

Appeal No. UKEAT/0037/06/MT

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 17 January 2007

Before

THE HONOURABLE LADY SMITH

MRS A HIBBERD

MR M SIBBALD

GLASGOW CITY COUNCIL

APPELLANTS (RESPONDENTS)

MR D McNAB

RESPONDENT (CLAIMANT)

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants (Respondents)	Mr I Truscott QC Instructed by: Glasgow City Council City Chambers George Square Glasgow G2 1DU
For the Respondent (Claimant)	Mr B Napier QC Instructed by: Messrs Anderson Partnership 125 West Regent Street Glasgow G2 2SA

SUMMARY

An atheist teacher working in a Roman Catholic school applied for the post of Acting

Principal Teacher of Pastoral Care. He was not even considered for an interview as he was not of the Roman Catholic faith and the local education authority which maintained the school thought that the Roman Catholic Church would have regarded being of their faith as a pre-requisite for the post. The Employment Tribunal found that he had been discriminated against on religious grounds in terms of the Employment and Equality (Religion or Belief) Regulations 2003 since none of the exceptions provided for under regulations 7(2) and (3) of those regulations applied. The Employment Appeal Tribunal upheld that finding and the award of £2,000 that had been made. Consideration given to the effect and implications of s.21(2)(A) of the Education (Scotland) Act 1980 and an agreement that had been entered into between the respondent education authority and the Roman Catholic Church, purportedly under reference to those provisions, in 1991.

THE HONOURABLE LADY SMITH

Introduction

1. This appeal concerns a finding that the claimant, an atheist teacher working in a Roman Catholic school, had been unlawfully discriminated against by the appellants, to whom we will refer as respondents, on religious grounds. He was found entitled to compensation of £2,000.

2. The Tribunal also found that the claimant had been discriminated against contrary to Article 14 of the European Convention on Human Rights by interfering with his right to freedom of religion or belief, guaranteed under Article 9 of that convention but parties are agreed that it did not have jurisdiction to make such a finding and we are satisfied that we ought to set that finding aside. We do so noting, however, that the claimant's position was that Articles 9 and 14 of the European Convention on Human Rights were relevant in respect that the tribunal were bound, given the terms of s.3 of the Human Rights Act, to interpret the regulations to which we will refer in a convention compliant manner if it was possible for them to do so. That was a submission with which the respondents did not take issue.

Background Facts

3. The respondents, in accordance with certain statutory requirements, maintain Roman Catholic schools in their area. Such schools will have been transferred to them under the provisions of s.16(1) of the Education (Scotland) Act 1980 ("the 1980 Act") or its predecessor statutory provisions which date back to 1872. Once a school has been so transferred, an education authority such as the respondents is bound to hold, maintain and manage it: see s.21(1) of the 1980 Act for the current statutory provision to that effect. One such school is St Paul's Roman Catholic High School. Section 21 of the 1980 Act also provides that the education authority shall have the sole power of regulating the curriculum and of appointing teachers but the latter is subject to the proviso that the

appointment of teachers to a post in any such school must be approved by the Roman

Catholic Church (“the Church”). Section 21(2)(A) of the 1980 Act provides:

“A teacher appointed to any post on the staff of any such school by the education authority shall satisfy the Secretary of State as to qualification, and shall be required to be approved as regards his religious belief and character by representatives of the church or denominational body in whose interest the school has been conducted.”

By the time of that enactment, there was a shortage of Roman Catholic teachers in Scotland and the Roman Catholic schools would have struggled to survive had their staff not included nonRoman Catholics. The Church regarded certain posts as what the Tribunal refers to as “sensitive” though and discussions took place between Mr Keir Bloomer, representing the respondents’ predecessors, and the Church, regarding such posts. Those discussions took place in the light of and under reference to the statutory provisions to which we have referred. The outcome of those discussions was that Mr Bloomer wrote to the Church by letter dated 6 November 1991 to record what had been discussed and agreed between them in terms which included the following:

“Teachers who do not profess to be Roman Catholics may be appointed to any posts in an RC school except that of head teacher, principal or assistant principal teacher of guidance or religious education, principal teacher of biology, teacher of religious education or senior teacher in a primary school. Except in the case of those posts listed in the previous sentence, nonCatholic candidates (who are automatically deemed to have been approved by the Church) and approved Catholic candidates will be considered on their individual merits.”

It is thus evident that in 1991, the Church indicated that the respondents’ predecessors could take it that they had the relevant statutory Church approval for the appointment of a teacher to any post other than to those posts specifically listed as recorded by Mr Bloomer without expressly requesting it. In respect of the posts specifically listed, they would require to have specific approval. The part of that letter which we have quoted was referred to by the tribunal as “the 1991 agreement” and we propose to do the same.

