



LEE V ASHERS BAKING CO LTD AND OTHERS [2018] UKSC 49 SC

Is this case the highpoint of “*the reason why*” approach to all discrimination claims? Probably.

In 2014 a baker decides “I’m not putting this message [support gay marriage] on a cake because I don’t agree with it”. It’s the message not the messenger that causes the refusal to provide the cake, which amounts to a potential failure to supply services for the purposes of discrimination law.

The Supreme Court in its judgment drives a wedge between the message and the person wanting the cake or those he associates with. Once that gap is established, then discrimination claims will fail. The Supreme Court rehearse the facts that the baker didn’t know the Claimant was gay or associated with the gay community and therefore the baker’s decision not to supply the cake with the message on it could never be caused by his sexual orientation or that of others.

The District Judge had made her decision that there had been sexual orientation discrimination (outcome) but without a finding that the reason for the refusal (the reason why), was the Claimant’s sexual orientation or those with whom he associated. A classic escape clause for an appeal court to overturn a decision that they don’t like – blame it on the little guy.

You also get the impression that the Supreme Court thought the case a bridge too far when Lady Hale says at paragraph 35:

“It is deeply humiliating and an affront to human dignity to deny someone a service because of that person’s race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope”.

Slightly earlier she had said:

“In a nutshell, the objection [by the baker] was to the message and not to any particular person or persons.

Thus, the central enquiry is why the thing is done and the baker’s answer; it was the message, stupid.

That’s the sexual orientation claim sorted.



The message was clearly an expression of the Claimant's political opinion, the other ground for his claim, so why did that fail? Fundamentally, the baker's rights under Article 9 and 10 of the ECHR (freedom of religion and expression etc) and the section 3(1) obligation under the Human Rights Act 1998 (to read legislation to comply with those human rights) was the battleground. At paragraph 56 Lady Hale said:

"FETO [The Northern Ireland Legislation outlawing political belief discrimination] should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so."

This is the balancing of rights that should have exercised the Equality Commission for Northern Ireland when deciding to support the Claimant (see paragraph 14 of the Supreme Court judgment).

I am still a little troubled with the decision as it relates to service providers not doing what they are asked, when what they are being asked to do is in support of something that is not of itself illegal. My instinct is that once you enter the public, commercial space you should park your religious or political beliefs. Imagine for a moment Waitrose refusing to display a cake with this particular piece of icing out of a desire not to offend its customers.

For most of us the key point from this case has to be establishing what the root cause is for the action complained of and making sure that, as far as possible, it is distant from the Claimant or those that he associates with (if acting for a respondent). In the alternative, trying to bring together the reason for the action and the person making the complaint or those he associates with. The closer the association, the greater chance of success for a claim, the further the distance, the more likely it is that the claim will fail.

For those still troubled by this decision it could be worse; we could have public politicised nomination hearings for the Supreme Court.

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