Neutral Citation Number: [2009] EWCA Civ 1357

Case No: A2/2009/0518

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
The Hon Mr Justice Elias, Mrs M McArthur BA FCIPD, Ms B Switzer
Appeal No UKEAT/0453/08/RN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2009

Before :

MASTER OF THE ROLLS
LORD JUSTICE DYSON
and
LADY JUSTICE SMITH

- -

Between :

	LILLIAN LADELE	**Appellant Claimant**
	- and -	
	THE LONDON BOROUGH OF ISLINGTON **-and-** **LIBERTY**	**Respondent Defendant** **Intervener**

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Mr James Dingemans QC and **Ms Sarah Crowther**(instructed by Ormerods) for Ms Ladele
Ms Helen Mountfield (instructed by **London Borough of Islington (Legal Services)**) for London Borough of Islington
Ms Karon Monaghan QC and Prof Aileen McColgan instructed by, and for, **Liberty**
Hearing dates : 2 & 3 November 2009

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Judgment

The Master of the Rolls:

1. This is an appeal, which, at its core, raises the question whether the London Borough of Islington ("Islington") are entitled to compel Ms Lillian Ladele to register civil partnerships even though she objects to officiating at such registrations on the grounds of her religious beliefs. There are other issues, but that is the core issue. The Employment Tribunal ("the ET") held that Islington could not so compel Ms Ladele, and concluded that Islington had been guilty of direct and indirect discrimination, and harassment, against Ms Ladele contrary to the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660 ("the 2003 Regulations"). The Employment Appeal Tribunal ("the EAT") reversed this

decision, holding that there had been no breach of those regulations, and that Islington had been entitled to act as they did.

2. On this appeal, the position is as follows. Ms Ladele seeks to restore the decision of the ET as to indirect discrimination and harassment, and to have remitted to the ET at least some of the issues of direct discrimination. Islington, on the other hand, say that the EAT were correct, but, following the case advanced by Liberty, they go further, at least on the core issue, and contend that they could not lawfully have acted in any other way in the light of the provisions of the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263 ("the 2007 Regulations").

3. Before turning to the relevant facts, it is right to mention one procedural matter. Ms Ladele's application for permission to appeal against the EAT's decision was initially considered on paper by Mummery LJ, who adjourned it to be heard on the basis that, if permission was granted, the appeal should immediately follow. Having considered the opening submissions of Mr Dingemans QC on behalf of Ms Ladele, we decided that permission to appeal should be granted, and the hearing then continued and concluded as a full appeal.

The factual history

4. The facts relevant to the core issue on this appeal are within a small compass, but it is necessary to go into the history in a little more detail, in the light of the other issues.

5. Having worked for Islington for the previous ten years, Ms Ladele became one of their registrars of Births, Marriages and Deaths on 14 November 2002. As a registrar, she held a statutory office during the pleasure of the Registrar General (under section 6 of the Registration Services Act 1953), although she worked for, and was paid by, Islington as the registration authority. Her status changed on 1 December 2007, when she became a direct employee of Islington pursuant to the Statistics and Registration Act 2007, and she remained employed by Islington as a registrar until she resigned with effect from 30 September 2009.

6. The Civil Partnership Act 2004 came into force on 5 December 2005. As is common knowledge, it introduced civil partnerships between same sex partners. By section 29(1), it defined a "civil partnership registrar" as "an individual who is designated by a registration authority as a civil partnership registrar for its area". Section 29(2) required each "registration authority to ensure that there is a sufficient number of civil partnership registrars for its area to carry out the functions of civil partnership registrars".

7. As the ET put it, Ms Ladele held "the orthodox Christian view that marriage is the union of one man and one woman for life", and she "could not reconcile her faith with taking an active part in enabling same sex unions to be formed", believing it to be "contrary to God's instructions". In anticipation of the 2004 Act coming into force, Ms Ladele told her line-manager, Ms Mendez-Child, that she would not want to officiate at civil partnerships, and reiterated her position to Ms Round, Islington's Director of Corporate Affairs. Between May and November 2005, Ms Ladele was absent owing to sickness; during that period,

Ms Mendez-Child decided that civil partnership duties should be shared out between all the existing registrars, although three of them (including Ms Ladele) had made it clear that they were unwilling to officiate at civil partnerships.

8. Accordingly, in early December 2005, around the time when the 2004 Act came into force, Islington designated all their registrars as civil partnership registrars. Thereafter, Ms Ladele made informal arrangements with colleagues to swap assignments, so she avoided officiating at civil partnerships. In late March 2006, two gay registrars, Mr Goncalves and Ms Kingsley, complained to Mr Lynch, Head of Islington's Democratic Services, that they felt "victimised" by Ms Ladele not carrying out civil partnership duties. Mr Lynch reported this to Ms Mendez-Child, who had a meeting next day with Ms Ladele, together with Ms Caines, Islington's Superintendent Registrar. Ms Mendez-Child took the view that, in refusing to perform civil partnerships, Ms Ladele was in breach of Islington's published "Dignity for All" equality and diversity policy.

9. Islington's "Dignity for All" policy provides that there should be equality and freedom from discrimination and harassment (on the grounds, among others, of sexual orientation and religious belief) for all staff, that complaints of discrimination would be promptly and thoroughly addressed and recorded, and that, where a complaint was established, appropriate action would be taken. The policy also requires Islington's staff to be treated with dignity and respect. Having stated that "[e]quality and greater diversity enables us to achieve service excellence and better represent the people of Islington", the policy provides that "[a]ll employees are expected to promote these values at all times and to work with the policy", going onto say that those who do not "may face disciplinary action".