4. What followed thereafter was the operation of a system under which, where vacancies for teaching posts were advertised by the respondents an indication was given in the advertisement of whether or not Church approval was required. Such an indication was given if the post in question was one on the list in the 1991 agreement. Then, a teacher who wished to apply for the post would make a separate application to the Church for the relevant approval unless he or she had already been issued with such approval in which case the existing approval number would be quoted on the job application form. If, however, the vacancy was for a post which was not specified on the list in the 1991 agreement and the applicant was not a Roman Catholic, all that he required to do was to tick a box on the form indicating that although he was not a Roman Catholic, he was prepared to be bound by the ethos of such a school. It seems though, perhaps curiously, that the way matters worked was that if the teacher was a Roman Catholic, Church approval would still be applied for or an existing approval reference number given, even if the post was not advertised as one which required such approval. That is what, in any event, emerges from an examination of the application documents that were both before the tribunal and before us (R19/4). Nothing, however, would seem to turn on that for the purposes of the present appeal.

5. In the 1990's, Personal and Social Education ("PSE") began to be taught in schools including St Paul's. Topics covered were work experience, drugs including alcohol and risk taking, career, study skills, racism, bullying, learning to learn, health, rights and

responsibilities, equal opportunities, homework, sexual health (delivered by an outside agency), vandalism, road, rail and water safety, sexual equality, citizenship, illegal substances, taking risks, decisions, dealing with conflict and study without tears. It could be taught by any teacher, whether or not they were themselves Roman Catholic.

6. PSE was formerly part of “Guidance” teaching. Following a review of guidance (discussed in a policy document of the respondents which was before the Tribunal entitled “Future of Guidance/Pastoral Care”) a new approach was proposed with guidance staff moving into “pastoral care” posts. The subject title was to be “Pastoral Care” and it was to have five main elements: personal support, curricular support, vocational support, PSE, and development of a positive school ethos. PSE was not taught by guidance staff nor by pastoral care staff.

7. Each pupil at St Paul’s has a designated pastoral care teacher. Any advice given to the pupil is in accordance with the teachings of the Church whether or not the pupil is a Roman Catholic. Separately, each pupil receives two periods of religious education each week. Further, and significantly, at St Paul’s not only were the elements set out in the respondents’ policy document comprised within pastoral care but, in addition, it covered what was referred to as learning or pupil support, something which had been a separate department from guidance under the school’s previous structure (tribunal judgment: paragraphs 40 and 41).

8. Regarding the position of the Church in respect of teachers of pastoral care, the

Tribunal made the following important findings and comments, at paragraph 101:

“We are satisfied from the evidence that what had been the responsibility of guidance teachers was now part of the responsibilities undertaken by pastoral care teachers. There were, however, significant differences. Neither Mr Gardner nor Mr O’Donnell gave evidence that the Roman Catholic Church had determined that pastoral care teachers held reserved posts in terms of the 1991 agreement although we are in no doubt that they believed that would have been the position of the Roman Catholic Church. However, it was the Roman Catholic Church which in 1991 determined which posts were reserved posts and accordingly the respondents have to establish that the position of the Roman Catholic Church is that a pastoral care post in St Paul’s was a reserved post but have failed to lead evidence to that effect.”

9. The claimant, who was aged 53 at the time of the relevant events, had been employed there since 1990, initially to teach computing but since 2000, to teach mathematics. He had taught PSE prior to the 2004/5 session but had refused to do so because for that session because of other heavy timetable commitments. He is an atheist.

10. On 10 September 2004, the claimant found, in his pigeon hole at school, and advertisement for a temporary post of Acting Principal Teacher of Pastoral Care. He applied for the post. He knew that the respondents believed that such a post was reserved for Roman Catholic teachers but he applied so as to test the legislation, something which, rightly, the Tribunal found that he was quite entitled to do.

11. The claimant was not successful in his application. He was not even afforded an interview for the post. Had he been a Roman Catholic, he would have been given an interview. If he had then been unsuccessful, he would have received feedback which would have been of assistance to him in any subsequent job applications.

Relevant Statutory Provisions

12. We have already made reference to certain provisions of the Education (Scotland) Acts. The claimant's claim was based on the provisions of the Employment Equality (Religion or Belief) Regulations 2003 ("the 2003 regulations"), the provisions of which include:

Regulation 3:

- "(1) For the Purposes 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 equally to persons not of the same religion or belief as B, but –
 - (i) which puts or would put persons of the same religion or belief as 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.
- (2) The reference in paragraph (1)(a) to religion or belief does not include A's religion or belief.
- (3) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

Regulation 6(2)(b):

"It is unlawful for an employer ... to discriminate against a person [whom he employs] in the opportunities which he affords him for promotion, transfer, training or receiving any other benefit."

