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EMPLOYMENT TRIBUNAL - SEXUAL ORIENTATION DISCRIMINATION CASES

2018 Cases

Sexual Orientation discrimination

Direct discrimination

Cake icing

Lee v Ashers Baking Co Ltd and others [2018] The Times, October 11, Supreme Court

A bakery refused to supply a cake iced with the message ‘support gay marriage’ because of the sincere religious belief of its owners that gay marriage was inconsistent with biblical teaching and therefore unacceptable to God. The customer, a gay man, complained of sexual orientation discrimination. The complaint was upheld by the county court in Northern Ireland. This decision was upheld by the Court of Appeal of Northern Ireland. The owners of the bakery appealed to the Supreme Court.

Decision

1. The appeal was allowed.
2. There was no evidence that the bakery had discriminated in the past. It had served and employed gay people and treated them in a non-discriminatory way. There was no finding that the reason for refusing to supply the cake was that the customer was thought to associate with gay people. The reason was their objection to gay marriage.
3. In a nutshell, the objection was to the message and not to any particular person or persons.
4. It did the project of equal treatment no favours to seek to extend it beyond its proper scope.

2017 Cases

Associative discrimination

Gay marriage cake

Lee v McArthur (2016) Eq Opp Rev 273:19, Court of Appeal in Northern Ireland

L is a campaigner for QueerSpace, an organisation campaigning for a change in Northern Ireland law to allow same-sex couples to marry. He placed an order with a bakery owned by M, to make a cake with a picture and a slogan saying ‘Support gay marriage’. M felt that this contravened his religious beliefs and refused to prepare the cake. L complained of sexual orientation discrimination. At first instance the claim was upheld. M appealed to the Northern Ireland Court of Appeal.

Decision

1. The appeal was dismissed.
2. The reference to gay marriage was a reference to people with a particular sexual orientation. Refusing to serve a customer for that reason was a refusal on grounds of sexual orientation and amounted to direct associative discrimination.
3. If businesses were free to choose what services to provide to the gay community on the basis of their religious belief, then that would create too much potential for abuse.

Civil partnership

Parris v Trinity College Dublin (2016) Court of Justice of the European Union, November 24

It became possible for same sex couples to enter into civil partnerships in the UK on 5 December 2005, and in Ireland on 1 January 2011.

P sought to establish that his same-sex partner would be entitled to receive a survivor’s pension on his death.

P was born in 1946 and has dual Irish and British nationality. He had lived with his same-sex partner for more than 30 years, and the national court was said to have been satisfied that Dr Parris and his partner ‘would have married or contracted a civil partnership many years ago had that been legally possible’.

P entered into a civil partnership with his partner in the UK (it not yet being possible to do so in Ireland) on 21 April 2009, his 63rd birthday. P’s civil partnership was not recognised in Ireland until January 2011, and then only prospectively, in accordance with the Ministerial Order of 2010. P married his partner on 12 January 2015, in the UK.

P was a non-contributory member of the Trinity College pension scheme (‘the Scheme’), and drew a pension under the Scheme since he took early retirement on 31 December 2010.

Rule 5 of the Scheme stated that a member’s surviving spouse or civil partner would receive a pension for life equal to two-thirds of the amount payable to the member before his death, but only if the marriage or civil partnership was entered into before the member reached age

60 (or before they retired, whichever was the earlier) (“the Rule”). In the case of a later marriage or civil partnership, the surviving spouse or civil partner was entitled only to a reduced survivor’s pension for a period of five years, and then only if the death occurred within five years from the date of the member’s retirement.

P turned 60 before entering into civil partnership, and so it was only possible for him to meet the requirements for his partner to receive the reduced benefit.

P applied to have his partner’s right to a full survivor’s pension recognised. The application was rejected by the university, and a subsequent complaint to the Equality Tribunal was unsuccessful. P then brought the claim to the Irish Labour Court, who referred questions to the CJEU for a preliminary ruling.

Decision

1. Discrimination on the grounds of sexual orientation

The Court stated that Member States are free to provide or not provide for marriage for persons of the same sex or for an alternative form of legal recognition of their relationship. In doing so, it noted that recital 22 of the Directive ‘expressly states that the directive is without prejudice to national laws on marital status and the benefits dependent thereon’. Consequently, the Directive did not require Ireland to provide for civil partnership or same sex marriage before 1 January 2011, nor did it require Ireland to give the legislation retrospective effect.

Similarly, there was no requirement for the scheme to put in place transitional measures for those who had already reached age 60 at the date the legislation came into force. As a result, the Rule did not constitute discrimination on grounds of sexual orientation. The requirement to marry or enter into a civil partnership before the age of 60 applied equally to heterosexual and homosexual couples.