10. Ms Ladele's reaction to Ms Mendez-Child's view was that it was she who was not being accorded appropriate dignity, and that she was suffering discrimination as a result of her religious beliefs. Nonetheless, on 1 April 2006, Ms Mendez-Child wrote to Ms Ladele saying that her refusal to officiate at civil partnerships would be viewed by Islington as discriminatory, indeed, potentially as gross misconduct, and threatening formal disciplinary action. The letter offered Ms Ladele a "temporary measure" of only having to officiate at civil partnerships which involved no ceremonies. Ms Ladele did not accept that offer, but replied on 18 April, reiterating and explaining her views in moderate and clear terms, saying that she was being asked to "facilitate the formation of a union which [she] sincerely believe[d] was contrary to God's law", and inviting Islington to accommodate her belief.

11. Thereafter, Ms Ladele continued to carry out her functions much as before. However, relationships among Islington's registrars were tense, and Ms Ladele felt victimised and picked on for her views, as she explained to Ms Mendez-Child at a meeting on 18 October 2006. At a team meeting on 2 November 2006, Mr Lynch said that matters would go on as they were until the registry services became part of the local authority (as was due to happen under the 2007 Act). However, on 14 November, Mr Goncalves and Ms Kingsley wrote to Ms Mendez-Child reiterating their concern about Ms Ladele (and one of the other registrars with similar views) not conducting civil partnerships, describing it as "an act of homophobia".

12. In his letter in reply the following day, Mr Lynch explained to them that, until what was to

become the 2007 Act came into force, he felt that there was little he could do. However, Mr Lynch's letter of 15 November 2006 also contained information about Ms Ladele, which was confidential to her. That was a breach of Ms Ladele's rights, and a breach of Islington's own "Code of Conduct for Employees", as Mr Lynch was aware. Indeed, he headed the letter of 15 November "Private and Confidential", but, unfortunately, this confidential information was then repeated at a meeting of Islington's LGBT [Lesbian Gay Bisexual Transgender] Forum.

13. On 17 January 2007, Ms Ladele had a meeting with Mr Lynch, at which she complained of being unfairly treated. Mr Lynch explained to her that, once the 2007 Act came into force, Islington would not accommodate her views by excusing her from civil partnership duties, as that would be contrary to its Dignity for All policy, and would involve discriminating against same sex couples. Islington does not seem to have taken any steps to investigate Ms Ladele's complaints or to consider disciplinary proceedings against anyone in connection with them.

14. The complaints from Mr Goncalves and Ms Kingsley continued, and, in May 2007, Mr Lynch instigated disciplinary proceedings against Ms Ladele, by inviting Mr Daniels, Assistant Director of Law, Commercial and Environment, to conduct an investigation.

15. At her initial meeting with Mr Daniels on 23 May, Ms Ladele made it clear that she wanted her religious views taken into account, and said that she had not acted in a discriminatory fashion. In his interview with Mr Daniels on 20 June, Mr Lynch conceded that civil partnership duties were not part of Ms Ladele's job description. These points were recorded in Mr Daniels's report, which after setting out the history and referring to Ms Ladele's letter of 18 April 2006 as an act of "gross misconduct", recommended that formal disciplinary proceedings be brought against Ms Ladele on the ground that she "had refus[ed] to carry out work in relation to the civil partnership service solely on the grounds of sexual orientation of the customers of that service". That proposal was adopted by Islington on 3 August 2007.

The procedural history

16. On 16 August 2007, a disciplinary hearing took place before Ms Round, in the course of which Ms Mendez-Child said that the Registry Service should "not be accommodating people's religious beliefs", and that she would not consider Ms Ladele for the post of additional Superintendent Registrar during Ms Caines's forthcoming maternity leave.

17. On 13 September 2007, the outcome of the disciplinary hearing was communicated in a letter from Ms Round to Ms Ladele. The letter stated that Ms Ladele would be transferred to a contract of employment with Islington, under which she would be required to perform civil partnership duties, and, if she refused to perform those duties, Islington would consider terminating her employment. The earlier offer of excusing Ms Ladele from conducting civil partnership ceremonies was repeated.

18. Ms Ladele then issued a claim in the ET on 28 November, and this resulted in a hearing which took place over four days in May 2008. In its decision, dated 3 July 2008, the ET

(Employment Judge Lewzey, Mrs D May, and Mr C J Storr) found that Ms Ladele had suffered both direct and indirect discrimination, as well as harassment, at the hands of Islington on grounds of her religious belief, in a number of respects.

19. The ET concluded that she had been the victim of direct discrimination by being required by Islington to perform civil partnership duties. Additionally, the ET considered that Islington had been guilty of direct discrimination against Ms Ladele in a number (but by no means all) of the respects contended on her behalf. The ET held Islington had directly discriminated against her by (a) the unauthorised sharing of material, which was confidential to her, with other employees of Islington, contrary to the Code of Conduct, (b) subjecting her to a disciplinary process from May 2007, (c) failing to consider Ms Ladele for the post of additional Superintendent Registrar, (d) failing to address her complaints that she was being accused of being homophobic, (e) treating the letter of 18 April 2006 as a "free standing" incident of gross misconduct, (f) concluding in the disciplinary proceedings that Ms Ladele had been guilty of gross misconduct, (g) unilaterally varying the terms of Ms Ladele's employment in September 2007, (h) failing to address her complaints about her treatment, (i) failing to accommodate her religious beliefs, (j) failing to apply the Dignity for All policy to the behaviour of Ms Ladele's colleagues, (k) threatening to terminate Ms Ladele's employment if she did not perform civil partnerships, and (l) failing, through Ms Mendez-Child, to take Ms Ladele's religious views or her concerns seriously.