Regulation 7:

- "(1) In relation to discrimination falling within Regulation 3 (discrimination on grounds of religion or belief) –
- (a) Regulation 6(1)(a) or (c) does not apply to any employment;
 - (b) Regulation 6(2)(b) or (c) does not apply to promotion or transfer to, or training for, any employment; and

- (c) Regulation 6(2)(d) does not apply to dismissal from any employment, where paragraph (2) or (3) applies.
- (2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out -
- (a) being of a particular religion or belief is a genuine and determining occupational requirement;
 - (b) it is proportionate to apply that requirement in the particular case;
 - (c) either –
 - (i) the person to whom that requirement is applied does not meet it, or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,
- and this paragraph applies whether or not the employer has an ethos based on religion or belief.
- (3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -
- (a) being of a particular religion or belief is a genuine occupational requirement for the job;
 - (b) it is proportionate to apply that requirement in the particular case; and
 - (c) either –
 - (i) the person to whom that requirement is applied does not meet it, or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.”

Regulation 39(1)(b):

“These Regulations are without prejudice to Section 21 of the Education (Scotland) Act 1980 (management of denominational schools).”

The Tribunal's Judgment

13. The respondents accepted that they had discriminated against the claimant in terms of regulations 6 and 3 of the 2003 regulations but sought to establish that being a Roman Catholic was a genuine occupational requirement of the post of Acting Principal Teacher of Pastoral Care. The Tribunal found that the respondents had discriminated against the claimant in not offering him an interview although it was not probable that he would have been appointed to the post of Acting Head of Pastoral Care. They awarded him £2,000 on the basis that that sum afforded appropriate recognition to the discrimination which had occurred.

14. As to how the Tribunal reached the view that the respondents had discriminated in breach of the regulations, at the heart of their determination is the finding that they made at paragraph 101, which we have quoted above. They also observed under reference to the factual findings that they had made that there were a number of possible explanations, given the nature of the subject and the way in which it was delivered, for the Church having decided that they did not require to regard pastoral care as a reserved post and, in particular, did not require all pastoral care teachers to be Roman Catholics. However, the fundamentally important finding was that the respondents did not establish that pastoral care posts were reserved posts under the 1991 agreement.

15. In the earlier part of their judgment, as we have noted, the Tribunal made findings regarding what, at St Paul's, was comprised within pastoral care from which it was plain

that they had found that its boundaries extended beyond what had formerly been known as guidance.

16. The respondents' response to the claimant's claim of discrimination was to the effect that, in refusing him an interview, they were obtempering the provisions of s.21(2A) of the 1980 Act: it fettered their power of appointment because of the requirement that any teacher appointed to a post in any denominational school required to be approved as to his religious belief and character by the representatives of the Church or body in whose interests the school was conducted and the claimant did not have the requisite approval. That showed, so the argument seemed to go, that in this case, their discrimination was due to a genuine occupational requirement. It was inherent in their approach that their position was that the claimant did not have the requisite Church approval.

17. In these circumstances, it is not surprising that the tribunal gave consideration to the part played, if any, by the s.21(2A) requirements. They noted that its effect was that it applied to teachers being appointed to any posts in a Roman Catholic school. They noted that the relevant Church approval required to be of both religious belief and character but that the religious belief in question did not, in terms of the statute, require to be Roman Catholic. They noted the absence of any statutory basis for an agreement of the sort that was recorded in Mr Bloomer's letter.

18. The respondents' position also being that the fettering of their power of

appointment contained in s.21(2)(A) flowed from the 1991 agreement, the tribunal gave consideration to its terms and effect. They did so in the context of considering whether or not being a Roman Catholic was a genuine occupational requirement for the post for which the claimant had applied. At paragraph 108, they state:

“The respondents’ requirements were based on the 1991 agreement (Production R19). There is no issue about the genuineness of that agreement. The agreement does exist. We do not suggest it was an agreement created on any whim by the employer. The agreement was between Strathclyde Regional Council and the Roman Catholic Church following discussions which resulted in the reservation of certain posts in Roman Catholic schools for Roman Catholics. It was an agreement reached which purported to give effect to the terms of legislation, namely Section 21(2)(a) of the 1980 Act. The terms of that legislation did not permit such an agreement. We conclude that as there was no basis for such an agreement the agreement itself was not genuine.”

19. So, shortly put, since the 1991 agreement could not be viewed as the implementation of any statutory requirement, the respondents could not establish “genuine occupational requirement” under reference to it, by reason of any statutory compulsion.

20. The tribunal then asked themselves whether, statutory requirements apart, the respondents had established a genuine occupational requirement. They found that it had not. At paragraphs 114 to 116, they state:

“114. The ‘nature’ of the job of Pastoral Care Teacher does clearly not require the holder of the position to be a Roman Catholic as the nature of the position as a teacher of pastoral care can be held by a person who is not a Roman Catholic in a non-denominational school.

115. St Paul’s is a school run in the interest of the Roman Catholic Church. Advice given to pupils both Roman Catholic and non Roman Catholic would be in accordance with the teaching or doctrine of the Roman Catholic Church.

