would have been the same.

[49] The meaning of religious belief and political opinion

Article 2 of the 1998 Order

...

(2) In this Order –

...

“religious belief ” in relation to discrimination or harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(2B) includes any religion or similar philosophical belief

...

(3) In this Order references to a person's religious belief or political opinion include references to –

- (a) his supposed religious belief or political opinion; and
- (b) the absence or supposed absence of any, or any particular, religious belief or political opinion

(4) In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.

[50] Political Opinion

There is no exclusive definition of either religious belief or political opinion in the 1998 Order.

In McKay v Northern Ireland Public Service Alliance [1994] NI 103 at 117 Kelly LJ had this to say:-

“There can be no difficulty as to the meaning of the word ‘opinion’ and none as to the word ‘political’. When they come together in the phrase ‘political opinion’ it means, in broad terms, and without attempting any exhaustive

definition, an opinion relating to the policy of government and matters touching the government of the state. The word 'political' is defined in the Shorter Oxford Dictionary as:

'Of, belonging or pertaining to the state, its government and policy; public, civil; of or pertaining to the science or art of government'

It seems to me clear that a person who holds an opinion on matters relating to any of the elements of this definition holds a political opinion'."

[51] Applying this reasoning, the Court of Appeal in Gill v Northern Ireland Council for Ethnic Minorities [2001] NIJB 289 said :-

"The object of the legislation is to prevent discrimination against a person which may stem from the association of that person with a political party, philosophy or ideology and which may predispose the discriminator against him"

[52] In Ryder v Northern Ireland Policing Board [2007] NICA para 15 Kerr LJ said:-

"...the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy. I agree."

[53] There had been an ongoing political debate in Northern Ireland about the introduction of same-sex civil marriage as it applies in all other parts of the United Kingdom. The Northern Ireland Assembly rejected a motion calling for the introduction of same-sex marriage on the 29th April 2014 this being the 3rd occasion that the motion had been rejected in a period of 18 months. According to the Plaintiff's evidence, he had ordered the cake to mark the end of the Northern Ireland anti -homophobia week and to mark the political momentum toward legislation for same-sex marriage.

[54] The first question I need to pose is whether I find that the Plaintiff's support of gay marriage is, in fact and law, a political opinion held by the Plaintiff? I answer this in the affirmative on the evidence before me and in the context of the political debate on same-sex marriage which was ongoing in Northern Ireland. The Plaintiff was actively involved in supporting this process both as an individual and also as part of the group QueerSpace although these proceedings are on behalf of the Plaintiff only.

[55] Discrimination

Discrimination and unlawful discrimination are defined by Article 3 of the 1998 Order

Article 3.

(1) discrimination on the ground of religious belief or political opinion;

...

and “discriminate” shall be construed accordingly.

(2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstance relevant for the purposes of a provision of this Order, other than a provision to which paragraph (2A) applies, if –

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but –

(i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can apply with it; and

(ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

...

(3) A comparison of the cases of persons of different religious belief or political opinion under paragraph (2) ... must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

...

(7) For the purposes of this Order a person commits unlawful discrimination against another if –

(a) he does an act other than an act of harassment in relation to that other which is unlawful by virtue of any provision of Part ...IV; or

(b) he is treated by virtue of any provision of Part V as doing such an act.

Article 28 - Discrimination in provision of goods, facilities or services

- (1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services –
 - (a) by refusing or deliberately omitting to provide him with any of them; or
 - (b) by refusing or deliberately omitting to provide him with the goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section.
- (2) The following are examples of the facilities and services mentioned in paragraph (1) –
...
 - (g) the services of any profession, trade or business, or any local or other public authority.

It is clear from the evidence and the legal submissions there is no dispute that the Defendants are “concerned with the provision ... for payment ... of goods, facilities [and] services to the public “or that the Plaintiff was” a person who [sought] to obtain or use those goods, facilities [and] services” that being the Plaintiff when he ordered and paid for a cake.

Article 31 - Further exceptions from Articles 28(1) and 29

...

- (3) So far as it relates to discrimination on the grounds of religious belief, Article 28(1) does not apply to goods, facilities or services provided by, or on behalf of, a religious denomination where the essential nature of the goods, facilities or services requires them be provided –
 - (a) only to persons holding or not holding a particular religious belief; or
 - (b) in a manner or on terms which, apart from this paragraph would be unlawful by virtue of this Order
- (4) So far as it relates to discrimination on the grounds of political opinion, Article 28(1) does not apply to goods, facilities or services provided by, or on behalf of, a party registered under the Registration of Political Parties Act 1998 where the essential nature of the goods, facilities or services requires them to be provided –

- (a) only to persons holding or not holding a particular political opinion; or
- (b) in a manner or on terms which, apart from this paragraph, would be unlawful by virtue of this order.