2. Age discrimination

As the Directive allows pension schemes to fix an age for entitlement to an old age benefit, the Rule did not constitute discrimination on the grounds of age. The fact that it was legally impossible for P to enter into a civil partnership before reaching the age of 60 did not affect that conclusion because, as noted above, EU law did not require Member States to allow civil partnership and / or same sex marriage.

Exemptions

Rev. Canon Pemberton v Right Rev. Inwood, former acting Bishop of Southwell and Nottingham [2017] IRLR 211, EAT

P was an ordained Church of England priest. He married his same-sex partner despite being advised not to do so by church representatives. He applied for a position as chaplain and bereavement manager at an NHS trust. The job description included the requirements that the successful candidate would meet the requirements of the Church of England and would have authorisation from the relevant faith community. The Bishop revoked P’s permission to officiate and refused to grant him a licence because of his same-sex marriage. P complained

of sexual orientation discrimination. Schedule 9, para. 2(3) of the *Equality Act 2010* provides for exemptions from liability in respect of qualifications for the purposes of employment for the purposes of an organised religion. The Bishop argued that a same sex marriage was incompatible with the doctrines of the Church in relation to marriage. The tribunal dismissed the claim. P appealed to the EAT.

Decision

1. The appeal was dismissed.
2. The licence was a qualification for the purposes of the Equality Act.
3. The Schedule 9 exemption applied. The purpose of the licence was for the purpose of employment for the purpose of an organised religion, albeit carried out while employed by a secular body.
4. The tribunal had been entitled to find that the doctrines of the church were clear: marriage for the purposes of the church was between one man and one woman.

Offensive homophobic bullying

Ferguson v Concierge Practitioners NI Ltd (2016) Eq Opp Rev 273:24, Belfast Industrial Tribunal

F and S were directors of CPN Ltd. There were a number of disputes between them. F claimed that he had been subjected to homophobic abuse on a daily basis. This included S making references to the HIV risk of the use of needles by gay staff, making adverse comments about homosexual sex acts, referring to F as 'gay boy' and making comments about 'bum fun'. F complained of harassment on the grounds of sexual orientation.

Decision

1. The claim succeeded.
2. The comments and gestures were grossly offensive and were ongoing on an unrelenting regular basis. They occurred on a daily basis over a three-year period.
3. £15,000 was awarded for injury to feelings. F said that the behaviour made him feel useless and worthless and affected his self-esteem.

2015 Cases

Assessor

Cary v Commissioner of the Metropolis [2015] ICR 71, CA

C complained of sexual orientation discrimination, alleging that he had been directly discriminated against by police officers investigating his complaint of homophobic abuse by his neighbour. The county court judge ordered the trial to be heard by a circuit judge and by an assessor. The county court appointed an assessor without informing the parties of the

assessor's name and qualifications. This was a breach of the Civil Procedure Rules. The information was supplied on the first day of the trial. The claimant submitted that the assessor lacked sufficient expertise. The judge ruled that the assessor was suitable by virtue of her appointment as a lay member of the employment tribunal. The claimant appealed to the Court of Appeal.

Decision

1. In determining whether a person had the skill and experience to be an assessor, it was necessary to identify the matter and then decide whether the putative assessor had the necessary skill and experience in relation to it.
2. In a case such as the present, the skill required was an ability to discern whether people were deceiving the court or themselves, when saying that they would not have behaved differently if the protected characteristic had not been present. That skill would not differ according to which characteristic was in play.
3. It had been open to the judge to conclude that the assessor was appropriate.
4. The appeal was dismissed.

Evidence

Time limit

Habinteg Housing Association Ltd v Holleron (2015) Morning Star, October 2, EAT

H was employed as a community assistant by HH. Her work involved providing support to tenants. One tenant, identified as AP, caused a complaint to be made against H. The investigating manager interviewed AP. AP later told H that the manager had asked her questions about H, including a suggestion that H 'might be batting for the other side'.

H complained of discrimination on the ground of her perceived sexual orientation. The claim was lodged outside the three-month time limit. The ET concluded that the questions asked to AP had created an adverse environment for H. It was just and equitable to extend the time limit. HH appealed to the EAT.

Decision

1. The appeal was allowed.
2. The tribunal had not taken all available evidence, including hearsay evidence, into account. It had refused to take the manager's witness statement into account.
3. H had not provided reasons for an extension of time and it was not possible for the ET to establish whether it was just and equitable to extend it.