SUNDAY WORKING AND HUMAN RIGHTS: A CRITIQUE OF *COPSEY v WWB DEVON CLAYS LTD*

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In the recent case of *Copsey v WWB Devon Clays Ltd,*[1] the Court of Appeal considered the impact which Article 9 of the European Convention on Human Rights had on an unfair dismissal claim brought by an employee against his employer. The claimant, a Christian, was dismissed by his employer for refusing to change to a 7-day shift pattern which might sometimes have required him to work on a Sunday. The claimant brought an unfair dismissal claim in the employment tribunal, but was unsuccessful. The tribunal held that the claimant's dismissal was 'not in any way connected with his religious beliefs', but was for some other substantial reason—namely the refusal to accept a change in shift pattern. The Employment Appeal Tribunal upheld the decision of the tribunal, and was appealed to the Court of Appeal.

FINDINGS

The Court of Appeal first considered whether the circumstances of Mr Copsey's dismissal fell within the ambit of Article 9. If there was no material interference with the right guaranteed by Article 9, the Article would not be engaged, and its impact on the dismissal would not need to be considered further. Mummery LJ felt that, in the absence of authority, the link between Mr Copsey's dismissal and his wish to manifest his religious belief was sufficiently material to bring the circumstances of the dismissal within the ambit of Article 9. However, he also felt obliged to take a series of European Commission rulings into account; the cases of *Ahmad*, *Kottinen* and *Stedman*[2] had established the principle that the Article 9 right of a citizen in an employment relationship to manifest his belief is not engaged when the employer requires an employee to work hours which interfere with the manifestation of his religion (or dismisses him for not working or agreeing to work those hours).

Essentially, if an employer's working practices and an employee's religious beliefs are incompatible, the employee remained free to resign and seek work elsewehere. An employee was thus not entitled to complain that

[1] *Copsey v WWB Devon Clays Ltd*, July 2005, CA, 2005 EWCA Civ 932.
[2] *Ahmad v United Kingdom* (1981) 4 EHRR 128; *Kottinen v Finland* (App. No. 249/49/94, 3 December 1996); *Stedman v United Kingdom* (1997) 23 EHRR CD168.

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there has been a material interference with his Article 9 rights. Mummery LJ understood the Commission's position on Article 9 to be that, so far as working hours are concerned, an employer is entitled to keep the workplace secular. Mr Copsey's appeal therefore failed.

Rix LJ reached the same conclusion but on different grounds. He was reluctant to follow Mummery LJ's analysis that the Commission decisions referred to represented a body of law which meant that an employee such as Mr Copsey could not raise a case of interference in his rights protected by Article 9. It was only the *Stedman* case which had applied this doctrine, and by itself, this did not represent the 'clear and constant jurisprudence' that obliged the United Kingdom courts to follow.

Rix LJ stated that where an employer seeks to change the working hours and terms of his contract of employment with his employee in such a way as to interfere materially with the employee's right to manifest his religion, then Article 9(1) of the Convention was potentially engaged. However, if the employer were able to find reasonable accommodation with the employee, there will be no material interference. Moreover, if a reasonable solution was offered to the employee, but not accepted by him, then it remained possible to say that there was no interference. Most importantly, Rix LJ felt that a balance should be struck between the rights of the employer and the rights of fellow-employees. In the present case, the tribunal had found that the employer had done everything possible to accommodate Mr Copsey's needs, and had therefore not unfairly dismissed him.

In similar tones, Neuberger LJ found that a balance should be struck between the interests of the parties. This was part of the statutory test for unfair dismissal under the Employment Rights Act 1996 in any event, and it was not considered that an Article 9 argument took the matter any further. Whilst not believing that it was necessary to decide whether or not to follow the authorities which Mummery and Rix LJJ had analysed, Neuberger LJ found the decisions of the European Commission on this topic 'arguably surprising and the reasoning hard to follow'. Clearly in a doubtful mind over the European jurisprudence in this area, he went on to state that the Commission's reasoning may well turn out to be incorrect.

ANALYSIS

This is a complex issue, decided against the backdrop of Convention cases which the Court of Appeal found difficult to evaluate or agree with. Interestingly, Mr Copsey's dismissal took place before the Employment Equality (Religion or Belief) Regulations 2003[3] came into effect.[4] Pursuant to those regulations, it has been postulated that it will be open for a Christian employee dismissed for rejecting Sunday working to claim that

[3] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660.
[4] They came into force on 2 December 2003.

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he has been indirectly discriminated against.[5] The employer's requirement that the employee work on Sundays would potentially place Christians at a particular disadvantage when compared with other persons. However, it would still be open to an employer to justify the Sunday working requirement by showing that it was 'a proportionate means of achieving a legitimate aim'. More case law is sure to follow.

RE-ORDERING: CULTURAL CLASHES OR MOMENTS OF REVELATION?

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An address to the Architects' Study Day convened by Chichester Diocesan Advisory Committee at Lancing College, Sussex, on 19 July 2005

Anyone who has travelled in the Holy Land cannot fail to have encountered the work of Antonio Barluzzi. He was responsible for the design of the vast majority of the structures on the holy sites during the early part of the last century. He was an Italian, therefore well placed to liaise with the Roman Catholic authorities and in particular the Franciscan Order who had been appointed guardians of the holy places, and his work proliferated across Jordan and the emerging State of Israel. Barluzzi's work always attempted to interpret the event commemorated by taking some of the biblical description, some cultural norm of the time, and bringing these into the present, thus involving the visitor not only in contemporary space but also in an ongoing translation both of the biblical text and of the event that text recorded. It would appear that he did all this with such success that he was retained to build sacred space on each new site as it was developed.

Barluzzi's work is to be found at the Shepherd's Fields on the edge of Bethlehem, on the slopes of the Mount of Olives overlooking the city of Jerusalem, in Bethany and on seven or eight other major pilgrim sites. For something approaching two decades his approach found favour with those creating the pilgrimage experience. It is difficult therefore to imagine how he must have felt when his supplied design for the Basilica in Nazareth was rejected in favour of a style which one might describe as being rather more postmodern. By that I mean rather than illicit a smooth translation of biblical event into contemporary experience; the Nazareth church is

[5] IDS Employment Law Brief 789, September 2005.

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