

Religious principles

Lord Carey, the former Archbishop of Canterbury, saw fit to intervene in the Court of Appeal's decision in *McFarlane v Relate* [2010] EWCA Civ B1 on an application for permission to appeal from the rejection by the tribunal and EAT of claims of direct and indirect religious discrimination.

The claimant counsellor was dismissed for refusing to give an unequivocal commitment to counsel same sex couples. Lord Carey submitted a witness statement supporting the appeal, which objected, among other things, to the use of the word 'discriminatory' to describe Christian views on sexual ethics.

Permission was refused. In relation to indirect discrimination, the provision, criterion or practice was Relate's insistence on complying with its equal opportunities policy. The claimant accepted that this pursued a legitimate aim of providing services to the whole community, but said it was disproportionate as there was no good reason not to let him counsel only heterosexuals.

There was, he said, no adequate balancing between respect for his religious views and Relate's application of its policy. Laws LJ disagreed, confirming the EAT's decision that allowing him to manifest his beliefs in this way would undermine the employer's commitment to the objective of non-discrimination. *Islington v Ladele* [2010] IRLR 211 was correctly decided and applied in this case.

Laws LJ's response to Lord Carey's 'misplaced' observations makes interesting reading, as well as providing a context for rejection of the appeal based on a distinction between beliefs and the conduct that flows from those beliefs.

In summary, the law labels conduct such as that of the claimant indirectly discriminatory by reference to its effect,

rather than the motives which lie behind it. While the law protects his right to hold and express beliefs, it could only protect a particular moral position on the objective basis that its merits recommend themselves, not on the subjective basis that it is espoused by the adherents of a particular faith.

Beyond Burchell

In *Salford NHS Trust v Roldan* [2010] EWCA Civ 522, the Court of Appeal reversed an EAT decision which had allowed an appeal against a finding of unfair dismissal. The real interest in the case lies in the guidance given by Elias LJ on the approach to adopt in unfair dismissal cases.

The case affirms the principle stated by the EAT in *A v B* [2003] IRLR 405 that the more serious the consequences for an employee, the more careful an investigation is required. This may impact on what is meant by 'reasonable investigation' under the test in *BHS v Burchell*. In this case, the claimant, a Filipino nurse, stood to lose her work permit and be deported if dismissed.

However, a further important steer given by Elias LJ is that employers facing diametrically opposed accounts from employees, where there is little other evidence, were not obliged to believe one and disbelieve another. It might be perfectly proper for employers to say they are not satisfied they can resolve the conflict so the case is not proved.

The combined effect of these comments is to re-emphasise that employers should adopt an extremely careful and balanced view of the evidence, before dismissing an employee in circumstances that will be catastrophic for his or her career.

Status hearings

A worker can bring a discrimination claim against a business that is not his or



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her employer as a 'contract worker', doing work for that business but employed by a third party that supplies him or her under a contract with the principal; for example, s.7 of the Race Relations Act 1976.

In *Leeds City Council v Woodhouse* [2010] EWCA 410, the Court of Appeal held that s.7 did not just apply to agency workers but should be applied case by case. Where the council had sub-contracted its property management functions to a company that employed the claimant, he could bring a claim directly against the council. It was not necessary to demonstrate the council had influence and control over the work, and it was not fatal if the work was being performed both for the company and the council.

The Court of Appeal said that the question of employment status under s.7 required an analysis of all the facts. Hence, in any case that was not 'clear and simple', the issue should be decided as part of the main claim rather than at a preliminary hearing. This is likely to influence all decisions on whether to hold pre-hearing reviews on status as there is no obvious reason to distinguish s.7 cases from other employment status disputes.

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