# Harassment, qualifications bodies and organised religion

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*Pemberton has provided welcome clarification of the potential width of the provisions of the Equality Act relating to qualifications bodies, the ambit of the provisions relating to organised religions in schedule 9 and the interpretation of the provisions relating to harassment in s.26.*

***Background***

In *Pemberton*, Canon Pemberton, an openly gay clergyman, married Laurence Cunnington in a civil ceremony on 12 April 2014. His local bishop, Bishop Inwood, withdrew his permission to officiate (PTO) and refused to grant him a licence to operate as a chaplain at a local NHS hospital (the holding of the bishop's licence being a condition the NHS Trust imposed before Canon Pemberton would be allowed to take up the position).

Canon Pemberton sued Bishop Inwood, alleging that the withdrawal and refusal were each acts of unlawful sexual orientation discrimination, marital discrimination and harassment. Pemberton reached the Court of Appeal where the bishop was successful.

***Argument on the issues: qualifications bodies under the Equality Act 2010***

S.54(3) provides that 'a relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession'. S.212 provides that 'profession' should be interpreted to include 'vocation or occupation'.

*Permission to officiate*

Canon Pemberton sought to argue that PTO was a 'relevant qualification' on the basis that it facilitated the grant of the licence that was required by the NHS hospital before it would approve his appointment to the chaplain position (a paid post).

The Court of Appeal found that having PTO did not facilitate the grant of a licence but Asplin LJ stated (*obiter*) that PTO might have amounted to a 'relevant qualification' if it had assisted the grant of the licence. If this is correct, then any 'authorisation, qualification, recognition, registration, enrolment, approval or certification' that merely facilitates the grant of some other 'relevant qualification' will *itself* be a 'relevant qualification'.

*The licence*

The bishop argued that the licence could not be a 'relevant qualification' because it allowed Canon Pemberton to minister *only* in the particular role and at the particular NHS Hospital in question. He was not vouching 'to the public' that Canon Pemberton had attained 'some kind of objective standard which the qualifying body applies, an even-handed, not to say "transparent", test which people may pass or fail' (per Lord Hoffmann in *Watt* at para 18). He had simply performed a subjective assessment of Canon Pemberton's character and the state of his relationship with the church, not his skill as a priest.

The Court of Appeal found that the bishop was vouching to the public *through* the NHS Trust that Canon Pemberton had met a particular standard. The decision whether to grant the licence was not made upon a whim and 'was subject to objective criteria even if different bishops could reach different conclusions'. The licence was therefore a relevant qualification.

The court appears to have relaxed the test for what amounts to a 'relevant qualification': it appears that the test of whether an 'objective standard' has been applied by the qualifications body will be satisfied if it applies objective criteria in its decision-making process.

***'the European Court recognised that the state should not interfere with a religious community's decision about whom it chooses to represent it or to be entrusted with religious duties'***

### *The schedule 9 exception: occupational requirements and organised religion*

The bishop had to show that the licence was 'for the purposes of employment for the purposes of an organised religion'. He also had to show that the requirement not to be married to a person of the same sex (see sub-para (4)(ca)) was applied 'so as to comply with the doctrines of the religion'.

The key issues were: (a) whether Canon Pemberton's employment by the NHS hospital would have been employment 'for the purposes of an organised religion'; and (b) whether the bishop's refusal of the licence engaged the 'compliance principle'. In other words, did he apply the requirement not to be in a same-sex marriage 'so as to comply with the doctrines of the religion'?

*Employment for the purposes of an organised religion*

Canon Pemberton argued that the licence was not 'for the purposes of employment for the purposes of an organised religion' because the employment was for the purposes of the NHS hospital (and not the church).

The Court of Appeal concluded that the licence was a 'qualification … for the purposes of employment … for the purposes of an organised religion'. A central part of the chaplaincy role was to act as a minister of the Church of England (hence why the NHS hospital required the licence). Any other conclusion would mean that the schedule 9 exception would not apply unless the employment was with the church itself, which would be improperly limiting the scope of the provision. The court's conclusion on this issue accords with principle. The purpose of the qualification ought to be judged from the perspective of the qualifications body.