20. The ET also found that Islington had been guilty of harassment. The ET also decided that there had been indirect discrimination against Ms Ladele, because the blanket policy of requiring all registrars to perform civil partnership duties put individuals who held the orthodox Christian belief, that marriage was a union between one man and one woman for life, at a disadvantage when compared with others who did not hold that belief. While it accepted that the promotion of the LGBT community was a legitimate aim, the ET concluded that Islington's treatment of Ms Ladele was not a proportionate means of achieving that aim.

21. Islington appealed to the EAT on 29 October 2008. Having heard argument on 10 December, the EAT (Elias J, Mrs M McArthur BA FCIPD, and Ms B Switzer) gave its decision on 19 December 2008. The EAT allowed Islington's appeal and set aside all the ET's findings of direct and indirect discrimination and harassment. The EAT refused Ms Ladele permission to appeal against its decision, and, as already explained, Ms Ladele applied to this court for such permission which we have granted.

The 2003 Regulations

22. The 2003 Regulations came into force on 2 December 2003, having been made to implement EU Directive 2000/78 EC ("the Directive"). Paragraphs (1) and (4) of the preamble to the Directive refer to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and other international declarations concerning human rights. Article 2(2) of the Directive distinguishes between direct and indirect discrimination. Article 2(5) (particularly in the light of paragraphs (1) and (4) of the preamble) suggests that the Directive and any domestic legislation made thereunder should be read in conformity with article 9 of the European Convention on Human Rights

and Fundamental Freedoms ("the Convention"). Of course, any such legislation would have, if possible, to be read in any event in conformity with article 9 by virtue of section 3 of the Human Rights Act 1998.

23. Regulation 3(1) of the 2003 Regulations provides:

> "For the purpose of these Regulations, a person ("A") discriminates against another person ("B") if -
>
> (a) On grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply to persons not of the same religion or belief as B, but
>
> > (i) which puts or would put B at a particular disadvantage when compared with other persons,
> >
> > (ii) which puts B at that disadvantage, and
> >
> > (iii) which A cannot show to be a proportionate means of achieving a legitimate aim."

Thus, in subparagraphs (a) and (b), Regulation 3(1) covers, respectively, direct and indirect discrimination, thereby reflecting the Directive. Regulation 3(2) states that the comparison under regulation 3(1) must "be such that the relevant circumstances in the one case are the same, or not materially different, in the other".

24. Regulation 5(1) defines harassment on grounds of belief or religion as occurring when "on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect" of (a) "violating B's dignity" or (b) "creating an intimidating, hostile, degrading, humiliating or offensive environment for B". Regulation 5(2) provides that conduct falls within regulation 5(1) if "having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered to have that effect".

25. Regulation 6(2) renders it unlawful for an employer to discriminate against a person whom he employs –

> "(a) in the terms of employment which he affords him;
>
> (b) in the opportunities which he affords him for promotion, a transfer…;

(c) by refusing to afford him, or deliberately not affording him, any such opportunity; or

(d) by dismissing him, or subjecting him to any other detriment."

Regulation 6(3) makes it unlawful for any employer to subject any of his employees to harassment.

26. Regulation 10(1) provides that, in relation to "an appointment to an office or a post", it is unlawful to discriminate against a person (a) in determining to whom the appointment should be offered, (b) when deciding the terms on which the appointment is offered, or (c) by refusing to offer him the appointment. Regulation 10(3) renders it unlawful to discriminate against a person who has been so appointed (a) in the terms of appointment, (b) in the opportunities afforded for promotion or transfer, (c) by terminating the appointment, or (d) "by subjecting him to any other detriment in relation to the appointment." Regulation 10(4) outlaws harassment of an office-holder.

27. Regulation 22(1) states that "[A]nything done by a person in the course of his employment shall be treated for the purpose of these Regulations as done by his employer as well as by him…" However, regulation 22(3) provides an employer with a defence if he took "such steps as were reasonably practicable to prevent the employee from doing [the act in question]". Regulation 23 renders a person who "knowingly aids" another person to do an act which infringes the Regulations liable for that act.

28. The Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661 ("the 2003 Sexual Orientation Regulations"), which came into force on 1 December 2003, were also made pursuant to the Directive. Those regulations prohibit discrimination in the fields of employment and office-holding on grounds of sexual orientation in very similar terms to those contained in the 2003 Regulations in relation to religion and belief.

The ET's finding on direct discrimination

29. The ET's conclusion that Ms Ladele suffered direct discrimination on the core issue, namely, by being required by Islington to conduct civil partnerships, is as the EAT said, in paragraph 52 of Elias J's impressive and cogent judgment, "quite unsustainable". As he went on to explain, Ms Ladele's complaint "is not that she was treated differently from others; rather it was that she was not treated differently when she ought to have been", and her complaint was "about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference". As Elias J said in the next paragraph of his judgment, "[i]t cannot constitute direct discrimination to treat all employees in precisely the same way." This error also applied to virtually all of the other findings of direct discrimination by the ET, as summarised in paragraph 19 above.

