



Employment Law Update

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THIS MONTH'S CONTRIBUTOR

Sarah Ramsey



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Contact Sarah

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Seminars and workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If

December 2013

In this month's update we look at sexual orientation discrimination and freedom of religion in *Bull and Bull v Preddy and Hall*, together with a review of the Equality Act and the importance of a 'contract personally to do work' in the *Halawi v WDFG UK Ltd*.

Sexual orientation discrimination and freedom of religion

Bull and Bull v Preddy and Hall [2013] UKSC 73

Sarah Crowther and **Sarah Ramsey** appeared for the Appellants in this landmark Supreme Court case which



considered whether a refusal by Christian hoteliers to provide a double-bedded room to a same sex couple in a civil partnership constituted discrimination on the grounds of sexual orientation.

The Appellants, Mr and Mrs Bull, were committed Christians who held a sincere belief that sexual intercourse outside marriage is sinful. They owned a private hotel in Cornwall which they operated in accordance with their policy that double bedrooms were available only to "heterosexual married couples". The Respondents, Mr Hall and Mr Preddy, were a homosexual couple in a civil partnership. Upon arrival at the hotel, Mr Hall and Mr Preddy were informed that they could not stay in the double bedroom Mr Preddy had booked over the telephone. Although the refusal was not done in a demeaning manner, Mr Hall and Mr Preddy found it "very hurtful" and left to find alternative accommodation. The Bulls refunded Mr Preddy's deposit.

Mr Hall and Mr Preddy brought proceedings against the Bulls under the Equality Act (Sexual Orientation) Regulations 2007 ("the SORs"), now superseded by the Equality Act 2010. Regulation 3 of the SORs defines discrimination on the grounds of sexual orientation. Regulation 4 makes direct or unjustified indirect discrimination on the grounds of sexual orientation unlawful. The Respondents argued that the refusal to provide them with a double bedroom was unlawful under Regulation 3 of the SORs. The Appellants contended that their actions did not

you have a request for a seminar or lecture, or would like further information then please do not hesitate to contact our marketing manager, [Carolyn Harris](#).

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, [Carolyn Harris](#).

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively please contact the Senior Clerk, [James Donovan](#).

Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming updates will be gratefully received.

Please contact our marketing manager, [Carolyn Harris](#) with any queries.

Employment Law and 3 Hare Court

We regularly appear in the employment tribunals and EAT. Silks in chambers have experience of employment and

constitute direct or indirect discrimination under the SORs since they had differentiated not on the basis of sexual orientation, but on marital status. They also argued that the SORs should be applied compatibly with their right to manifest their religious beliefs under Article 9 ECHR.

In the Bristol County Court, the judge held that the Appellants' actions directly discriminated against the Respondents. The Court of Appeal unanimously dismissed the appeal against the judge's decision.

Mr and Mrs Bull appealed to the Supreme Court. They argued that (i) their policy did not constitute direct discrimination under the SORs; (ii) that their policy did constitute indirect discrimination, but that that indirect discrimination was justified; and (iii) that if their policy did contravene the SORs, the SORs should be read and given effect compatibly with their Article 9 ECHR right of freedom to manifest their religion ("the ECHR issue").

The Supreme Court dismissed the appeal, with a 3:2 majority holding that that the conduct of the Appellants was direct discrimination. The Supreme Court was unanimous that the conduct of the Appellants was unjustified indirect discrimination.

The leading majority speech was from Lady Hale, who noted that the Appellants' concept of marriage was the Christian concept of the union of one man and one woman. When the Appellants were applying the criterion to the Respondents, therefore, the Appellants were applying a criterion that the Respondents' legal relationship was not that of one man and one woman. Lady Hale held that civil partnership is a status akin to marriage, and the criteria of marriage and civil partnership are "indissociable" from the sexual orientation of those qualifying for the particular statuses. Lords Kerr and Toulson agreed that there was direct discrimination against the Respondents.

Lords Neuberger and Hughes dissented on the direct discrimination point. Lord Neuberger stated that the Appellants' policy discriminated only against unmarried couples and was therefore only indirectly discriminatory. The Respondents' civil partnership does not convert this into direct discrimination. The Appellants would have treated an unmarried heterosexual couple in precisely the same way that they treated the Respondents. Accordingly, the Appellants' treatment of the Respondents was not on grounds of their sexual orientation.