[56] In their letter of 31st July 2014, Hewitt and Gilpin, solicitors for the Defendants expressly stated:-

“In fulfilling your client’s order, our client would have been acting so as to promote and support your client’s political campaign for a change in the law of Northern Ireland so as to enable same sex marriage which objective is directly contrary to our client’s religious faith and conscience. Our client is entitled to refuse to create a polemical message which conflicts with their religious belief and conscience”.

[57] I am of the view that this explanation why the Defendants cancelled the order in itself acknowledges that the 3rd Defendant was aware of the Plaintiff’s support of a political campaign for gay marriage and that the Defendants’ refusal to provide the cake was because of their religious beliefs.

[58] I refer to para [38] - [39] above in which I considered the factual background and the evidence when I sought to apply the 2006 Regulations and which I also rely upon in my consideration of the Plaintiff’s case under the 1998 Order.

[59] The Defendants make the case that there was no reason for the Defendants to have any knowledge or perception of the Plaintiff’s political opinion. The Defendants were and remained (until much later) unaware of the Plaintiff’s political allegiance or views (or indeed, those with whom he associated). These factors played no part in the Defendant’s actions.

[60] I do not accept this on the evidence before me for similar reasons that I do not accept this submission when considering the 2006 Regulations at Para [39]. My reasons are that the Defendants must have known that the Plaintiff supported gay marriage and /or he associated with others who supported gay marriage; this was a cake for a special event; the Plaintiff was a member of a small volunteer group; he wanted his own graphics on the cake; those graphics included a political statement relating to an ongoing debate on same sex marriage; the 3rd Defendant was fully aware of this ongoing debate as she had prayed about it in church and she is opposed to gay marriage. In her evidence she said she didn’t think that perhaps we have to do this [meaning complete the order] which is inconsistent with the evidence of her son when he discussed the issue with her on the Sunday and she raised the point that there may be litigation. He said whatever the law said we were not going to do it as we have Christian beliefs which are key.

[61] As at para [39] when considering the 2006 Regulations, the second named Defendant would have been prepared to fulfil the order but, after discussing the issue with the 3rd Defendant and wrestling with his heart and mind, he subsequently adopted the same approach as her. During those discussions it must also have been abundantly clear to him that the Plaintiff supported gay marriage and/ or associated with others who supported gay marriage and that this was a political opinion in the context of the ongoing debate.

[62] As at para [40] when considering the 2006 Regulations, the Defendants also make the case that what the Plaintiff wanted them to do would require them to promote and support a campaign for a change in the law to enable same sex marriage. I have already made it clear I do not accept that was what the Defendants were required to do. They were contracted on a commercial basis to bake and ice a cake with entirely lawful graphics and to be paid for it. The Plaintiff was not seeking support or endorsement. Whilst the graphics were contrary to their genuinely held religious beliefs, the provisions of the 1998 Order allow for no exceptions in these circumstances.

[63] The crucial question in a case of any alleged discrimination is to ask why the claimant received less favourable treatment. Was it on grounds of religious belief and/or political opinion? Or was it for some other reason. If it is on the grounds of religious belief and/ political opinion, direct discrimination is established. The reason why the discriminator acted on those grounds is irrelevant.

I refer to those authorities to which I referred above when considering the 2006 Regulations and the crucial question why the Plaintiff received less favourable treatment - see para [41].

In the Matter of an Application by the Northern Ireland Electricity Service, Nicholson J said at p. 23:-

‘...the words “on the ground of religious belief or political opinion” are capable in their own ordinary meaning of covering any cause or reason for an action based on religious belief or political opinion, whether it is the belief or opinion of the person affected by the action or of the person doing the act or of another person.’

In Showboat Entertainment Centre Ltd v Owens [1984] 1 WLR 384 a white manager was dismissed by his employers for refusing to obey instruction not to admit black customers and the issue was whether the Applicant had been treated less favourably on “racial grounds”.