116. The five objectives of pastoral care are given in Production R14/7 although in St Paul’s there was the additional objective of pupil or learning support. Some elements of personal support and development of a positive school ethos may require input from a teacher familiar with the teaching or doctrine of the Roman Catholic Church but we do not regard this is necessary in relation to support on the school curriculum or in relation to vocational support. In PSE outside agencies were used. Therefore, within the responsibilities of a teacher of pastoral care advice would be given on a large number of issues and it may be that only in a small number of matters (which we shall call ‘sensitive matters’) that the teaching or doctrine of the Roman Catholic Church would be relevant. In a Roman Catholic school where advice on sensitive matters was concerned then a pastoral care teacher who was not familiar with the teaching or doctrine of the Roman Catholic Church could arrange for the advice to be given by a teacher who was

familiar with the teaching or doctrine of the Roman Catholic Church. The nature of the job or the context in which the work of a pastoral care teacher is carried out is not in our view a genuine occupational requirement in terms of Regulation 7(2) of the 2003 Regulations.”

21. The Tribunal dealt separately with an argument advanced by the respondents to the effect that the case fell within the provisions of regulation 7(3) of the 2003 Regulations because they had an ethos based on religion or belief. They rejected that submission firstly, because they were not satisfied that it was open to the respondents, a local authority, to pray it in aid and secondly, because it was not a determining occupational requirement. We note that in that respect that the tribunal applied the wrong statutory wording; they used the language of regulation 7(2) rather than the language of regulation 7(3).

22. The tribunal also considered the question of proportionality that arises under the regulations. They found that it was not proportionate to require that a pastoral care teacher at St Paul’s be a Roman Catholic.

23. As we have indicated, the tribunal also considered articles 9 and 14 of the European Convention on Human Rights and made a finding that the discrimination which he suffered was contrary to those rights.

Respondents’ Submissions on Appeal

24. By way of introduction, Mr Truscott indicated that the claimant was not interviewed for the post he applied for because he did not have Church approval and he referred to the

1991 agreement as being the way in which the respondents had “obtempered” the provisions of s.21(2)(A).

25. Mr Truscott accepted that there had been no evidence placed before the tribunal from the Church to the effect that they viewed pastoral care as being in the same category as guidance. One would, however, he said, expect approval to be required because of the similarities between the two. At times Mr Truscott referred to guidance having “become” pastoral care but at others he accepted that pastoral care was a development from guidance.

26. We should also record that a general concern that went beyond the specific facts of this case was expressed on behalf of the respondents by Mr Truscott. They were required, they accepted, to act proportionately in any conduct which involved religious discrimination (such discrimination could arise where it was a genuine occupational requirement). They could find themselves discriminating against a teacher on religious grounds because the Church did not give approval under s.21(2)(A) of the 1980 Act. However, what if that approval was unreasonably withheld? The respondents could not, given the terms of s. 21(2)(A) appoint a teacher without Church approval, so they would be able to show that the discrimination was due to a genuine occupational requirement, but if the withholding of approval was unreasonable, it was hardly likely to be regarded as proportionate. They did not regard regulation 39(1)(b) of the 2003 regulations as providing sufficiently clear reassurance that they would not find themselves in difficulty, facing a finding of unlawful discrimination in circumstances where there was nothing that they could have done about it.

Grounds of Appeal 1 and 4

27. In the first ground the respondents challenged the jurisdiction of the tribunal to make the human rights determination that it made, a challenge which was conceded. Mr Truscott explained that the ground was indicative of the concern that the respondents had with the overall reasoning of the tribunal. It was disappointing that they had wrongly thought that they were being asked to make such a determination, which they were not. In the fourth ground the respondents refer to the tribunal having failed to refer to the post for which the claimant applied as a “Principal” teacher’s post. In similar vein that was indicative of misunderstanding on their part. It would, Mr Truscott said, have been “nice” if they had referred to the post as being a “Principal” teacher’s one.

Ground of Appeal 2

28. In this ground the respondents assert that the tribunal erred in law when it “purported” to construe section 21(2)(A). They had no jurisdiction to determine any question as to whether or not its requirements had been complied with. Although they had not made any order regarding that issue, they had taken all steps short of doing so. He submitted that this was a fundamental ground because the tribunal had, in effect, treated St Paul’s as though it was a nondenominational school (a theme to which he returned on a number of occasions during his submissions).

Ground of Appeal 3

29. In this ground the respondents refer to paragraph 108 of the tribunal's judgment and Mr Truscott submitted that in stating that "there was no issue about the genuineness of the agreement" and "the agreement itself was not genuine", the tribunal had erred as doing so constituted simultaneous approbation and reprobation. The 1991 agreement fell to be weighed in the balance, not put to one side.