30. A similar error of law in the ET's approach, which applies to virtually every allegation of direct discrimination, was identified by the EAT, and was expressed by Elias J in paragraph 59 in these terms: "Even if … there is sufficient evidence from which an

inference of discrimination could be made, [the allegation] requires consideration of the explanation given by the employer for the less favourable treatment", as, if the ET had been "satisfied that the reason is non-discriminatory (even if in other respects the conduct is unreasonable) then no discrimination has occurred." As Elias J said in the next paragraph, the ET did not adopt that approach, but, instead, considered "whether the employer has satisfied them that the alleged detriment did not occur" which tells one "nothing about why it occurred, which is the focus of the enquiry".

31. Mr Dingemans realistically does not challenge the EAT's reasoning on this point, which is plainly right, and was founded on the reasoning of Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [2000] 1 AC 501, 511H, as expanded by Peter Gibson LJ in *Igen v Wong* [2005] ICR 931, paragraph 37. However, that is not the end of the matter so far as direct discrimination is concerned. Although accepting that the EAT had been correct to set the ET's findings of direct discrimination aside on the ground of an error of law, Ms Ladele's case is that the EAT ought to have remitted at least some of the allegations of direct discrimination to the ET for reconsideration.

The contention that the direct discrimination claims be remitted to the ET

32. Mr Dingemans attacks the EAT's reason for refusing to remit any of the allegations of direct discrimination to the ET for reconsideration. That reason is to be found in paragraph 62 of Elias J's judgment, where he was dealing with the allegation which, as Smith LJ said during argument, is one of the most troubling, namely Mr Lynch's breach of Ms Ladele's confidence in the letter of 15 November 2006. Elias J said that "there was no adequate basis for concluding that there was evidence from which the [ET] could properly infer that the reason for disclosing information was the religious belief of [Ms Ladele]" (although he rightly went on to say that "[t]he conduct of Mr Lynch in breaching confidence was improper; it was a breach of the employee's rights under the Confidentiality Code and it was unreasonable").

33. Elias J expressed the same view in paragraphs 76 to 80 of his judgment when considering another troubling allegation, namely Mr Daniels's "extraordinary and unreasonable" characterisation of Ms Ladele's "thoughtful and temperate letter" of 18 April 2006 as a freestanding act of "gross misconduct". The EAT said that there was no evidence that Mr Daniels had formed this indefensible view because of Ms Ladele's religious beliefs. As the EAT also pointed out, Mr Daniels's ultimate recommendation was that the charge against Ms Ladele should be that "she refused to do civil partnership work solely on the grounds of the sexual orientation of the customers".

34. Accordingly, the EAT decided that, in the light of the evidence, the argument that at least some of Ms Ladele's claims of direct discrimination should be remitted to the ET should be rejected. Having been taken to the contemporaneous written records, the witness statements, and some extracts of the transcripts of the evidence given to the ET, I consider that this assessment was correct.

35. It is true that, on a pedantically literal, unrealistic, or acontextual interpretation of one or two of the recorded remarks made to Ms Ladele during 2007, it could be argued that, at

least in some respects, she was being treated in the ways she complains of because of her religious beliefs. Thus, Mr Dingemans relies on a recorded statement by Ms Mendez-Child that she did not want a registrar "who does not wish to participate in civil partnership duties". It seems clear to me that this statement was directed not to Ms Ladele's belief with regard to civil partnerships, but to the manifestation of that belief, namely her refusal to conduct such partnership duties. Equally, the fact that Ms Mendez-Child said in evidence that she thought it wrong to "be accommodating people's religious beliefs in the Registry Service" is not supportive of the notion that she was motivated by Ms Ladele's religious beliefs: the accommodation of such beliefs is what Ms Mendez-Child was referring to, and, in this case, that would mean accepting Ms Ladele's refusal to conduct civil partnerships – i.e. accommodating her actions rather than her beliefs.

36. The notion that Islington, or any officers or employees responsible for the acts of alleged discrimination, were motivated by Ms Ladele's religious beliefs, rather than by her refusal to officiate at civil partnerships is inconsistent with the fact that Islington's concerns would undoubtedly have been put to rest if Ms Ladele had agreed to perform all her assigned civil partnership duties. As the EAT pointed out in paragraph 88 of Elias J's judgment, the evidence showed that "if she was willing to carry out the ceremony … then no further action would be taken against her". Indeed, Islington's proposed compromise, although temporary, further supports this conclusion. So too does the fact that no action was taken against one of the other registrars who held the same views but agreed to move to another post. (The third registrar who held such views has, as I understand it, retired).

37. Accordingly, the difficulty for Ms Ladele's argument that there should be a remission to the ET is that there was no evidence on which an Employment Tribunal, properly directed, could have concluded that Islington's reasons for causing or permitting all, or at least some of, the various matters summarised in (a) to (l) of paragraph 19 above were, or even included, Ms Ladele's religious belief. It is, I suppose, conceivable that, if the matter went back to the ET and further evidence was heard, fresh cross-examination of Islington's witnesses would be devoted to the question of whether Islington was motivated by Ms Ladele's religious beliefs. But that sort of Micawberism cannot possibly justify a remission, at least in the absence of special factors (such as the ET having stopped such a topic being raised) which do not exist here.