Brown Wilkinson J said at p.7 :-

“We therefore conclude that section 1(1) (a) covers all cases of discrimination on racial grounds whether the racial characteristics in question are those of the person treated less favourably or of some other person. The only question in each case is whether the unfavourable treatment afforded to the Applicant was caused by racial considerations.”

Stephenson LJ said at p.248 :-

“Although we are not bound by the dicta, they are in our view persuasive authority for holding that A can discriminate against B on the ground of C’s colour. Once this point is reached, there seems to be no stopping point short of holding that any discriminatory treatment caused by racial considerations is capable of falling within section 1 of the Act...”

In Wethersfield v Sargent [1999] I.C.R. 425 the Applicant was constructively dismissed for failing to comply with her employer’s instruction not to accept orders from any ‘coloureds or Asians’.

Swinton Thomas LJ said at p.11:-

“in my judgment, using ordinary language, the Applicant was discriminated against “on racial grounds” albeit that the unlawful instruction in relation to race concerned others of a different racial group to her.”

In the Ryder Case referred to above at para [52] Kerr LCJ said at para 11:-

“It appears to me to be clear that discrimination on political grounds can equally be based on the political opinion of the discriminator. If on grounds of his own political opinion a prospective employer chooses a candidate on the basis that the candidate’s political views are believed to coincide with his own and rejects a candidate whose political views are unknown, that unfavourable treatment can constitute discrimination.”

In the Gill case referred to above at para [51] Girvan LJ went on to say at p.7 para 2 :-

‘Even in a free democratic society such as our own, discrimination on the grounds of political opinion may arise in different ways. Such discrimination may (inter alia) arise because -

- (a) the discriminator does not approve of the actual political views or activities of an individual; or
- (b) the discriminator wants to advance a political viewpoint of his own; or
- (c) the discriminator misinterprets or misunderstands the political viewpoint of the individual and does not like that misunderstood viewpoint;
- (d) the discriminator wants to favour others whose political opinions or perceived political opinions are more in tune with his own viewpoint.

At para 4 Girvan LJ continues:-

...This clearly cannot have been intended to be an exhaustive definition of discrimination in this context since, as seen above, political discrimination can occur in different ways and can occur even if the victim has no association with a political party, philosophy or ideology. The word "association" must itself be interpreted widely and cannot be restricted to an active, actual or particular association with a party or political viewpoint but includes actual or perceived commitment of the intellect to a political viewpoint."

[64] If the Plaintiff had ordered a cake with the words "support marriage" or "support heterosexual marriage" I have no doubt that such a cake would have been provided. It is the word gay to which the 2nd and 3rd Defendants took exception, the connotation of gay marriage which the Defendants regard as sinful.

[65] I considered the issue of an appropriate comparator at para [40] in relation to the 2006 Regulations and believe that this is also the appropriate comparator under the 1998 Order which is:-

"A heterosexual person who places an order for a cake with the graphics of either 'support marriage' or 'support heterosexual marriage'".

The criterion as for the 2006 Regulations is "support for same sex marriage" which, in the context of the political debate ongoing in Northern Ireland at the time, is indissociable from the political opinion of those who support it. There is also an exact correspondence between the disadvantage imposed in supporting one and not the other.

[66] Have the Defendants directly discriminated against the Plaintiff on the ground of religious belief and/or political opinion contrary to Article 3(2) of the 1998 Order? I find that they have. Applying the reasoning in *Gill v NICEM*, the 2nd and 3rd Defendants disagreed with the religious belief and political opinion held by the Plaintiff with regard to a change in the law to permit gay marriage and, accordingly, by their refusal to provide the services sought, treated the Plaintiff less favourably contrary to the law. If the Plaintiff had chosen graphics which said “support heterosexual marriage” or “support marriage” or if a heterosexual had ordered a cake with graphics “support heterosexual marriage” I am satisfied that the Defendants would have completed the order and would have had every right to do so. It is for the reason that the Defendants objected to the word ‘gay’ as they are totally opposed to same-sex marriage which they regard as sinful that they refused the order.

[67] If I had been persuaded by the Defendants’ submission that they were not aware of the Plaintiff’s religious belief and/or political opinion or the religious beliefs and political opinion of those with whom he associates, I would in any event have found that the Defendants discriminated against the Plaintiff and treated him less favourably on the grounds of their own religious beliefs and political opinion - see authorities cited in para [50] -[52] - the ‘Ryder’ case as applied in ‘Gill’. The Defendants have accepted that the order was cancelled because of their religious beliefs because they are opposed to a change in the law regarding gay marriage which they regard as sinful.