Ground of Appeal 7

30. Mr Truscott turned next to this ground which was to the effect that the tribunal had made contradictory findings regarding what was comprised in pastoral care. He referred to paragraph 101 and then to paragraphs 35 and 36, which stated:

"35. The respondents had undertaken a review of guidance in a document entitled 'Future of Guidance/Pastoral Care' (Production R14). Pastoral care is defined in Production R4/1 in the following terms:-

'The review of guidance has revised the definition of pastoral care. Pastoral care is an holistic approach by which the school attempts to meet the personal, social, emotional and intellectual needs of every pupil, in order that each might participate fully and gain maximum benefit from everything the school has to offer.

The review proposed that pastoral care should be defined in terms of an entitlement for every pupil in five key areas: personal guidance, curricular guidance, vocational guidance, a programme of personal and social education and development of a positive school ethos.'

36. In Production 14/2 one of the elements identified as a key component in the respondents' approach to developing policies and structures for the future of guidance is:-

'The replacement of the term "guidance" by the more holistic term of "pastoral care" and a definition of pastoral care in terms of pupil entitlements.'

Mr Truscott stated that there had been evidence from the respondents and from the headteacher of St Paul's that guidance had become pastoral care. It followed, in his submission, that the system "designed to protect Roman Catholic education" was moved in line with that change. The tribunal thus had no basis for what they stated at paragraph 101.

Further, their finding at paragraph 114 that the nature of the job of pastoral care teacher did not require the holder of the position to be a Roman Catholic, was perverse.

31. He sought, at one point, to refer in some detail to parts of the text of the written submissions that he had made to the Tribunal where he had set out his summaries of what certain witnesses had said. It seemed that he expected us to treat those passages as if they were an agreed note of the evidence of those witnesses (which they were not) or as if they were the equivalent of Chairman's notes. There were, however, no agreed notes of evidence before us nor, failing such agreement, Chairman's notes and we did not consider it appropriate to take account of Mr Truscott's notes of evidence set out in his written submissions as if they were. They could not properly be regarded as an accurate record of such evidence for appeal purposes. When we pointed this out to Mr Truscott, he desisted. His submission remained, however, that the Tribunal had evidence from the headteacher of St Paul's and from the respondents that they were applying the 1991 agreement system because guidance had become pastoral care. That system had been designed to protect Roman Catholic education but the Tribunal had approached matters as though the system was not there.

Ground of Appeal 5(a)

32. As set out in the notice of appeal, this ground extends to almost a page and half and is not easy to follow. Having heard Mr Truscott's submissions, it seemed to us that at the heart of it was the assertion that the tribunal erred in law in failing to find that the

respondents had not established that being a Roman Catholic was a genuine occupational requirement under regulation 7(2) of the 2003 regulations because they should have so regarded it, given the terms of s.21(2)(A) of the 1980 Act. Mr Truscott observed that free of any information or understanding about Roman Catholic education in Scotland, it was possible to look at the evidence and come to the same result as the Tribunal had done on this matter. However, the respondents complaint was that the Tribunal were not free to do that yet they made themselves free by wrongly setting aside s.21(2)(A) and with their findings regarding what was required of a pastoral care teacher (paragraph 114). He referred also, under this ground, to the need to recognise the “right to Roman Catholic education” (which was, at one point, expressed in terms of the respondents having a duty to provide Roman Catholic education) and the need to give it due account.

Ground of Appeal 5(b)

33. The respondents submitted under this head that the tribunal had taken into account irrelevant matters in respect that it had engaged in speculation about what the Church may or may not have thought. This was a reference to the passage after paragraph 101 in which the tribunal set out what they considered, on the evidence, were possible reasons for the Church holding the view that a teacher of pastoral care did not require to be a Roman Catholic.

Ground of Appeal 6

34. This ground related to the tribunal’s finding that the respondents had not established

that there was a genuine occupational requirement under regulation 7(3). Mr Truscott accepted that the respondents as a whole could not have an ethos but he submitted that a part of it could have. He accepted that that meant, in effect, reading the “or any relevant part of it” into the first line of regulation 7(3) after the word “employer”. The respondents were not a homogenous entity. They were a heterogeneous organisation concerned in the provision of a multiplicity of diverse services. As education authority, they were required to maintain as part of the public provision of education, a denominational sector. That showed that they had an ethos and the regulation applied. The tribunal had wrongly then looked for a “determining” factor which was not required. It was proportionate to allow for the requirement.

Ground of Appeal 8

35. Although this ground covers over two and half pages of the notice of appeal, it was not pressed. It relates to the tribunal’s findings on proportionality. In submission, however, Mr Truscott went no further than to comment that it might be said that a strict application of s.21(2)(A) lacked proportionality but he accepted that a balancing exercise was involved and it would be difficult to persuade us to differ from the tribunal.

Ground of Appeal 9

36. This ground related to quantum. £2,000 was an excessive award. No reasonable tribunal would have made such an award in the circumstances. Reference was made to the cases of *Vento v Chief Constable of West Yorkshire Police [2002] ICR 318 CA* and *Moyhing v Barts and London NHS Trust [2006] IRLR 860*. These authorities supported

the view that the claimant should have been awarded nothing or next to nothing.