Conclusions on direct discrimination and harassment

38. Apart from the points already considered, Mr Dingemans contends that the EAT failed to deal appropriately with the argument that Ms Ladele could not have been required to carry out civil partnership duties as it was not part of her job description, and therefore outside the terms of her contract. Quite apart from sharing the EAT's doubts as to how that would assist her direct discrimination claim, I agree with what Elias J said in paragraph 86 of his judgment, namely that this was plainly not the reason why Ms Ladele refused to perform any civil partnership functions, as "is demonstrated by the fact that she sought to avoid [any] difficulties by changing rosters". As Ms Mountfield, who appears for Islington, points out, Ms Ladele (to her credit) was quite prepared to carry out, and indeed did carry out, various functions which were not within the ambit of her contract.

39. It is right to mention that the EAT also disagreed with the ET as to the correct comparator

to take in order to determine whether or not there had been direct discrimination against Ms Ladele. The ET considered that the two gay registrars, Mr Goncalves and Ms Kingsley, were good comparators, and that the greater weight and respect which Islington appeared to have accorded to their views and feelings than to those of Ms Ladele established that there had been direct discrimination against Ms Ladele. In paragraph 64 of the EAT's judgment, Elias J said that "[t]he proper hypothetical or statutory comparator here is another registrar who refused to conduct civil partnership work because of antipathy to the concept of same sex relationships but which antipathy was not connected [to] or based upon his or her religious belief". I agree with that view, although, in relation to one or two of the matters summarised in paragraph 19 above, there is an argument for saying that the ET adopted the correct comparators: for instance in relation to the breach of Ms Ladele's confidence. However, it is unnecessary to resolve any issue in that connection, in the light of the fact that there was, in any event, no basis upon which the ET could have made a finding of direct discrimination, as I have explained.

40. Elias J said in paragraph 67 of his judgment, that the ET found that Mr Lynch and Ms Mendez-Child were far more sympathetic to the views of Mr Goncalves and Ms Kingsley than to those of Ms Ladele. This finding appears to me to be not merely one which was open to the ET, but was pretty plainly right, and it gives rise to a measure of sympathy for Ms Ladele. However, as Elias J also said, "it is not possible to infer from that fact that the real reason they acted as they did was [Ms Ladele's] belief rather than her conduct". If (as seems likely) part of Islington's motivation in acting as they did was the complaints from the gay registrars, that does not support the contention that Islington was influenced by Ms Ladele's beliefs, as opposed to what she refused to do as a result of those beliefs. Indeed, it is noteworthy that, in their letter of 14 November 2006, Mr Goncalves and Ms Kingsley complained not of Ms Ladele's beliefs, but of her "refusal to do civil partnerships", and it was that refusal which they characterised as "an act of homophobia".

41. So far as the ET's findings of harassment are concerned, the reasons for the EAT setting aside those findings, and my grounds for upholding those reasons, are effectively the same as in relation to the ET's findings of direct discrimination. The ET failed to ask itself the right questions, in particular whether the grounds for the alleged harassment fell within regulation 5; had it done so, it could not have concluded that there had been any harassment of Ms Ladele within the meaning of that regulation.

42. Accordingly, I would refuse Ms Ladele's contention that any part of her case on direct discrimination or harassment be remitted to the ET.

Ms Ladele's claim of indirect discrimination

43. There is no doubt but that Islington's policy decisions to designate all their registrars civil partnership registrars, and then to require all registrars to perform civil partnerships put a person such as Ms Ladele, who believed that civil partnerships were contrary to the will of God, "at a disadvantage when compared with other persons", namely those who did not have that belief. Accordingly, ignoring (for the moment) the effect of the 2007 Regulations, the issue to be determined is whether Islington can show that these policy decisions represented "a proportionate means of achieving a legitimate aim" within

regulation 3(1) of the 2003 Regulations.

44. The first argument raised on behalf of Ms Ladele is that the ET correctly identified the aim by reference to which Islington sought to justify their treatment of Ms Ladele as being "to provide effective civil partnership arrangements", and that the ET was, to put it at its lowest, entitled to conclude that, while this was a legitimate aim, the treatment of Ms Ladele was not, in all the circumstances, a proportionate means of achieving the aim. If one starts with Ms Ladele's wish not to officiate at civil partnerships, and assumes that Islington's justification for not accommodating that wish was simply their desire to have an effective system for registering civil partnerships, then it is easy to see the force of this argument. Particularly as the other two registrars who shared Ms Ladele's views and wishes were no longer registrars by autumn 2006, it is pretty clear that, by accommodating the wishes of the only registrar who wanted to avoid civil partnership functions, Islington would not have significantly, if at all, impaired the quality of their registry services, whether in the field of civil partnerships or otherwise.

45. The problem with the ET's analysis is, as the EAT pointed out, that it wrongly identifies Islington's aim, as it overlooks the point that the service which Islington stated that they aimed to provide was not merely one which was effective in terms of practicality and efficiency, but was also one which complied with their overarching policy of being "an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others", to quote from Ms Mountfield's argument on behalf of Islington (and which very closely reflects Islington's written case in the ET). Mr Dingemans' response, namely that it was not open to the EAT to interfere with the ET's identification of Islington's aim, on the ground that it was a finding of fact, is, in my view, wrong. In paragraphs 86 and 87 of its decision, the ET does not appear to have rejected Islington's case as to their aim; what the ET did in those paragraphs was to mischaracterise Islington's aim by treating it as a purely practical one of delivering an efficient system. In any event, there would have been no basis for rejecting Islington's characterisation of their aim: it was supported by the Dignity for All policy, and the evidence, both in contemporaneous documentary form and orally before the ET, relating to Ms Ladele's complaints.