[68] The 2nd and 3rd Defendants are opposed to the political opinion that supports gay marriage which they regard as sinful and is contrary to their genuinely held religious beliefs. They believe that the Plaintiff holds a different religious belief and political opinion which seeks to extend marriage to same sex couples. I find that this was the reason why the order was cancelled and which is direct discrimination prohibited under Article 3(2) of the 1998 Order and as such cannot be justified.

[69] The Defendants also make the case that the 1998 Order protects only the holding of political opinions and not the manifestation of those opinions. It seems to me that, before a person can manifest an opinion they must hold that opinion as, otherwise, what are they seeking to manifest? The holding and/or manifestation of an opinion are so interlinked that it is illogical to suggest that they can be separated and as such they are protected under the 1998 Order which protects against less favourable treatment on grounds of religious belief or political opinion.

If I had not reached a finding of direct discrimination but of indirect discrimination, I would have found that it was not justified.

THE HUMAN RIGHTS ACT 1998

[70] Competing Legal Arguments

Mr Allen QC for the Plaintiff makes the case:-

1. Article 9 (2) limits the right to manifest religion or beliefs and in the context of a clash of rights it will be necessary to work out how that can be resolved.
2. A limited company cannot invoke Article 9 rights.
3. In Bull & Bull, the Supreme Court drew a dividing line between sexual orientation discrimination and the right to manifest religion.
4. The rule of law depends on legal certainty.
5. Was the interference prescribed by law and was it necessary in a democratic society?

Mr Scofield QC for the Defendants makes the case:-

1. If the Court holds that there is discrimination, then the Court must construe the 2006 Regulations and/or the 1998 Order consistently with Articles 8,9,10, 14 and 17.
2. By doing so, the Court should conclude that the result is contrary to the Defendant's Convention rights.
3. If the Court was to conclude that the 2006 Regulations and /or the 1998 Order could not be interpreted compatibly with the Defendant's Convention rights the Court should dis-apply them.
4. There should be a proportionality assessment to consider accommodation of respective rights.
5. The Defendants have a right under Article 10 not to be compelled to express or commit them to a viewpoint.

[71] Section 3 - **Interpretation of legislation**

- (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Both the 2006 Regulations and the 1998 Order are subordinate legislation for the purposes of the Human Rights Act and must be interpreted in a manner which is compatible with Convention rights.

Section 6

“(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

...

(2) In this section “public authority” includes –

(a) a court or tribunal”

Schedule 1 incorporates the European Convention of Human Rights.

Article 8 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.

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 a 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 freedom of others.”

Article 10 FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions...
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 ...”

Article 14 PROHIBITION OF DISCRIMINATION

“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”

Article 17 PROHIBITION OF ABUSE RIGHTS

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”

[72] In S.A.S. v France App no43835/11 Grand Chamber Judgment 1st July 2014 in looking at religion said:-

“Freedom of thought, conscience and religion is one of the foundations of a democratic society ... This freedom is, in its religious dimension one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been clearly won over the centuries, depends on it”.

In a pluralistic society the Court must not be asked to make any assessment or comparison of different religions but just decide if the belief is genuinely held. I have found in this case that the 2nd and 3rd Defendants have a Christian belief that is genuinely and sincerely held and that they have a right to manifest their religion albeit limited by Article 9 (2) of the Convention.

[73] “The Convention seeks to balance the rights of the individuals against other public interests, but the object of human rights jurisprudence in democratic systems is not simple majoritarian rule. The rule of law is also required to ensure that democracy does not mean that the tyranny of the majority causes disproportionate interference with the rights of minorities” - Blackstone’s Guide to the Human Rights Act 1998 at p.27.

[74] Article 9(2) seeks to ensure that the limitations placed upon an individual’s protected rights will only be applied if they are:-

- (a) prescribed by law; and
- (b) intended to achieve a legitimate objective; and
- (c) ‘necessary in a democratic society’

[75] (a) **Prescribed by law**

No interference with a right protected under the Convention is permissible unless it is authorized by law. The relevant legislation in Northern Ireland is the Equality Act (Sexual Orientation) Regulations (NI) 2006 and the Fair Employment and Treatment (NI) Order 1998.

