Requiring Christian care worker to work Sundays on a shift rota was not discriminatory

In Mba v Mayor and Burgesses of the London Borough of Merton, the Court of Appeal has upheld a tribunal's decision, confirmed by the EAT, that a practising Christian, who has a deep and sincere belief that Sunday is a day for worship and not for work, who was employed as a care worker at a Council children's home, was not indirectly discriminated against by a provision, criteria or practice (PCP) to work on Sundays, as and when required, on a shift-rota basis.

The Court of Appeal found there was no suggestion of a legal error in the tribunal's finding that the employer's PCP was designed to meet a legitimate aim, i.e. the Council's effective running of its business, both in terms of service delivery and the wider considerations of costs and staffing. As to whether the means chosen was a proportionate way of achieving the legitimate aim, the tribunal had erred in two respects in the balancing exercise between weighing the employer's needs against the discriminatory effect:

1. The tribunal described Mrs Mba's Sabbatarian belief as "not a core component of the Christian faith". By so doing it opened the door to a quantitative test – how many Christians would be affected generally - on far too wide a basis. It is clear is that for some Christians, working on Sundays is unacceptable and Mrs Mba's religious belief genuinely embraces that view. So the real issue in the justification exercise in this specific case was not whether all or most Christians have no issue with Sunday working, but whether the Council could show that its PCP was in proportion to achieving its aim, given the discriminatory impact on Mrs Mba.

2. By taking into account the Council's efforts to accommodate Mrs Mba and still being prepared to arrange her shifts in a way that enabled her to attend her Church to worship on Sundays, the tribunal considered factors which were irrelevant to the issue of proportionality. The reference to enabling her to attend Church on Sunday ignored the other aspect of her belief, namely that she should not work on Sunday at all.

However, in the Court's view, while there were legal errors in the tribunal's reasoning, the ultimate conclusion it reached was plainly and unarguably right, notwithstanding any misdirection of law. Once it was established that Mrs Mba was contractually required to work on a Sunday, and the Council had established that there was really no viable or practicable alternative way of running the children's home effectively, there was only ever going to be one outcome to this case. The legal error made no difference.

Acas launches consultation on revisions to Discipline and Grievances Code of Practice

Acas is seeking views on a specific change to the Code relating to the legal right workers have to be accompanied at a disciplinary or grievance hearing. This change comes as a result of the recent Employment Appeal Tribunal decision in the case of Toal and anor v GB Oils. The decision concerned the right to be accompanied in disciplinary and grievance hearings and suggested that the Acas Code did not accurately reflect the law on the right to be accompanied and in particular the law relating to the need to make a 'reasonable' request. Acas state that the current wording does not accurately interpret the law, which is why they have decided to amend the Code.

In the Toal case, the EAT rejected the employer's argument that the word "reasonable" applies to the choice of companion as well as the request to be accompanied. The employer relied on Paragraph 36 of the Code which states that "it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing." The EAT held that an Acas code of practice is not an aid to the construction of the law and the guidance could not be accepted. S.10 of the Employment Relations Act 1999, which sets out the right to accompaniment, makes no mention that the choice of companion must be reasonable and in any event, there is no standard by which reasonableness could be judged.

Government outlines how mums and dads can use new shared parental leave system

In February 2013, the Government consulted on its views as to how the system for shared parental leave and pay should operate. The measures for shared parental leave and flexible working are included in the Children and Families Bill 2013 which is currently going through Parliament. The scheme details will be set out in regulations. In the response to the consultation, the Government announced that it will:

- protect mothers who give binding notice to opt into shared parental leave prior to giving birth by introducing a right to revoke the notice up to 6 weeks following birth;
- require employees to give: (i) a non-binding indication of when they expect to take their allocated leave when they initially notify their employers of their intention to take shared parental leave; and (ii) at least 8 weeks' notice of any leave they will actually be taking;
- introduce a limit of 3 notifications a parent can give the employer to take a period of shared parental leave; provision will be made for changes that are mutually agreed between the employer and employee to not count towards the cap;
- set the cut-off point for taking shared parental leave at 52 weeks following birth (or adoption);
- create a new provision for each parent to have up to 20 days under shared parental leave to support them in returning to work;
- maintain the right to return to the same job for employees returning from any period of leave that includes maternity, paternity, adoption and shared parental leave that totals 26 weeks or less in aggregate - even if the leave is taken in discontinuous blocks; any subsequent leave will attract the right to return to the same job, or if that is not reasonably practicable, a similar job;
- align the notice periods for leave and pay for a parent taking paternity leave to make the system simpler;
- publish guidance to encourage employees who qualify under the new fostering-for-adoption placement process to give employers as much warning as possible.

The Government also highlight that the right to request flexible working will be extended to all employees who have worked for their employer for 26 weeks or more. Employers are obliged to consider all requests in a reasonable manner. The current statutory procedure will be repealed to lift the burden on business and the Government has asked Acas to produce a code of practice to help businesses manage this new extended right. Acas will also produce a non statutory good practice guide with practical examples of managing this in the workplace. This will be published alongside the final Code early next year.

New EHRC report highlights disadvantages suffered by disabled people

A new EHRC report, Barriers to employment and unfair treatment at work: a quantitative analysis of disabled people's experiences, shows that on all key employment measures, disabled people of working age in Great Britain are at a disadvantage compared with non disabled people. They are less likely to be in work (47 per cent compared with 77 per cent); less likely to be economically active (47 percent are economically inactive compared with 16 per cent of non disabled people); and those who are economically active are more likely to be unemployed (12 per cent compared with eight per cent) and unemployed for longer (47 per cent of unemployed disabled people have been unemployed for a year or more, compared with 31 per cent of unemployed non disabled people). Earnings are lower among disabled people, with 30 per cent earning less than the Living Wage (compared with 26 per cent of non disabled people) and 49 per cent compared with 55 per cent earning more than £10 an hour.