*Ambit of the compliance principle*

Canon Pemberton contended that the Church of England has no doctrine in relation to same-sex marriage. He relied on the absence of any express provision prohibiting same-sex marriage in the Canons or elsewhere. He contended that a guidance statement, which was issued by the House of Bishops (that made it clear that priests should not enter into same-sex marriages), was not part of its doctrine. Further, this allowed individual bishops to decide what consequences should follow for a priest who did enter into a same-sex marriage. Therefore, the Church's doctrine did not *require* the bishop to refuse to grant a licence to a priest who had entered into a same-sex marriage.

The Court of Appeal rejected Canon Pemberton's contentions. 'Doctrines' is not simply what the particular religion in question considers to be 'doctrine'. This provision would apply to any organised religion and it could well be difficult for a number of them to identify precisely what constituted doctrine. 'Doctrines' should be construed as meaning the teachings and beliefs of the religion in question, as found by the employment tribunal on the basis of the evidence adduced to it. The church's doctrine was apparent from Canon B30 (which states that marriage is between 'one man and one woman'), as were its teachings and beliefs (in the wider sense) from the guidance statement. It was unnecessary for the church's doctrine to specify a particular consequence for a priest who enters into a same-sex marriage. What was key was why the bishop applied the requirement not to be in a same-sex marriage, namely the clear requirement in ecclesiastical law on priests to exemplify the teachings of the Church on marriage.

*Human rights of religious organisations under Article 9*

The bishop contended that schedule 9 must be interpreted in light of the Church's right to freedom of religion under Article 9 of the European Convention on Human Rights (ECHR). The bishop pointed to the decisions of the European Court of Human Rights in *Hasan and Chaush* and *Fernandez Martinez* in which the European Court considered the competing rights of organised religions under Article 9 and, on the other hand, an individual's freedom of religion under Article 9 and his or her right to private and family life under Article 8. The European Court recognised that the state should not (save in exceptional circumstances) interfere with a religious community's decision about whom it chooses to represent it or to be entrusted with religious duties. The individual right to freedom of religion of a dissenting member of the community is exercised by being able to leave.

The Court of Appeal did not expressly endorse the bishop's contentions as to the significance of Article 9, nor did it say anything to suggest that they were unpersuasive. However, these arguments did find favour both with the employment tribunal and the EAT.

### *Harassment*

Whereas schedule 9 provides a potential defence to a claim for direct discrimination, it cannot be relied on as a defence to

***'if you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you'***

a claim for harassment under s.26. This therefore gave Canon Pemberton the incentive to try to advance a claim on this alternative basis.

Canon Pemberton alleged that the 'unwanted conduct' was (a) the revocation of the PTO; and (b) the refusal to grant the licence. In other words, the very same conduct that he alleged amounted to direct discrimination. He later broadened his claim to include the manner in which the bishop's decisions about the PTO and the licence were communicated to him.

As the EAT explained in *Dhaliwal* in relation to the equivalent wording of s.3A of the Race Relations Act 1976, the harassment provisions require that it must be objectively reasonable for the conduct complained of to have the proscribed effect. The bishop contended that, in the absence of 'aggravating features', it would not be reasonable to conclude that conduct which had been authorised by schedule 9 had that effect.

The Court of Appeal agreed. Asplin LJ stated: 'To conclude otherwise would make a nonsense of providing the defence in schedule 9 in the first place.' It was not reasonable to conclude that Canon Pemberton had suffered the proscribed effect. As Underhill LJ put it, 'If you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you, however wrong you may believe them to be.'