Claimant's Submissions on Appeal

37. For the claimant, Mr Napier began by observing that although the tribunal had no jurisdiction to make a finding of breach of any article of the European Convention on Human Rights, it was, importantly, bound to interpret the 2003 regulations in manner which was convention compliant, given the provisions of s.3 of the Human Rights Act 1998. It was important to see the tribunal's findings as having been underpinned by a recognition that article 14 was engaged. In that regard, it was important to recognise that what the tribunal had to consider were exceptions provided for under the regulations. The fundamental principle that thus applied was that they should be read narrowly; that was evident from paragraph 23 of the preamble to the parent directive (*Council Directive No 2000/78/EC*) which states that it is in

“... very limited circumstances ...”

that a difference of treatment on religious grounds can be justified.

38. As a generality, Mr Napier observed that clearly, there could be problems created for the respondents by the need to have Church approval for teaching posts in Roman Catholic schools but this was a claim by one individual who had rights as an individual under the 2003 regulations.

39. Regarding the thread of the respondents' submissions which were to the effect that

pastoral care was the same as guidance, they were wrong about that but that was not the point. What was relevant was that the tribunal were entitled to find that they were not the same thing and had done so.

40. Regarding the respondents' submissions about the tribunal's entitlement to make any findings about compliance with s.21(2)(A), it was plain that the tribunal had had to consider those provisions in order to decide if a complaint could be made under the regulations at all. The respondents' case was that they did not have Church approval for the claimant for the post in question and therefore the exemption provided for in the regulations applied. They had claimed that their freedom to appoint was fettered because of those statutory provisions.

41. Further, the tribunal had been entitled to find, as they did, that the respondents had not established that the claimant was not approved. Firstly, a Principal Teacher of pastoral care was not on the list in the 1991 agreement which meant, in terms of that agreement, that he had deemed approval. Secondly the tribunal had found, as they were entitled to do, that the failure to lead evidence from the Church that they had not given the requisite approval, was fatal to their case.

42. Regarding ground of appeal 3(a), the tribunal's articulation was readily capable of explanation as being a slip of expression. It appeared that, at the end of the paragraph, they were referring to the question of whether a genuine occupational requirement had been

established, not whether the respondents and the Church had genuinely entered into an agreement or not. Mr Napier noted that the tribunal had, though, erred in paragraph 110 where they stated that the 1980 Act placed an obligation on the Church but it was not relevant to the matters that the tribunal had to decide and so could be ignored: *Riniker v University College London [2001] EWCA 597*.

43. Regarding ground of appeal 3(b), in respect that the essence of the submission was that the Tribunal had misunderstood the evidence, this Tribunal required to be very careful: *BT v Sheridan [1990] IRLR 27*. There was no basis for suggesting that the claimant did not have the requisite approval. This was not really a “misunderstanding” ground but, rather, an attempt at a perversity case and it did not begin to pass that high test .

44. Regarding the criticism advanced in the fourth ground to the effect that the Tribunal failed to afford the post for which the claimant applied the correct nomenclature in that they did not, in the body of their reasons, refer to it as a “Principal” post, it was ridiculous to suggest that that somehow showed that the Tribunal had fundamentally misunderstood the case. The case for Church approval only arose if the post was for a “Principal” teacher, given the terms of the 1991 agreement on which the respondents relied.

45. Regarding ground of appeal 5(a), Mr Napier submitted that the respondents had failed to advance any relevant case that the tribunal had erred in finding that it had not been established that being a Roman Catholic was a genuine occupational requirement for the

post in question. The Tribunal had had regard to the nature of the employment and they had had regard to the context. They were entitled, in that regard, to take account of the fact that the job was carried out by non-Roman Catholics in other schools. There was no failure of adequate reasoning and no incomprehensible reasoning, as was suggested. Again, what was really being advanced was a perversity appeal but the high test was not met.

46. Regarding ground of appeal 5(b), there was no question of improper speculation by the Tribunal. The tribunal had simply set out its reasons why it was not safe to assume that the Church, if they had been asked, would have deemed pastoral care at St Paul's to be covered by the reference to "guidance" in the 1991 agreement.

47. Regarding the sixth ground of appeal, if the legislature had meant to provide for regulation 7(3) to apply if "part of" an employer's organisation had a relevant ethos, it could have been expected to do so expressly, just as it had done under the TUPE regulations. The regulation ought not to be read in the manner suggested by the respondents. Further, neither local authorities as a whole nor any part of them had no business in having an ethos. They were statutory bodies and having a religious ethos was not their function. Mr Napier submitted also that the respondents approach to the nature of their obligations regarding denominational education was wrong. They did not have a duty to provide Roman Catholic education. Their duty went no further than an obligation which involved facilitating the provision of such education.