46. Islington wished to ensure that all their registrars were designated to conduct, and did conduct, civil partnerships as they regarded this as consistent with their strong commitment to fighting discrimination, both externally, for the benefit of the residents of the borough, and internally in the sense of relations with and between their employees. I find it very hard to see how this could be challenged, either as being Islington's actual aim, in the light of the evidence, or as being a legitimate aim, in the light of Islington's Dignity for All policy, current legislation and mainstream thinking.

47. If, contrary to his submissions, the EAT was (as I think) right in its identification of the actual aim of Islington and in holding that that aim was legitimate, then Mr Dingemans contends that the EAT was nonetheless wrong to overturn the ET's conclusion that Islington's requirement that Ms Ladele perform civil partnership functions, when she did not wish to do so for *bona fide* religious reasons, was a disproportionate means of achieving that aim. He relies on Pill LJ's statement in *Hardy & Hansons plc v Lax* [2005] ICR 1565, paragraph 31, that it is for "the tribunal … to make its own judgment, upon a

fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. … This is an appraisal requiring considerable skill and insight." Two paragraphs later, Pill LJ emphasised "the respect due to the conclusions of fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation".

48. I would respectfully endorse those observations, but, in my opinion, they have no application to the ET's decision in this case. Unfortunately, although very fully and carefully explained, that decision was not sound, because, in particular, as I have explained, it mischaracterised Islington's aim. It was therefore plainly open to the EAT to overrule the ET's decision on proportionality. In addition, as Ms Mountfield says, the ET's decision was open to attack because, in paragraph 81 of its judgment, when considering the issue of indirect discrimination, it asked itself an irrelevant question, namely whether the rights of those holding orthodox Christian beliefs should be afforded the same value as the rights of the LGBT community.

49. The EAT was therefore entitled, indeed effectively obliged, to address the issue of whether Islington's designation and requirement of Ms Ladele in relation to civil partnerships, and their treatment of Ms Ladele in the light of her refusal to officiate at such partnerships, was a proportionate means of achieving their legitimate aim which the EAT had correctly identified. On that issue, as the EAT said in paragraph 111 of Elias J's judgment, "[o]nce it is accepted that that the aim of providing the service on a non-discriminatory basis was legitimate – and in truth it was bound to be – then … it must follow that [Islington] were entitled to require all registrars to perform the full range of services." As the EAT went on to point out, permitting Ms Ladele to refuse to perform civil partnerships "would necessarily undermine the council's clear commitment to" what the EAT described as "their non-discriminatory objectives which [they] thought it important to espouse both to their staff and to the wider community".

50. Mr Dingemans says that this approach overlooked the requirement that Islington show that their treatment of Ms Ladele was a "proportionate means" of achieving the legitimate aim identified by the EAT, or at least wrongly conflated the legitimate aim issue with the proportionate means issue. In the passage which I have just quoted, the EAT said that, once one accepted that Islington's aim was as they claimed, then the only way in which they could have achieved that aim was by requiring all their registrars to conduct civil partnerships. It would have been no more acceptable for someone with Ms Ladele's views to refuse to perform civil partnerships than it would have been for a militant gay registrar to refuse to perform marriages between people who, for religious reasons, objected to homosexual relationships or civil partnerships.

51. Mr Dingemans argues that is not good enough, as, if Islington's aim was only achievable by disproportionate means, then it should not be justifiable, as "[t]o conclude otherwise would be to licence disproportionality" – per Maurice Kay LJ in *GMB v Allen* [2008] EWCA Civ 810, [2008] ICR 1407, paragraph 33. Accordingly, it is said, proportionality of means still ought to have been considered. In a case such as the present, it seems to me that argument might well be characterised as invoking the tail to wag the dog: the aim of the Dignity for All policy was of general, indeed overarching, policy significance to Islington, and it also had fundamental human rights, equality and diversity implications,

whereas the effect on Ms Ladele of implementing the policy did not impinge on her religious beliefs: she remained free to hold those beliefs, and free to worship as she wished.

52. However, even assuming that argument could be run here, it appears to me that the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.

53. So, in agreement with the EAT, I consider that there were no grounds to support the ET's conclusion that Islington was guilty of indirect discrimination under the 2003 Regulations against Ms Ladele.

The Strasbourg jurisprudence on article 9 of the Convention

54. It is, rightly, common ground that the issues raised on this appeal must be addressed in the light of article 9 of the Convention. Article 9(1) provides that everyone has "the right to freedom of thought, conscience and religion" and to manifest that religion, but article 9(2) states that the right to manifest religion or beliefs "shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society" for, inter alia, "the protection of the rights and freedoms of others". It is clear that the rights protected by the article are qualified, and that it is only beliefs which are "worthy of respect in a democratic society and are not incompatible with human dignity" which are protected – *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, paragraph 36. As Lord Hoffmann put it in *R(SB) v Governors of Denbigh High School* [2007] 1 AC 100, paragraph 50, "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing".

55. This appears to me to support the view that Ms Ladele's proper and genuine desire to have her religious views relating to marriage respected should not be permitted to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community. This assessment of the assistance to be obtained from article 9 in the present case is reinforced if one looks a little more closely at decisions of the Strasbourg court.