*Dhaliwal guidance updated*

Underhill LJ updated the guidance he gave in *Dhaliwal* in light of the wording of s.26 of the Act. Whereas s.3A of the Race Relations Act 1976 had required the conduct to be 'on grounds of' the protected characteristic, s.26 of the Equality Act 2010 required only that it be 'related to' that characteristic. Plainly that might make a significant difference in some cases: 'I would now reformulate it as follows ... [A] tribunal must consider both … whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and … whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – … [If] the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect … [If] it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

***Costs limiting orders***

Canon Pemberton (who had lost in the employment tribunal and EAT) sought an order under CPR 52.19 that the bishop be prohibited from recovering any of his costs if the appeal failed. He argued that he would not be able to pay any costs order and that he would otherwise not be able to continue his appeal. The bishop pointed to the obvious lack of merit in Canon Pemberton's appeal. The Court of Appeal (Elias LJ) rejected Canon Pemberton's application but imposed a cap on what the bishop could recover, set at £25,000.

***Key consequences of the Court of Appeal decision***

- On harassment, the Court of Appeal's clarification that a commonsense and intuitive approach applies is welcome. Acts of an opponent that are reasonable, particularly those which amount to following due process or an objectively rational process without any aggravating factor in the way that the decisions are communicated or in the way that the decision-maker behaves, are unlikely by themselves to constitute acts of harassment.
- LJ Underhill's clarification of his guidance in *Dhaliwal* (at para 88) is equally welcome. It perhaps remains unclear exactly how far conduct must be 'related to' a protected characteristic. In *Henderson*, giving judgment in the EAT, Simler J suggested that conduct complained of must be related 'to a significant extent' to the protected characteristic (para 93). In *Pemberton*, the Court of Appeal stopped short of giving any clarification (but see now *Bakkali*).
- The decision queries whether remuneration is a necessary requirement before an activity may be considered part of the carrying on of a profession. Underhill LJ talks of 'other kinds of a putative profession' and it is possible to think of qualifications or certifications that facilitate a vocation or occupation which may be caught by a wider reading of the Act, particularly voluntary work which is a precursor to, or intended to facilitate, career development. Consider, for example, whether a requirement to undertake a voluntary assessed mini-pupillage or placement as a pre-requisite to an application for pupillage is caught.

***'readers might contrast the court's approach in Pemberton with that in Ladele, where Neuberger MR concluded that Ms Ladele's individual desire to have her religious views relating to marriage respected should not override the council's equal treatment policies'***

- On a related note, practitioners should remember Underhill LJ's reminder that s.53 is concerned with qualification for engagement in *any* trade or profession, which need not take the form of employment. Given the present climate, in which employment status is very much a live issue, the identification of a 'relevant trade or profession' may not be clear cut.
- Lawyers representing faith organisations will particularly welcome the Court of Appeal's restatement that courts should not themselves enter into theological debates in order to determine the ambit of doctrines or beliefs. It is clear, however, that tribunals will expect to be presented with cogent evidence of 'doctrines'. Less established churches or branches of churches may not have available documented statements of belief and practitioners will need to give thought how best to obtain and present such evidence.
- Faith organisations will also note with interest what appears to be tacit acceptance by the Court of Appeal that greater deference should be paid to the rights of religious organisations under Article 9 ECHR than the rights of individual adherents. Readers might contrast the court's approach in *Pemberton* with the approach taken in *Ladele*, where Neuberger MR concluded that Ms Ladele's individual desire to have her religious views relating to marriage respected should not override the council's equal treatment policies, a view upheld (albeit by a majority) by the European Court of Human Rights.

*This article was written by Paul Stevenson, Senior Advisory Lawyer at the Church Commissioners, Matthew Sheridan of Littleton Chambers and Peter Frost of Herbert Smith Freehills.*

***KEY:***

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| *Pemberton* | *Pemberton v Inwood* [2018] EWCA Civ 564 |
| *Watt* | *Watt (formerly Carter) v Ahsan* [2008] 1 AC 696 |
| *Hasan and Chaush* | *Hasan and Chaush v Bulgaria* [2000] ECHR 30985/96 |
| *Fernandez Martinez* | *Fernandez Martinez v Spain* [2014] 37 BHRC 1 |
| *Dhaliwal* | *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 |
| *Henderson* | *GMB v Henderson* [2015] IRLR 451 |
| *Bakkali* | *Bakkali v Greater Manchester Buses (South) Ltd* UKEAT 2018/0176 |
| *Ladele* | *Ladele v Islington LBC* [2010] IRLR 21 |