48. Regarding the seventh ground of appeal, Mr Napier submitted that there had been no misconstruction of the evidence as was clear from a reading of the paragraphs relied on.

49. Regarding the eighth ground of appeal which concerned proportionality, Mr Napier submitted that there was no failure of reasoning and the relevant question was that of what went into the balance? That question had to be answered bearing in mind the requirement to look at matters narrowly, given that it was an exemption to the regulations that was being considered. The respondents were, in their notice of appeal, trying to have matters considered in the balance which were irrelevant.

50. Finally, regarding quantum, Mr Napier submitted that the decision in *Moyhing* was not directly in point since, in that case, the Tribunal had failed to make any award at all. Awards for discrimination should not be so low as to diminish respect for an anti-discrimination policy. The figure awarded by the Tribunal was not so generous as to amount to a perverse award and was not, accordingly, susceptible to being interfered with by this Tribunal.

Discussion

General Observations

51. The provisions of s.21(2)(A) of the 1980 Act lay at the heart of the respondents' case on appeal and were, clearly, at heart of their case before the Tribunal. That being so, to have sought to criticise the Tribunal for construing those provisions appears to us to be

inappropriate and unfair. Insofar as the Tribunal entered into some discussion as to whether or not by entering into the 1991 agreement and operating the approval system that they did, the respondents and the Church were really doing what Parliament had intended, we can see that they may have gone beyond what was strictly necessary but we have some sympathy for them, given the respondents reliance on those provisions and we are readily satisfied that they properly considered what, relevantly, they required to consider regarding that part of the 1980 Act.

52. The Tribunal should, the respondents said, have seen that s.21(2)(A) had had the effect of putting an insurmountable obstacle in the respondents' pathway so that they could not be said to be in breach of the 2003 regulations. The argument seemed, at times, to go as far as saying that s.21(2)(A) showed that being a Roman Catholic was a genuine occupational requirement for the purposes of regulation 7(2). It flowed, we observe from an approach by the respondents to the effect that they had a duty to provide Roman Catholic education. We note also the wider concerns that were expressed about the interaction between the respondents and the Church that is required because of the provisions of s. 21(2)(A).

53. We have to decide this appeal by considering the Tribunal's findings and reasoning and under reference to the particular facts and circumstances of this case. It is not for us, for instance, to make any determination as to whether or not paragraph 39 of the 2003 regulations adequately protects an education authority from an unreasonable refusal to

approve the appointment of a teacher to a post in a Roman Catholic school although we would observe that we can see that it could be interpreted as doing so. We do, however, consider that we require to make one or two general comments regarding the background to this case since the respondents' submissions appeared, at times, to proceed on a misapprehension of their statutory role.

54. Firstly, it is plain that an education authority in Scotland is not statutorily required to provide Roman Catholic education. S.16(1) of the 1980 Act, in common with its predecessors, requires such an authority to accept the transfer to it of a denominational school and once such a school has been transferred, it is obliged to hold, maintain and manage it unless and until, broadly put, the school is no longer required (see: s.22(4) of the 1980 Act) but the statute does not impose any direct obligation on an education authority to provide Roman Catholic education. Their obligation can, rather, be seen as one of facilitation. The *Church* is thereby enabled to afford such Roman Catholic education as it thinks fit through the relevant school as is any other denomination whose school is transferred to an education authority under the statutory provisions.

55. Secondly, it follows that the legislation does not require an education authority to protect Roman Catholic education other than indirectly in the facilitation sense to which we have referred.

56. Thirdly, since a misunderstanding as to the effect of s.21(2)(A) may have

influenced the respondents' approach, we would add that we do not accept that it shows that being a Roman Catholic is necessarily a genuine occupational requirement under regulations 7(2) and (3) of the 2003 regulations, for a post in a Roman Catholic school. The provisions are drafted in such a way as to leave it open to the Church to approve the appointment of a non Catholic teacher provided they are satisfied as to his religious belief and as to his character. The belief in question does not, in terms of the statute, require to be that of Roman Catholicism or, indeed, to match that of any denomination for whose interest a denominational school is maintained. That is a matter for the denomination in question. It is, for instance, shown by the findings in the present case that by 1991, the Church were prepared to give the requisite approval to non Catholics in the case of a great number of posts. It cannot, accordingly, be the case that when s.21(2)(A) and regulations 7(2) and (3) are read together it is automatically evident that being of any particular religious belief amounts to a genuine occupational requirement for the job.

Respondents' Case on Appeal

57. It is, perhaps, not surprising that the respondents' contention was, at least at some points, that pastoral care was the same as guidance. If it was not, their argument that the post for which the claimant applied was covered by the specific list in the 1991 agreement could not get off the ground. That was because if the post of Acting Head of Pastoral Care did not fall within that list then the position as between the respondents and the Church was that, under the express terms of that agreement, the respondents could be deemed to have given the requisite statutory approval of the claimant.