56. In *Pichon and Sajous v France* Application 49853/99 (2 October 2001), the Strasbourg Court pointed out that "the main sphere protected by Article 9 is that of personal

convictions and religious beliefs" although it "also protects acts that are closely linked to those matters such as acts of worship or devotion forming part of the practice of a religion or a belief". Accordingly, the article did not protect pharmacists who claimed that their "religious beliefs justified their refusal to sell contraceptives" as "the sale of contraceptives is legal and occurs nowhere other than in a pharmacy", and the pharmacists could "manifest [their] beliefs in many ways outside the professional sphere."

57. This seems consistent with *C v United Kingdom* App. No. 10358/83, 37 ECHR Dec & Rep 142, where the Commission declared inadmissible a claim by a Quaker that he should not be required to pay tax insofar as it was used to finance weapons research, on the grounds that it would infringe his article 9 rights. The Commission said at 147, that the article "primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*." Accordingly, as it went on to explain, article 9 "does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief".

58. Accordingly, in *Sahin v Turkey* (2007) 44 EHRR 5, the Grand Chamber held that there had been no violation of article 9, when a University refused admission to lectures or tutorials, and refused enrolment on courses, to students with beards or Islamic headscarves. In paragraph 108, the Grand Chamber said that the need "to maintain and promote the ideals and values of a democratic society", in that case "the principle of secularism" (paragraph 116), can properly lead to "restrict[ing] other rights and freedoms … set forth in the Convention" (in that case the wearing of beards and headscarves for religious reasons). In paragraph 105, the Grand Chamber endorsed the proposition that "Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account".

59. By contrast, decisions of the Strasbourg Court such as *Salguerio da Silva Mouta v Portugal* (2001) 31 EHRR 47 and *EB v France* (2008) 47 EHRR 21 emphasise that, to quote from paragraph 90 in the latter case, "[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8". It is not suggested that, by permitting Ms Ladele not to officiate at civil partnerships, Islington would have infringed anyone's rights under the Convention, but observations such as these demonstrate the importance which the Convention should be treated as ascribing to equality of treatment irrespective of sexual orientation.

60. Casting one's eyes beyond Europe, it is worth quoting what Sachs J, giving the judgment of the Constitutional Court of South Africa, said in *Christian Education South Africa v Minister of Education* (2000) Case CCT 4/00, paragraph 35:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic

> norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."

61. The conclusion reached by the South African Supreme Court in that case was that a ban on corporal punishment had to be complied with by Christians whose religious beliefs extended to believing in the right, indeed, in certain circumstances, the obligation of a teacher to chastise a child physically. This conclusion was, of course, consistent with the subsequent decision to much the same effect of the House of Lords in *R(Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

The effect of the 2007 Regulations

62. I now turn to what might be characterised as a potentially overriding argument, pressed by Ms Monaghan QC, on behalf of Liberty, and now supported by Ms Mountfield for Islington, namely that, following the 2007 Regulations coming into force, Islington had no alternative but to require Ms Ladele to perform civil partnership duties along with all the other registrars. The EAT declined to deal with the argument, on the grounds that it was unnecessary to do so. I fully understand that view, but, the point has been fully argued, as a result of which court time and costs have been devoted to it, and it may be an issue of some importance, so I consider that it is right to address it

63. The 2007 Regulations were made pursuant to the Equality Act 2006, and came into force on 30 April 2007. Regulation 3 is in these terms:

> (1) For the purposes of these Regulations, a person ("A") discriminates against another ("B") if, on grounds of the sexual orientation of B …., A treats B less favourably than he treats or would treat others (in cases where there are no material differences in the circumstances). ….
>
> (3) For the purposes of these Regulations, a person ("A") discriminates against another ("B") if A applies to B a provision, criterion or practice –
>
> (a) which he applies or would apply equally to persons not of B's sexual orientation,
>
> (b) which puts persons of B's sexual orientation at a disadvantage when compared to some or all others (where there are no material differences in the relevant circumstances),
>
> (c) which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there are no material

differences in the relevant circumstances), and

(d) which A cannot reasonably justify by reference to matters other than B's sexual orientation."

Thus, there are, in slightly different words, the familiar provisions for direct and indirect discrimination. Regulation 3(4) states that civil partnership is not materially different from marriage for these purposes.

64. Regulation 4(1) provides:

"It is unlawful for a person ("A") concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate …. –

(a) by refusing to provide B with goods, facilities or services….."

Regulation 4(3) provides that Regulation 4(1) "does not apply … in relation to the provision of … services by a person exercising a public function", but this must be read in the light of regulation 8.

65. Regulation 8(1) states that it is "unlawful for a public authority exercising a function to do any act which constitutes discrimination"; "public authority" is defined in regulation 8(2) as including "any person who has functions of a public nature…". Regulation 9(1) renders it unlawful for any person "to operate a practice which would be likely to result in unlawful discrimination …". Regulation 11(1) renders it unlawful for a person to instruct or cause, or attempt to cause, another to discriminate unlawfully.

66. Regulations 29 and 30 contain provisions relating to aiding and employers' liability for employees' acts which are similar (but not identical) to regulations 22 and 23 respectively of the 2003 Regulations.