The 2006 Regulations in Northern Ireland were considered by Weatherup J in Re the Christian Institute and others Application [2007] NIQB 66 [2008] NI86 at p.30 :-

“The qualified rights in Articles 8, 9, 10 and 11 may be subject to limitations. It is a preliminary requirement that all limitations be prescribed by law thus importing a requirement of legal certainty. Accordingly such limitations as are imposed by the Regulations on the right to manifest religious belief must be prescribed by law. Secondly, the law must be adequately accessible, that the citizen has access to the rules applicable to a given case. Thirdly the law must be formulated with sufficient precision to enable the citizen to regulate his conduct, that is, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...I am satisfied that the inevitable lack of certainty as to the scope of the Regulations is not such as to offend the principle of foreseeability and the requirement that the interference occasioned by the Regulations be prescribed by law”.

In the “Bull” case, Rafferty LJ in the Court of Appeal said at para [51] when considering the Sexual Orientation Regulations:-

“The Appellants simply seek a further exception from the requirements in the regulations, which already provide exceptions, in the case, for example, of certain landlords and of those who permit others to share their home. The Secretary of State has drawn what she considers the appropriate balance between the competing claims of hoteliers and, (amongst others) homosexuals. Her decision has been approved by affirmative resolution. This Court would be loathe to interfere with its conclusions.”

In R (Countryside Alliance) v A-G [2007] UKHL 52, [2008] 2All ER 95, Lord Bingham said at para [45] :-

“But after intense debate a majority of the country’s democratically – elected representatives decided otherwise... respect should be shown to what the House of Commons decided. The democratic process is liable to be diverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament”

The interference sought in this case is clearly prescribed by law.

[76] (b) **Intended to achieve a legitimate objective**

The protection of the rights and freedoms of others. As in all anti-discriminatory laws introduced over the years to prohibit discrimination against a minority group in society because of the beliefs of a majority group on the basis of a protected characteristic - sex, race, religious beliefs, political opinion and sexual orientation. Where the requirement as to non - discrimination relates to persons protected by domestic anti-discrimination law, in particular, those subject to heightened protection under Article 8 (strict scrutiny), the provision of goods and services to the public must be in accordance with the law otherwise it would not meet the legitimate aim.

[77] (c) **Necessary in a democratic society**

This incorporates the proportionality standard that determines all permissible restrictions on rights.

In Bayatan v Armenia [2011] 54 ECHR 23459/03, the Grand Chamber said this:-

“The Court re-iterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends upon it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion.”

[78] At page 35 of the Christian Institute case, Weatherup J said:-

“In summary the approach to proportionality requires consideration of:-

- (1) The overarching need to balance the interests of society with those of individuals and groups.
- (2) The recognition of the latitude that must be accorded to legislative and executive choices in relation to the balance of public and private interests.
- (3) The legislative objective being sufficiently important to justify limiting the fundamental right.
- (4) The measures designed to meet the legislative objective being rationally connected to it, that is, the measures must not be arbitrary, unfair or based on irrational considerations.
- (5) The need for proportionate means being used so as to impair the right or freedom no more than necessary to accomplish the objective, that is, that the measures are the least intrusive, insight of both the legislative objective and the infringed right. The Court should consider whether the measures fall within a range of reasonable alternatives, rather than seeking to ascertain whether a lesser degree of interference is a possibility.
- (6) The need for proportionate effect in relation to the detrimental effects and the advantageous effects of the measures and the importance of the objective.”

Weatherup J referred to the 'Brockie' case which I shall discuss below.

[79] In McFarlane v Relate Avon Ltd [2010] IRLR 872 Laws LJ said :-

“22. In a free constitution such as ours there is an important distinction to be drawn between the law’s protection of the right to hold and express a belief and the law’s protection of that belief’s substance or content. The common law and the ECHR Article 9 offer vigorous protection of the Christian’s right (and every other person’s right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatsoever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.

23. ... But the conferment of any legal protection or preference upon a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be true; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefor it lies only in the heart of the believer who is alone bound by it. No-one else is or can be bound, unless by his own free choice he accepts its claims.
24. So it is that the law must firmly safeguard the right to hold and express religious belief; equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime."

[80] This eloquent extract from the judgment of Laws LJ reinforces my approach to this issue which is that, whilst the Defendants have a right to hold religious views they are limited as to how they manifest them provided those limitations are prescribed by law; in this case the 2006 Regulations and the 1998 Order; and are necessary for the protection of the rights and freedom of others; the Plaintiff's right as a gay man not to be discriminated on the ground of his sexual orientation; which is the legitimate aim.

