

## XpertHR Weekly Podcast

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- Jeya Thiruchelvam: Hello and welcome to XpertHR Weekly with me, Jeya Thiruchelvam. The facts of discrimination cases rarely have much to do with cake but the sexual orientation case that we're about to look at has been known as the 'gay cake' case. In this case, the Northern Ireland County Court found that Mr Lee, a gay customer, had been discriminated against on the grounds of sexual orientation when a bakery refused to bake a cake for him with a pro-gay marriage slogan. The case highlights the tension that can arise between the protections afforded to religious discrimination on the one hand and sexual orientation discrimination on the other, and today I'm joined by employment law editor Laura Merrylees, who's here to tell us more about this case and remind us what employers need to know about sexual orientation discrimination. Hi Laura.
- Laura Merrylees: Hello Jeya.
- Jeya Thiruchelvam: So tell us, in this case, how was the bakery found to be discriminating against by refusing to bake the cake?  
[0:00:56.5]
- Laura Merrylees: Well in this case Mr Lee, who is gay, placed an order with a Christian-run bakery, Ashers Baking Company, for a cake with the words 'Support Gay Marriage' scanned on the top. Having initially accepted the order, Ashers then informed Mr Lee a few days later that they would not be able to fulfil the order.
- Jeya Thiruchelvam: And what was behind Ashers's change of heart?
- Laura Merrylees: Well the McArthur family who run the bakery hold deeply religious Christian views and decided that the slogan that was to appear on the cake ran contrary to their Christian beliefs. They said they couldn't make the cake as they believed that promoting same-sex marriage is against God's word.
- Jeya Thiruchelvam: And Mr Lee was presumably not happy about that?  
[0:01:31.2]

- Laura Merrylees: No. He was shocked and believed that the cancellation of the order was due to the fact that he is gay and supports same-sex marriage, and with the support of the Northern Ireland Equality Commission, he issued proceedings in the County Court for, amongst other claims, direct discrimination on the grounds of sexual orientation.
- Jeya Thiruchelvam: So we know that the court found in Mr Lee's favour but can you take us through how they came to that decision?  
[0:01:51.3]
- Laura Merrylees: Yeah, sure. I mean, the bakery had argued that it wasn't Mr Lee's sexual orientation that they objected to but the slogan on the cake which supported same-sex marriage. However, the court found that their objection to same-sex marriage in this case amounted to sexual orientation discrimination. The court found that given that same-sex marriage is a union between persons having a sexual orientation, any refusal to provide a service on that ground must amount to sexual orientation discrimination.
- Jeya Thiruchelvam: The fact that the bakery was objecting or its objection was founded on deeply held religious views, did that have any impact or did that make any difference to the court's ruling?  
[0:02:25.3]
- Laura Merrylees: Not in this case, no. The judge made it clear that the purpose of the sexual orientation regulations is to ensure that gay people are treated on the same terms as heterosexual persons and there is no exception in the regulations which allows a commercial business to provide their services based on their own religious beliefs. To quote the judge in the case, she said, 'much as I acknowledge fully their religious belief is that gay marriage is sinful, they're in the business of supply services to all, however constituted.' Essentially what is being said here is that the bakery's religious beliefs could not be manifested in a commercial environment if their beliefs contravene the rights of others.
- Jeya Thiruchelvam: And so is that the end of the case now? [0:03:00.1]
- Laura Merrylees: No. Ashers have decided to appeal the decision.
- Jeya Thiruchelvam: And on what grounds are they appealing? [0:03:04.7]
- Laura Merrylees: Ashers believe that the law appears to be forcing them to promote a cause with which they fundamentally disagree because of their religious views. Ashers maintain that they have no issue in serving any customer, irrespective of their sexual orientation, but there is a wider question of principle

here as to whether a business can be forced to promote a cause which conflicts with its religious beliefs.

Jeya Thiruchelvam: Okay, so it'll be really interesting to see how this case ultimately plays out and what happens in the appeal because it raises a really interesting issue about competing protected characteristics. But in the meantime, what can employers take from the case? [0:03:34.5]

Laura Merrylees: Well it's clear that if you're a business providing services to the public you cannot discriminate on any grounds covered by anti-discrimination law, even if this conflicts with your own religious beliefs, and in the light of this decision I thought it'd be helpful maybe to take a closer look at sexual orientation discrimination within the workplace.

