

## Group Briefing

### April 2019

# What your employer knows may hurt you: less favourable treatment by an employer, on the basis of employer's religious belief, does not establish direct discrimination

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

In *Gan Menachem Hendon Limited v De Groen*, the UK Employment Appeals Tribunal (the “EAT”) concluded that the dismissal of a nursery employee following the disclosure that she was living with her boyfriend did not constitute discrimination on the grounds of religion or belief.

### BACKGROUND

The employee was employed for four years by a Jewish nursery affiliated to the ultra-orthodox Chabad movement. At a work-related social event, it became known that the employee was cohabiting with her boyfriend. She was subsequently called to a meeting with the nursery's head teacher and managing director, where she was informed that, although her private life was of no concern to them, there was a risk that parents would disapprove, which could have a knock-on effect on the nursery's reputation and enrolment numbers. An internal investigation concluded that, by continuing to cohabit with her boyfriend and refusing to accede to the nursery's request that she allow the nursery to inform parents, if asked, that she was no longer doing so, the employee had (i) contravened the nursery's culture, ethos and religious outlook; (ii) damaged the nursery's reputation; and (iii) put the nursery at risk of financial loss.

### AT FIRST INSTANCE

An Employment Tribunal (the

“Tribunal”) found in the employee's favour on all of her claims, namely that she had been:

1. directly discriminated against on the basis of (i) her sex; and (ii) her religious belief;
2. indirectly discriminated against on the basis of her religious belief; and
3. unlawfully harassed on the basis of her sex.

Section 16(2) of the UK Equality Act 2010 (the “Act”) provides that a person (“A”) discriminates against another (“B”) if A applies to B a provision, criterion or practice (a “PCP”) which is discriminatory in relation to a relevant protected characteristic of B's. The Tribunal found that the employee had been dismissed because she lived with her boyfriend, contrary to the nursery's religious beliefs, and that the nursery had applied a PCP by requiring her to make a dishonest statement about her private life in order to remain in employment.

## ON APPEAL

The EAT allowed the nursery's appeal against the finding of direct discrimination on the basis of the employee's religious belief (Claim 1(ii) above). It held that the Tribunal had erred in concluding that the Act, which includes religion or belief as a protected characteristic, extends to the religion or belief of the alleged discriminator. The EAT stated that it was clear from the recent Supreme Court decision in *Lee v Ashers Baking Company Limited* that such a claim is not possible under the Act.

The EAT referred to the judgment in the *Ashers* case, emphasising that the purpose of discrimination law is to protect those with a protected characteristic from less favourable treatment as a result of that characteristic. Any direct discrimination claim based on an alleged discriminator's protected characteristic is unfounded, since an alleged discriminator acting on his/her own principles would act in the same way regardless of the identity of the affected party. It should be noted that the decision in *Ashers* was handed down after the Tribunal's (but before the EAT's) decision in this case.

The EAT also allowed the nursery's appeal against the finding of indirect discrimination (Claim 2 above). The EAT held that the Tribunal had failed to consider whether the nursery's

treatment of the employee actually amounted to a PCP. The EAT concluded that the 'PCP' in question (requiring the employee to lie in order to remain in employment) was actually no more than an ad hoc measure. As such, in the absence of a PCP, the claim of indirect discrimination could not succeed.

The nursery's appeals in respect of the finding of direct discrimination on grounds of sex and harassment (Claim 1(i) and Claim 3 above) were unsuccessful.

In rejecting the appeal against Claim 1(i), the EAT referred to Section 13(1) of the Act, emphasising that "a person (A) discriminates against another (B) if, **because of a protected characteristic**, A treats B less favourably than A treats, or would treat, others." The EAT concluded that the 'because of' question posed by section 13(1) required the Tribunal to ascertain whether the employee's sex was a 'significant influence' in the context of the discrimination, bearing in mind that, in that context, 'significant' means anything more than trivial. The EAT was satisfied that the employee's sex was a 'significant influence' for the purposes of this section because, as the Tribunal had noted, the nursery's head teacher and managing director's intentions in advance of the meeting included discussion of "possible marriage and possible pregnancy and child bearing in general terms." In relation to

Claim 3, the EAT held that the Tribunal had been entitled to conclude that the matters were "related to" the employee's sex and that they were sufficient to amount to harassment.

Those claims were remitted to the Tribunal for determination of the appropriate remedy.

## THE IRISH POSITION

The Employment Equality Acts 1998-2015 (the "Equality Acts") defines discrimination as treating a person in a less favourable way than another person on the basis of any one of nine protected characteristics. As with the corresponding UK legislation, in cases of direct discrimination, the Equality Acts require a comparison to be made between the alleged victim and another individual.

## CONCLUSION

Following the Supreme Court's decision in the highly publicised *Lee v Ashers Baking Company Limited* (our update on that case is available [here](#)), this case again considers the scope of discrimination law in the UK. The EAT emphasised that it is an employee's protected characteristic, not the employer's, that is relevant in assessing whether an employee has been discriminated against.

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