67. Regulation 14 contains certain limited exceptions in relation to "organisations the purpose of which is" the practice, advancement, or the like, of "a religion or belief". In particular, by paragraphs (3) and (5), it states that the regulations which I have referred to do not apply to restrictions on the membership, on the activities undertaken by, or on the provision of goods facilities and services under the auspices of, such organisations, provided that the restrictions are necessary to comply with the organisation's doctrine, or to avoid conflict with the "strongly held religious convictions of a significant number of the religion's followers".

68. Liberty's argument is simple, and is based purely on the natural meaning of the 2007 Regulations, and it has three stages. The first stage is an assertion that a refusal to perform civil partnerships, on the part of someone who is quite prepared to perform marriages, amounts to discrimination as defined in Regulation 3(1) and (3), as the requirements of

paragraphs (3)(a) to (d) are satisfied, and it cannot be said, in the light of Regulation 3(4), that marriage and civil partnership are "materially different". The second stage involves the contention that officiating at marriages and civil partnerships involves "the provision to the public or a section of the public of … services" within paragraph 4(1), and, if that is not applicable in the light of regulation 4(3), then regulation 8(1) and (2) apply, as Islington and Ms Ladele are both "public authorit[ies]" "exercising a function". Further, if not otherwise liable for Ms Ladele's refusal to conduct civil partnerships, regulation 30 would seem to render Islington liable for any unlawfulness.

69. I find it hard to see any logical flaw in those two stages of the argument, at least once Ms Ladele had been designated a civil partnership registrar. The third, and final, stage in Liberty's argument is that, even if Ms Ladele had succeeded in establishing that Islington would not otherwise have been entitled to require her to perform civil partnerships, the effect of this analysis of the impact of the 2007 Regulations means that, at least once Ms Ladele was designated a civil partnership registrar, Islington were not merely entitled, but obliged, to require her to do so. This argument effectively involves saying that the prohibition of discrimination by the 2007 Regulations takes precedence over any right which a person would otherwise have by virtue of his or her religious belief or faith, to practice discrimination on the ground of sexual orientation.

70. Such an argument, in my view, accords with the natural meaning of the 2007 Regulations, and is supported by the provisions of Regulation 14, which identifies the relatively limited circumstances in which it is permissible to discriminate against anyone on grounds of sexual orientation because of one's religious belief: those circumstances are essentially limited to the membership and operation of "organisations relating to religion or belief", which plainly does not cover performing civil partnership unions, which is self-evidently a secular activity carried out in a public sphere under the auspices of a public, secular body.

71. Once it is decided that there is nothing in the 2003 Regulations which entitles Ms Ladele, having been designated a civil partnership registrar, to insist on her right not to have civil partnership duties assigned to her because of her religious beliefs in relation to marriage, it means that there is no inconsistency, so far as other legislation is concerned, in giving the subsequent 2007 Regulations their natural meaning, namely that it is simply unlawful for Ms Ladele to refuse to perform civil partnerships. It is also hard to resist the conclusion that this means that Islington had no alternative but to insist on her performing such duties together with their other registrars.

72. It would also appear to follow that it would be difficult for Islington, having designated her a civil partnership registrar, to justify the offer they made Ms Ladele, namely that she officiate only at civil partnerships which involve no ceremonies. The EAT said in paragraph 15 of Elias J's judgment that they "would be sorry if pragmatic ways of seeking to accommodate beliefs were impermissible" so that "choosing not to designate those with strong religious objections [as civil partnership registrars, as some local authorities do] would be a lawful way of reconciling conflicts in this highly sensitive area". As Elias J went on to say, "[f]undamental changes in social attitudes, particularly with regard to sexual orientation, are happening very fast and for some – and not only those with religious objections – they are genuinely perplexing. In that context, there seems … to be some virtue in taking a pragmatic line if it is lawful."

73. I see the force of that point. Nonetheless, it appears to me that, however much sympathy one may have with someone such as Ms Ladele, who is faced with choosing between giving up a post she plainly appreciates or officiating at events which she considers to be contrary to her religious beliefs, the legislature has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions.

74. It is right to add that this conclusion may well not have applied if Islington had not designated Ms Ladele (along with all the other registrars) a civil partnership registrar. If they had not so designated her, it seems to me that there would have been a powerful case for saying that she would then have had no cause to refuse to officiate at civil partnerships, and accordingly no problem of discrimination under the 2007 Regulations could arise. Accordingly, I doubt whether a decision by Islington that she would not be designated a civil partnership registrar, at her request because of her religious problems with officiating at civil partnerships, would fall foul of the 2007 Regulations.

75. However, the fact that some registration authorities have (as I understand to be the case) decided not to designate registrars who shared Ms Ladele's beliefs as civil partnership registrars, and the fact that such decisions may well be lawful certainly do not undermine the conclusions reached by the EAT (with which I agree) that Ms Ladele was neither directly nor indirectly discriminated against, nor harassed, contrary to the 2003 Regulations, whether by being designated a civil partnership registrar, by being required to officiate at civil partnerships, or by any other aspect of her treatment by Islington (albeit that it is only right to record that many people may feel sympathy for the position in which she finds herself, and that, in some respects – most notably the unjustifiable characterisation of her letter of 18 April 2006 as "gross misconduct" and the unwarranted breach of her confidence in Mr Lynch's letter of 15 November 2006 – Islington did not treat her fairly).

Conclusion

76. Accordingly, for my part, I would dismiss this appeal.

Lord Justice Dyson:

77. I agree.

Lady Justice Smith:

78. I also agree.