As regards indirect discrimination, their Lordships held the Appellants could not justify their conduct by reference to their religious beliefs. Lady Hale noted that Parliament had created the institution of civil partnership in order that same sex partners can enjoy the same legal rights as partners of the opposite sex. The purpose of the SORs was to secure that those of homosexual orientation were treated equally. There was a carefully-tailored exemption for religious organisations in Regulation 14 of the SORs, which did not extend to the Appellants.

As to the ECHR issue, their Lordships held that the SORs' interference with the Appellants' Article 9 rights is justified as a proportional means of achieving a legitimate aim, i.e. the protection of the rights and freedoms of homosexuals. There was therefore no basis for reading down the SORs.

discrimination issues in the High Court and Court of Appeal.

Members deal with a range of work from straightforward issues of unfair dismissal and redundancy to issues of equal opportunities, discrimination and human rights. This includes the seminal case of *Bull & Bull v Preddy & Hall* [2013] UKSC 73 where the Supreme Court determined whether it was discrimination not to provide goods and services on the grounds of sexual orientation.

Additionally, members regularly deal with the full range of discrimination claims under the Equality Act 2010 including direct and indirect discrimination, whistleblowing, victimisation and harassment in multi-day hearings for both Claimants and Respondents.

For more information and examples of cases, please visit our [Employment Law page](#).

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The Equality Act and the importance of 'a contract personally to do work'

Halawi v WDFG UK Ltd *UKEAT/0166/13*

The Claimant worked in a World Duty Free outlet at an airport, selling Shiseido cosmetic products airside. Her security clearance to do so was withdrawn by the First Respondent ('WDF'). The Claimant claimed that she had thereby been unfairly dismissed and discriminated against. In order to succeed, she had to show that she was an employee or worker.



The ET found that the Claimant had no written contract of employment, instead working through a "web of relationships". She provided her services through a limited company which she had incorporated for the purpose. That company invoiced the Second Respondent ('CSA') each month for her work at an hourly rate set by CSA. CSA provided a management service to Shiseido, which included the staffing of Shiseido's space at the airport. Shiseido was permitted space within the premises occupied by WDF at the terminal. WDF bought the cosmetic products from Shiseido, took the profit from sales, and managed the outlet as a whole.

The ET found that the arrangements were such that the Claimant as not required to work personally at her job, but could get another person to substitute for her and had in fact done so in the past. It was held that on existing appellate authority that the Claimant was not an employee of either WDF or CSA, since she had a contract with neither. Furthermore, the Claimant was not a 'worker' since that required a contract under which she agreed to work personally.

On appeal, the Claimant argued that section 83 Equality Act 2010 must be read purposively in accordance with the European law that underpins the rights that it is designed to support. Section 83 held that 'employment' means "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work". The Claimant argued that the requirement for there to be a "contract personally to do work" should be disregarded when deciding whether she was 'in employment', and that the EAT should instead focus on whether she was in an 'employment relationship' with the Respondents. She submitted that what mattered in such an employment relationship was not 'personal service', but whether she was in a 'subordinate' position to the Respondents.

The EAT rejected the Claimant's appeal. It held that, where there is no written contract of employment, the correct approach is still to look carefully at the particular relationship and how it operated in practice. It found no reason to interpret the words "contract personally to do work" as if the word "contract" and the word "personally" were not present.

Even if it were wrong on that point, however, the EAT held that on the facts of the case, the Claimant was not in a 'subordinate' position, as there was no obligation on her to personally do work for either WDF or CSA and she was not under their control. There was no evidence directly of economic dependence.

Although Langstaff J expressed an "uneasy feeling" that the arrangements were such that the Claimant could have been the victim of discrimination and yet have no right to complain to a Tribunal, he also noted that this was in principle no different from cases involving agency arrangements.

This case illustrates the importance of establishing a 'contract personally to do work', i.e. without the right of substitution or to subcontract, before bringing a discrimination claim under the Equality Act. It also confirms that, even when dealing with a complex web of relationships, the correct approach is to examine carefully how each relationship operated in practice whilst considering issues such as personal service and control.

Get in touch



We hope you have enjoyed this issue of the Employment Law Update. If you are dealing with a similar case or wish to discuss any area of employment law, please **get in touch** to arrange a short informal discussion.

We wish you all a very merry Christmas and a Happy New Year!

The next edition of the Employment Law Update is due in January 2014. Until then!

Chambers of Peter Knox QC

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