Jeya Thiruchelvam: Okay, let's do that. Remind us of the key features then, of the law in this area. [0:03:53.4]

Laura Merrylees: Well sexual orientation is a protected characteristic under the Equality Act 2010. It is therefore unlawful to discriminate against an employee or worker on the grounds of the person's sexual orientation.

Jeya Thiruchelvam: So in the same way that race or sex or disability is also a protected characteristic. Historically we used to call them grounds. [0:04:10.9]

Laura Merrylees: Yes, that's right.

Jeya Thiruchelvam: And how does the law define sexual orientation? [0:04:14.9]

Laura Merrylees: Under Section 12 of the Equality Act, sexual orientation is defined as meaning the person's sexual orientation towards either persons of the same sex, persons of the opposite sex or persons of either sex.

Jeya Thiruchelvam: Okay, that's really interesting. So there's a common misconception then that it applies only to gay people, but in fact it applies equally and affords protection equally to heterosexual people as well as those who are bisexual. [0:04:35.6]

Laura Merrylees: Yes, that's right. Perhaps something that isn't immediately apparent is the risk of a claim being brought by a heterosexual employee who is, say, offended by regular homophobic banter between colleagues. Even though the employee is not of the same sexual orientation as the subject of the banter, the legislation on harassment in the Act covers behaviour that is related to sexual orientation.

- Jeya Thiruchelvam: Okay, so it doesn't have to relate to that person's sexual orientation. Can you give us an example then of a case where a tribunal has actually found that to be the case? [0:05:02.7]
- Laura Merrylees: Yes, there's a good example in the case of Austin and Samuel Grant (North East) Ltd. Mr Austin joined the firm of Samuel Grant as a sales executive. Shortly after joining, Mr Grant was asked by another sales executive whether he liked football and when he said he wasn't interested, he was told, 'You're gay then.' Comments about being gay were also made on the back of the fact that Mr Austin said he helped with household chores at home and took an interest in the arts. For example, Mr Austin alleged that he had been accused of being gay due to the fact that he'd watched a documentary about Salvador Dali.
- Jeya Thiruchelvam: And what did Mr Austin do about it? [0:05:34.7]
- Laura Merrylees: Well he lodged a grievance but this was not upheld as the HR manager found that the comments amounted to banter only and other employees who had been interviewed had not found it offensive. And needless to say, Mr Austin was unhappy with the outcome of the internal process and issued proceedings in the tribunal for, amongst other claims, sexual orientation discrimination.
- Jeya Thiruchelvam: And how did he get on in the tribunal? Did the tribunal find the same as the HR manager or...? [0:05:58.6]
- Laura Merrylees: No. They found in Mr Austin's favour and the comments which had been made about him constituted harassment related to sexual orientation. It's important to remember here that Mr Austin was not gay, but that made no difference to his ability to bring a claim.
- Jeya Thiruchelvam: Okay, so can you remind us of the other ways then in which sexual orientation discrimination in the workplace can occur? [0:06:17.3]
- Laura Merrylees: Yeah, sure. There are again familiar concepts when you look at the other protected characteristics under the Act and they fall into four categories: direct discrimination, indirect discrimination, harassment and victimisation.
- Jeya Thiruchelvam: So to remind our listeners, taking direct discrimination first, that would apply where a worker is treated less favourably because of a protected characteristic of sexual orientation. So a very straightforward example is where a person is not recruited or not promoted or not given a particular project

because they're gay and that will amount to direct discrimination. [0:06:48.8]

Laura Merrylees: Yes, that's right, but it's important to pick up on a couple of key points here. Firstly, the less favourable treatment can again relate to the worker's actual or perceived sexual orientation, even where the perception is wrong.

Jeya Thiruchelvam: So if a worker is treated less favourably because they're believed to be gay, even if they are in fact heterosexual, will that also be discrimination? [0:07:07.1]

Laura Merrylees: Yes, that's right.

Jeya Thiruchelvam: So you mentioned there are two points to bear in mind. What's the second point? [0:07:10.8]

Laura Merrylees: Well again it's a concept that arises in other areas of discrimination protection which is associative discrimination.

Jeya Thiruchelvam: And remind us what that is. [0:07:18.5]

Laura Merrylees: Well it means that it's unlawful to discriminate against a worker because of his or her association with someone who has the protected characteristic. So for example if the worker is treated less favourably because they have friends who are gay, the worker will be able to complain of discrimination.