[81] What we are faced with in this case are competing rights under the Convention. There is the Defendants right under Article (9) of the Convention to manifest their religion without unjustified limitation and the right under Article 14 of the Plaintiff to enjoy his right (under Article 8) to respect for his private life without unjustified discrimination on grounds of his sexual orientation. The Plaintiff also has additional rights under the 2006 Regulations.

[82] In Francesco Sessa v Italy a Jewish lawyer complained that a court's refusal to adjourn his case to a date which did not coincide with a major Jewish holiday was an interference with his right to manifest his religion. He was unsuccessful but the minority took the view that for a measure to be proportionate, the authority must choose the means which is least restrictive of rights and freedoms. What is required is a reasonable accommodation which may, in some circumstances, constitute a less restrictive means of achieving the aim pursued.

In Eweida v United Kingdom [2013] 57 EHRR 8 the ECHR at para 84 took the view that whilst the State's positive and negative obligations under the Convention does not lend itself to precise definition, the applicable are, nonetheless similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject to the margin of appreciation enjoyed by the State."

In the Jewish Free School case referred to above in para [41] Munby J said at para 107:-

"Religion - whatever the particular believer's faith - is no doubt something to be encouraged but is not the business of government or of the secular courts, though the courts will, of course, pay every respect to religious belief. Article 9 of the Convention, after all, demands no less. The starting point of the common law is a tolerant indulgence to cultural and religious diversity and an essentially agnostic view of religious beliefs. A secular judge must be very wary of straying across the well recognized divide between church and state. It is not for the judge to weigh one religion against another. The court recognizes no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect. And the civil courts must be slow to interfere in the life of any religious minority or to become involved in adjudicating on purely religious issues..."

At para [108] continues:-

... it is important to realize that reliance upon religious belief, however conscientious the belief and however ancient and respectable the religion, can never of itself immunise the believer from the reach of the secular law. And invocation of religious belief does not necessarily provide a defence to what is otherwise a valid claim..."

[83] When should this process of reasonable accommodation arise? Where a person seeks accommodation for a religious belief which is discriminatory on a prohibited ground, and outside the specific exemptions provided for by Parliament or the Assembly itself, then the refusal to grant such accommodation should be justified. If this approach is not followed it would be necessary for the civil courts to weigh the value of particular religious beliefs against the rights of other protected groups - which Munby J cautions against.

In R (SB) v Denbigh High School [2007] 1 AC 100 Lord Hoffman said at para [50]:-

“Article 9 does not require that one should be allowed to manifest one’s religion at any time and place of one’s choosing”.

[84] Section 3(1) of the Human Rights Act 1998 requires me, in so far as possible, to read and give effect to the Regulations in a way which is compatible with their rights under the Convention.

In R (Amicus-MSF) v Secretary of State for Trade and Industry [2004] IRLR 430 Richards J in ruling that Regulation 7(3) of the Employment Sexual Orientation Regulations (which provides for a limited defence ‘for the purpose of an organized religion’) said:-

“...involves a legislative striking of the balance between competing rights. It was done deliberately in this way so as to reduce the issues that would have to be determined by courts or tribunals in such a sensitive field. As a matter of principle, that was a course properly open to the legislature ...Regulation 7(3)... lays down the specific conditions that have to be met and thereby avoids the need for the court or tribunal to consider some of the issues that might otherwise arise on a case by case basis...”

[85] Sexual orientation is a highly protected right under the ECHR -see Salgueiro de Salva Mouta v Portugal [2001] 31 EHRR 47 and EB v France [2008] 47 EHRR 21. “Very weighty reasons have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex compatible with the Convention...Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification...” - Karner v Austria (2004) 38 EHRR 24 at para 37. As is religion a highly protected right under the ECHR.

[86] Lady Hale in the Bull case when faced with the same deliberations I now face said at para [45]:-

“The question, therefore, is whether it is “necessary in a democratic society”, in other words whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved” ...The mutual duty of reasonable accommodation unless this causes undue hardship originated in the United

States and found its way into the Canadian Human Rights Act 1985...”

and at para [47] “I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases. This is reinforced by the decision in *Eweida v United Kingdom*...”

Lady Hale went on to consider two examples of this concept which had come before the British Columbia Human Rights Tribunal neither of which are relied upon by the Defendants in their legal submissions in this case. In both cases the Tribunal accepted that the Defendants could not be compelled to act in a manner contrary to their core belief that same sex marriages were wrong but, they had nevertheless failed in their duty of reasonable accommodation in how they dealt with the Plaintiffs.

