

Dismissal of Christian employees who refuse Sunday work is not always unfair

This is the third article in our series of law digests by **Thomas H. John**, pharmacist and barrister, of cases heard recently in the appeal courts of England and Wales. In this article, Mr John discusses the freedom to express one's religious beliefs within the working environment

The question

Is dismissing a Christian employee who refuses to work on Sundays a breach of his or her human rights under Article 9 of the European Convention on human rights?

For over a decade many businesses, particularly those in the retail sector, have extended their weekly trading hours to include Sundays. Readers may well recall that among the objections to Sunday trading voiced during the consultation period to the coming into force of the Sunday Trading Regulations were those from Christian individuals and organisations contending that members of the Christian community might be forced to compromise their beliefs in order to comply with their employment contracts.

The law

The relevant law is to be found in two major statutes enacted during the past decade. The Employment Rights Act 1996 (ERA) governs the statutory scheme for unfair dismissal. Provided an employee can show an Employment Tribunal he has been dismissed, the onus of proof passes to the employer to show that the reason for the dismissal was fair. Fairness is dealt with in Section 98 of the ERA, which defines both those reasons that are automatically deemed unfair (for example dismissal for trade union membership, taking leave for family reasons, unlawful discrimination, asserting various rights under health and safety laws) and those reasons for dismissal which are potentially fair. Examples of the latter include the capability or qualifications of the employee, his or her conduct, redundancy or some other substantial reason. "Some other substantial reason" has been held in the past to include irreconcilable breakdowns between employees or dismissals at the behest of third parties such as regular, valued customers who, for whatever reason, simply do not get along with the employee concerned. Provided the employer can justify the reason for dismissal the final burden be-



How to read this article

To obtain optimum benefit it is suggested that practitioners read the question or questions posed at the outset of the digest, then read the facts and the issues arising, then the decision of the court together with the reasoning behind the decision. The question or series of questions should then be reread and consideration given as to whether any lessons can be learnt in terms of practitioners' practices.

fore the tribunal is placed equally upon both parties to demonstrate the overall reasonableness of the dismissal in the circumstances of the particular case.

The Human Rights Act 1998 enshrined the European Convention on Human Rights into UK law. Article 9 governs an individual's right to freedom of religion and belief.

The Case

Copsey v WWB Devon Clays Ltd. Court of Appeal — Civil Division (Lord Justice Mummery, Lord Justice Rix and Lord Justice Neuberger). Judgment given 25 July 2005.

Stephen Copsey was an employee of WWB Devon Clays Ltd (WWB). He was also a practising Christian, a fact known to his employers. WWB, for perfectly proper business reasons, changed the shift patterns of its workers to introduce seven-day shifts, including Sundays. To comply with the law as WWB saw it this was to be done by varying the employment contracts of its employees, including Mr Copsey. Mr Copsey refused to accept the variation as he did not want to accept regular Sunday working (although he did indicate he would be prepared to cover

Sundays in emergencies). WWB dismissed him. He brought a claim before the Employment Tribunal claiming both unfair dismissal and breach of Article 9 of the European Convention on Human Rights.

The tribunal dismissed his claim. It found that WWB had done everything it reasonably could to accommodate Mr Copsey's wish not to work on Sundays (under Section 98[4] of the ERA) and found that the real reason for his dismissal was under the "some other substantial reason" category in Section 98(2), namely, his refusal to accept a reasonable change to the working shift pattern. Interestingly, it also found that Article 9 of the European Convention on Human Rights was not engaged here (ie, did not apply) but that even if it did, there would have been no breach. It relied for this on the earlier European Court of Justice case of *Stedman v UK (1997) 23 EHRR CD168* in which the ECJ ruled that Stedman's dismissal was not as a result of her religious convictions in refusing to work on Sundays but arose as a result of her general lack of respect for her working hours.

Mr Copsey accordingly appealed to the Employment Appeal Tribunal. The EAT in dismissing his claim and upholding the tribunal's decision did so on the basis that the tribunal had correctly applied the law. Mr Copsey therefore took his case to the Court of Appeal for a binding decision on whether he had been fairly or unfairly dismissed.

The judgment and reasoning The Court of Appeal also dismissed Mr Copsey's Appeal. Lord Justice Mummery gave as his reasoning that Mr Copsey's religion and its manifestation were not the reasons for his dismissal albeit there was a definite link between them. As to whether Article 9 of the European Convention on Human Rights was engaged he said that a line of European Court of Justice cases, including *Stedman*, clearly showed that an employee could not assert Article 9 against his employer in respect of working hours because in any case where the two were incompatible the employee always had the option of resigning his job in order to accommodate his religious beliefs. Therefore in terms of the UK law on employment rights he had in fact been dismissed for a potentially fair reason within section 98(2) of the ERA and that it had been reasonable to dismiss him for that reason in the circumstances (Section 98[4]).

Lord Justice Rix agreed with Lord Justice Mummery but said that he thought Article 9

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of the European Convention on Human Rights was potentially engaged because it could not invariably be the case that every employer seeking to vary an employee's working hours would never impinge on the employee's right to manifest his religious beliefs. However in this case he said that WWB had sought to reach a reasonable accommodation with their employee but Mr Cosey had not accepted it and therefore could not then seek to use Article 9 as a device for justifying his unreasonable stance with regard to WWB.