Jeya Thiruchelvam: And turning then to indirect discrimination, can you take us through the key points to be aware of here, as far as a sexual orientation discrimination claim is concerned? [0:07:39.5]

Laura Merrylees: Yes of course. Just as a reminder, indirect discrimination takes place where an employer applies a provision, criterion or practice which is otherwise known as a PCP, and it applies it equally to all employees but it puts people with a certain protected characteristic at a particular disadvantage. For example, this would be the case if an employer had a maternity or a paternity policy which didn't apply to same-sex couples.

Jeya Thiruchelvam: But I suppose indirect discrimination differs from direct discrimination in the sense that you can actually justify indirect discrimination, can't you, potentially? [0:08:08.8]

Laura Merrylees: Yes you can, although we know from other cases in the field of discrimination that cost alone will not justify the imposition of a discriminatory PCP. Interestingly in the bakery case, the judge indicated that even if she hadn't found direct

discrimination but had found indirect discrimination, she would still have concluded that there was no justification. This means that the religious convictions of the bakery owners would not have justified their refusal to bake a cake with the 'Same Sex Marriage' slogan.

Jeya Thiruchelvam: Okay, so turning now to the final two areas, which are harassment and victimisation. We've already touched on the fact that someone who doesn't share a protected characteristic can still be the subject of harassment but what actually amounts to harassment? [0:08:46.3]

Laura Merrylees: Well harassment occurs when there is any unwanted conduct which is related to sexual orientation and which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Jeya Thiruchelvam: But I suppose it's not always easy for an employer to know what might take place or what has taken place between employees and how to prevent that, so what can an employer actually do to protect itself? [0:09:09.5]

Laura Merrylees: Well this is where the reasonable steps defence comes in. If an employer can prove that it has taken all reasonable steps from committing an act of harassment, it may be able to defend a claim brought against it.

Jeya Thiruchelvam: Okay, so for example an employer makes it clear, abundantly clear in a staff handbook that condemns acts of harassment, would that be sufficient to invoke the reasonable steps defence? [0:09:28.9]

Laura Merrylees: Not by itself, no. A tribunal will want to see concrete evidence of any policy having properly been trained out to all employees. I mean, it would also be sensible to ensure that any manager who is responsible for investigating a complaint of sexual orientation discrimination is trained in the area of equal opportunities.

Jeya Thiruchelvam: Okay, so that policy's got to be properly implemented and communicated to have a stab really, at this defence? [0:09:50.5]

Laura Merrylees: Yes, absolutely.

Jeya Thiruchelvam: So turning to the final area then, of victimisation, can you tell us a bit more about that? [0:09:55.1]

Laura Merrylees: Yeah, similar to other areas of discrimination legislation. If a person is subjected to a detriment because he or she has

done or is believed to have done a protected act, an act of victimisation will have taken place.

Jeya Thiruchelvam: So if, for example, an employer refuses to provide a reference to an employee who's left and the reason for refusing to provide that reference is due to the fact that the former employee raised a grievance about sexual orientation, that would presumably be an act of victimisation? [0:10:19.3]

Laura Merrylees: Yes it would be. I mean, in fact, in the Austin case that we've already discussed, Mr Austin also succeeded in a claim of victimisation.

Jeya Thiruchelvam: And take us through why that was. [0:10:27.7]

Laura Merrylees: Well Mr Austin had eventually been dismissed by his employer, ostensibly due to his poor sales figures. The tribunal, however, found that the reason given by his employer for the dismissal was nonsense, as the evidence didn't support it. In fact, his sales figures were better than one of the managers who'd been the perpetrator of the harassment and the real reason for the dismissal was the fact that he had raised a grievance.

Jeya Thiruchelvam: Thanks very much, Laura. That was a really, really useful look at sexual orientation. Now we have lots of resources on the site on sexual orientation discrimination but can you point us to some of the key ones? [0:10:58.0]

Laura Merrylees: Yeah, sure. As a starting point it's always worth checking that your diversity policy is up-to-date and meets the needs of your workforce and you can find example policies in our policies and documents area under 'tools'.

And to take you through all the practical points you then need to be thinking about rolling out an effective diversity policy, it's worth taking a look at our good practice manual on sexual orientation.

Jeya Thiruchelvam: Thanks again, Laura. That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Jeya Thiruchelvam. We're back next Friday but until then it's goodbye from us.