Lady Hale at para [50] then said:-

“We cannot place too much weight on these cases, decided under different legislation and in a different constitutional context...”

and at para [51]... “Mr and Mrs Bull cannot get round the fact that United Kingdom law prohibits them from doing as they did. I have already held that, if justification is possible, the denial of a double bedded room cannot be justified under Regulation 3(3) (d)...My reasons for doing so are equally relevant to the Convention question of whether the limitation on the right of Mr and Mrs Bull to manifest their religion was a proportionate means of achieving a legitimate aim. The legitimate aim was the protection of the rights and freedoms of Mr Preddy and Mr Hall.”

[87] The Defendant’s in this case seek to rely on another Canadian case, *Brockie v Ontario Human Rights Commission* [2002] 22 DLR (4th) 174.

In this case Mr Brockie, President and directing mind of the company, held the belief that homosexual conduct was sinful. He acted for customers who were homosexuals but would not assist in the dissemination of information intended to spread the acceptance of a gay lifestyle. On appeal to the Ontario Superior Court of Justice it was held that Mr Brockie as the mind of the company had discriminated in the provision of services on the basis of sexual orientation. However the Court added a condition that Mr Brockie was not required to print material of a nature that could reasonably be considered to be in direct conflict with the core elements his religious

beliefs. In this case there already was a concession as to discriminatory conduct. The Court did not exclude rights to religious freedom from the commercial arena but did place commercial activity on the periphery of rights to religious freedom.

[88] In the Christian Institute Judicial Review, Weatherup J having considered the Brockie case said at para [89]:-

“... individuals running the commercial provision of services, such as printers, photographers, or booksellers, may find that under a Brockie approach they are not required to undertake activities that could reasonably be considered to be in direct conflict with the core of the orthodox belief on homosexuality... and at

para [92] ...the applicants make general complaints about the Regulations [2006 Regulations] reflecting a lack of balance between competing rights, a preference for the Article 8 rights of those sought to be protected by the Regulations over the Article 9 rights and the introduction of more limited exemptions for religious belief.....This balance is essentially a matter for the legislative decision makers, subject to compatibility with other legal obligations.”

[89] The Plaintiff makes the case that the legislature in Ontario had not defined how, in the provision of goods, facilities and services, conflicts between the right to protection from discrimination on grounds of sexual orientation or religious or political opinion and the right to manifest religious belief was to be resolved.

[90] In the circumstances of this case, I do not consider that the “Brockie” approach can be applied. Neither the Court of Appeal nor the Supreme Court sought to apply the ‘reasonable accommodation’ put forward in Brockie and Lady Hale specifically expressed a view in relation to the two other Canadian cases that “we cannot place too much weight on these cases, decided under different legislation and in a different constitutional context...”

[91] The law in Northern Ireland prohibits the Defendants from acting as they did and, in relation to the requirement to balance competing interests, I find that the extent to which the 2006 Regulations and/or the 1998 Order limit the manifestation of the Defendants’ religious beliefs, those limitations are necessary in a democratic society and are a proportionate means of achieving the legitimate aim which is the protection of the rights and freedoms of the Plaintiff. I am satisfied that this does not give rise to any incompatibility between the rights of the Defendants under Article 9 and the rights of the Plaintiff under the 2006 Regulations and/or the 1998 Order . To do otherwise would be to allow a religious belief to dictate what the law is. That is a matter for the Assembly.

[92] Lady Hale in Bull & Bull para [52] said:-

“Sexual orientation is a core component of a person’s identity which requires fulfillment through relationships with others of the same orientation. As Justice Sachs of the South African Constitutional Court movingly put it in National Coalition for Gay and Lesbian Equality v Minister of Justice, 1999 (1) SA 6 para 117:

“While recognizing the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined.”

Lady Hale continues at para [53]

“Heterosexuals have known this about themselves and been able to fulfill themselves in this way throughout history. Homosexuals have also known this about themselves but were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognized. Homosexuals can now enjoy the same freedom and the same relationships as others... It is no doubt for that reason that Strasbourg requires “very weighty reasons” to justify discrimination on grounds of sexual orientation. It is for this reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.”