58. As we have observed, the Tribunal found (paragraph 101) not that guidance was the same as pastoral care but that it was included within it. The respondents' policy was that pastoral care had the five elements set out in paragraph 37 but at St Paul's, in addition to that, there was another element, learning or pupil support (paragraph 41), something which had never been part of guidance. Further, it is evident from the terms of the respondents' policy document (referred to by the Tribunal at paragraph 35) that whilst the first three areas of pastoral care were termed as matters of "guidance", the last two, PSE and the development of a positive school ethos, were not. We are satisfied that there was ample evidence from which the Tribunal were entitled to draw the conclusion that they drew in paragraph 101. That being so, the post for which the claimant applied was not covered by the specific list in the 1991 agreement and, therefore, so far as that agreement went, the respondents were entitled to proceed and should have proceeded on the basis that the claimant had been approved by the Church. We do not accept, as was suggested on behalf of the respondents, that the Tribunal ought to have found that pastoral care was, in effect, the same as guidance because pastoral care was designed to protect Roman Catholic education. The Tribunal made no finding that that was the purpose and design of pastoral care at all.

59. In these circumstances, the respondents' argument that centred on the interplay between s.21(2)(A) and the 1991 agreement, was bound to fail. They were not fettered. They had the approval they needed and the claimant should have been given an interview.

60. The Tribunal went further, however, and considered, rightly in our view, whether the respondents had shown that the exception provided for in regulations 7(2) had been established other than by simply looking at the 1991 agreement. They reached the view, on the evidence, that they had not done so and provide adequate reasons for their view. It was a view which was manifestly open to them on the findings in fact which they made. They approached matters on the basis that the onus was on the respondents and they were correct to do so not only because of the way in which the regulations are drafted but because of the underlying directive which stresses that these are but limited exceptions to a strong non discriminatory principle and because of their duty to interpret the regulations in a convention compliant manner, given the engagement of articles 14 and 9. We agree with parties that those articles were engaged.

61. Regarding regulation 7(3), the Tribunal unfortunately appear to have failed to notice that it is not necessary for an employer to show that the genuine occupational requirement is a “determining” requirement under that subparagraph. It does not, however, matter. We are readily satisfied that they were correct in their view that the respondents were not entitled to have recourse to regulation 7(3) as they could not show that they were an employer who had “an ethos based on religion or belief”. We agree with Mr Napier that if the intention had been that an employer could qualify for the protection afforded by regulation 7(3) if only part of their organisation had such an ethos, one would have expected such a right to have been expressly stated by the legislature. Further, we agree

with the Tribunal that an education authority does not, in any event, have a religious ethos. The fact that it operates a statutory system under which it enables denominations to advance their ethos through schools maintained by it, does not mean that they espouse the same ethos at all. An education authority could, under the statute, be maintaining schools for varying denominations at one and the same time. Each denomination could hold a different ethos and it could contradict that of another denomination for which a school is maintained. As Mr Napier so succinctly put it, neither the respondents nor their education department have any business having an ethos. Whilst we would suggest that they ought to accept, at least, that they are bound to follow the ethos encapsulated in the Nolan principles of standards in public life, we would accept that they, as a local authority, have no business seeking to follow or further any particular religious ethos at all.

62. As regards the various other separate criticisms voiced on behalf of the respondents, we do not accept that indications of misunderstanding or misapprehension of the evidence can be deduced from the various matters on which the respondents founded. The Tribunal were not bound to infer, as seemed to be suggested, from the accepted evidence of the headteacher's and the respondents' belief that the church would have determined that pastoral care posts were reserved posts that they were in fact reserved posts. The Tribunal's ensuing speculations (paragraphs 102–104) were not indicative of their having taken account of irrelevant matters but appear, rather, as detailed explanation of why they did not consider themselves bound to draw such an inference. We do not accept that there is any contradiction between the findings in paragraph 101 and those in

paragraphs 36 and 37; on the contrary, the latter are but part of the Tribunal's findings on what was contained in pastoral care. Nor do we accept that there is any need for concern regarding the dual use of the word "genuine" in paragraph 108. It seems plain to us that when used at the end of the paragraph, it is used in the sense that in the circumstances, just because the 1991 agreement specified that a teacher had to be a Roman Catholic for certain posts, that did not mean that that requirement had to be regarded as a genuine occupational requirement for the purposes of regulation 7(2) of the 2003 regulations.

63. That leaves the matter of quantum. We have considered the discussions in *Vento* and *Moyhing*. We accept that the figure of £2,000 is at the upper end of what could properly be regarded as the appropriate range of awards for the sort of discrimination which occurred in this case. We cannot, however, conclude that it lay outwith that range and it would not, accordingly, be appropriate for us to interfere with it.

Disposal

64. In the foregoing circumstances, we will pronounce an order dismissing the appeal.