Lord Justice Neuberger said that to dismiss a Christian employee for refusing to work on Sundays was potentially unfair but that since the tribunal had found as a fact that WWB had not acted unfairly or unreasonably within the meaning of the ERA, using Article 9 of the European Convention on Human Rights on top would not have taken matters any further in any event.

Discussion

It is apparent that the courts are applying a rather restrictive approach to their interpretation of Article 9 of the European Convention on Human Rights at least in the employment context. They are not allowing employees to use Article 9 as a tool to interfere with the running of the employer's business. The same cannot perhaps be said of Article 9 issues arising outside the employment field where the courts have recently shown a more liberal approach to individuals seeking to manifest their religious beliefs. The well publicised

Court of Appeal case of *Shabina Begum v Denbigh High School*, decided last March, affirmed a Muslim schoolgirl's right to wear a jilbab during the whole time she was at school, for example.

From these examples it is submitted that the scope of any individual's Article 9 rights in today's Britain is somewhat uncertain. This proposition neatly demonstrates a principle enshrined elsewhere in the Human Rights Act itself in that most of the so-called "rights" are not absolute.

Of the 16 Articles encapsulating various "rights" the only one that is absolute in the sense it can never be restricted, exempted or derogated from are those in Article 3 of the European Convention on Human Rights (the prohibition on torture, degrading and inhuman treatment or punishment). All other stand-alone "rights" — for example, those in Articles 2 (the right to life), 4 (prohibition of slavery and servitude, forced or compulsory labour), 8 (privacy, family life, home and correspondence), 9 (thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of assembly and association) — may be excluded or restricted to the extent necessary to uphold a democratic society. In the case of Article 9 within the employment context the right to practise and manifest one's religion (whatever it may be) seems to be being restricted so that employers and employees are expected to make reasonable adjustments to accommodate one another. In the field of children's education, it appears it is the educator (school or education author-

ity) that must respect pupil's religious practices to a greater degree than employers need to accede to their employees' wish to manifest religious beliefs.

On the whole it is submitted that the Court of Appeal decided Cosey correctly. After all the whole purpose of having an independent court system at all is to do justice between two or more parties. Extreme care must be taken, however, in extending the reasoning in Cosey to all employment situations which on the face of it appear similar or broadly similar to the circumstances prevailing at WWB.

In deciding what are reasonable adjustments in any given case the tribunal will also need to examine the financial and other resources available to the business, any particular trade customs within the type of business concerned as well as the manner of dismissal itself. Clearly a large business with hundreds of employees would be better able to adjust shift rotas where a handful of employees wished to take time off for religious purposes than would a small or medium-sized business facing a situation where perhaps just one key employee wanted the same time off. Disregarding or overlooking any of these factors may render a potentially fair and reasonable dismissal unfair or unreasonable. Employers and employees are well advised to seek specialist legal advice before bringing or defending any claim in circumstances where it is felt there is a genuine grievance in terms of freedom to manifest one's religion within their working environment.

Society membership groups

The Royal Pharmaceutical Society has established special interest groups for community pharmacists, for veterinary pharmacists, for industrial, regulatory and technical pharmacists, for hospital pharmacists and for pharmacy academic staff.

The groups hold meetings to consider topics of interest within their own fields of practice and they provide a source of advice to the Society's Council on specialist matters.

A pharmacist whose employment does not automatically entitle him or her to join a particular group but who has a demonstrable interest in that field of practice may be admitted at the discretion of the group committee.

Details of the groups can be obtained from the Society. Contact details are given below.

Community Pharmacists Group Contact: Angela Canning, practice division (tel 020 7572 2412; e-mail angela.canning@rpsgb.org).

Veterinary Pharmacists Group Contact: Lorraine Fearon, practice division (tel 020 7572 2409; e-mail lorraine.fearon@rpsgb.org).

Industrial Pharmacists Group Contact: Angela Canning, practice division (tel 020 7572 2412; e-mail angela.canning@rpsgb.org).

Hospital Pharmacists Group Contact: Lorraine Fearon, practice division (tel 020 7572 2409; e-mail lorraine.fearon@rpsgb.org).

Academic Pharmacy Group The Contact: Damian Day, education and registration directorate (tel 020 7572 2215; e-mail damian.day@rpsgb.org).

The Society's museum

The Museum of the Royal Pharmaceutical Society maintains important collections representing the history, science and practice of pharmacy and the development of pharmacy as a profession in Britain. Since the Museum's establishment in 1842, the collections have grown to about 45,000 items. Representative items from the museum collections are displayed in showcases in selected parts of the Society's headquarters building. Members and their guests can access these displays.

The collections also form an invaluable resource for researchers. Among other things, they include:

- A fine collection of English pharmaceutical delftware
- Other ceramic items, including feeders, leech jars, advertising models and pot lids
- An extensive collection of mortars, including outstanding examples of bell-metal mortars bequeathed from the collection of the late Edward Saville Peck
- Pharmaceutical glassware, silver, pewter and treen used for storage, dispensing and display

Most of the items in the collections are kept off-site, safely stored for future generations. However, the museum's plans for the future focus on developing the collection's potential as a resource for learning, for schoolchildren, university students, community groups and web-users and through loans to other museums.

Since January 2002 the museum's collecting policy has also taken a new direction, to enable the collection's relevance to be maintained for now and the future. This new focus means concentrating on the collection of historical and contemporary proprietary medicinal products and material.

Further information on the museum and its services can be obtained from the museum office (tel 020 7572 2210; e-mail museum@rpsgb.org).