[93] This compelling analysis of the necessity for Human Rights and Equality jurisprudence articulates all I could have hoped to say albeit not so fluently to demonstrate that the law must protect all. It must protect the rights of the Defendants to have and to manifest their religious beliefs but it also recognizes that the rights of the Plaintiff not to be discriminated because of his sexual orientation must also be protected.

If the Plaintiff was a gay man who ran a bakery business and the Defendants as Christians wanted him to bake a cake with the words “support heterosexual

marriage” the Plaintiff would be required to do so as, otherwise; he would, according to the law be discriminating against the Defendants. This is not a law which is for one belief only but is equal to and for all.

The Defendants are entitled to continue to hold their genuine and deeply held religious beliefs and to manifest them but, in accordance with the law, not to manifest them in the commercial sphere if it is contrary to the rights of others.

[95] The Defendants also seek to rely on Article 10 of the Convention not to be compelled to express or commit them to a viewpoint or to appear to give support to another’s views.

In Gilberg v Sweden [2012] ECHR 41723/06 the Grand Chamber observed at para [85]:-

“the case law on the ‘negative’ right protected under Article 10 is scarce ...and at para [86] -

The Court does not rule out that a negative right to freedom of expression is protected under Article 10 of the Convention, but finds that this issue should be properly addressed in the circumstances of a given case.”

I have reached a finding in this case that what the Defendants were asked to do did not require them to support, promote or endorse any viewpoint. If I am wrong in this finding and that Article 10 is engaged, there are under Article 10 (2) limitations imposed on such freedoms similar to my analysis of those limitations and the justifications thereof under Article 9(2), which are ... prescribed by law, ..necessary in a democratic society and for ... the protection of the rights of others.

[96] I said above that I would address the issue of the liability of the 1st Defendant, Ashers Baking Co. Ltd and I now propose to do so by considering the legal position of the 1st Defendant in respect of its liability, if any, under the three categories:-

1. Sexual Orientation Regulations
2. Fair Employment and Treatment Order
3. Human Rights Act

[94] The 2006 Regulations and the 1998 Order have similar provisions consistent with all other statutory anti - discrimination measures which provide for joint liability as between employers and their employees (or agents, or aiders).

Regulation 23 of the 2006 Regulations make a company liable for the acts of the directors of a company. This states:-

- (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 employers as well as by him, whether or not it was done with the employer's knowledge or approval...

If the 1st Defendant is liable under the 2006 Regulations for the unlawful acts of its two Directors, they in turn are made liable for aiding Ashers to act unlawfully by Regulation 24 which states :-

- (1) A person who knowingly aids a person to do an act made unlawful by these Regulations shall be treated for the purposes of these Regulations as himself doing the same kind of unlawful act.
- (2) For the purposes of para 1 an employee or agent for whose act the employer or principal is liable under Regulation 23 (or would be so liable but for regulation 25(3)) shall be taken to have aided the employer or principal to do the act.

[97] The liability of employers and principals under the 1998 Order has similar provisions under Articles 35 and 36.

The liability of the 1st Defendant arises as a result of the actions by the 2nd and 3rd Defendants in the unlawful discrimination of the Plaintiff as the actions or otherwise were within their control.

[98] With regard to the Human Rights Act, it has long been recognized in Convention jurisprudence that a limited company cannot invoke Article 9 rights.

In Kustannus Oy Vapaa and others v Finland 1996 the Commission rejected the right of the company to rely on Article 9 saying -

“(iii) Turning to the substance of the complaint, the Commission recalls that the first limb of Article 9(1) guarantees to ‘everyone’ a general right to freedom of thought, conscience and religion which cannot be restricted....The freedom enshrined in Article 9 is one of the foundations of a “democratic society” within the meaning of the Convention and is, among other characteristics, a precious asset for atheists, agnostics, sceptics and the unconcerned.

The Commission has repeatedly held that a church body or an association with religious and philosophical objects is capable of possessing and exercising the right to freedom of religion, since an application by such a body is in reality lodged on behalf of its members...

By contrast, the Commission has held that a limited liability company, given the fact that it concerns a profit-

making corporate body, can neither enjoy nor rely on the rights referred to in Article 9 para1.”

[99] Applying this reasoning, I find that the 1st Defendant is liable to the Plaintiff for unlawful discrimination contrary to the provisions of the 2006 Regulations and the 1998 Order and cannot rely on the protection afforded by Art 9 of the Convention.

I give judgment in favour of the Plaintiff. I would ask Counsel to address me on the issue of damages.